The Law Commission

(LAW COM. No. 86)

FAMILY LAW

THIRD REPORT ON FAMILY PROPERTY: THE MATRIMONIAL HOME (CO-OWNERSHIP AND OCCUPATION RIGHTS) AND HOUSEHOLD GOODS

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting reform of the law.

The Commissioners are—

The Honourable Mr. Justice Cooke, *Chairman.*

Mr. Stephen Edell.

Mr. W. A. B. Forbes, Q.C.

Mr. Norman S. Marsh, C.B.E., Q.C.

Dr. Peter M. North.

The Secretary of the Commission is Mr. J. M. Cartwright Sharp, and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London WC1N 2BQ.

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THE LAW COMMISSION

Item XIX of the Second Programme

THIRD REPORT ON FAMILY PROPERTY: THE MATRIMONIAL HOME (Co-ownership and Occupation Rights) and HOUSEHOLD GOODS

To the Right Honourable the Lord Elwyn-Jones, C.H., Lord High Chancellor of Great Britain

GENERAL INTRODUCTION

The background

0.1. Under Item XIX of the Law Commission's *Second Programme of Law Reform*[1], which recommends a comprehensive examination of family law with a view to its systematic reform and eventual codification, we published in 1971 a working paper on Family Property Law[2] ("the working paper"). That paper put forward proposals for consideration under the following heads: The Matrimonial Home; The Household Goods; Family Provision; Legal Rights of Inheritance; and Community of Property.

0.2. In 1973 we published our *First Report on Family Property: A New Approach*[3] ("the first report"). In that report we expressed our general conclusions as to the implementation of all the proposals put forward in the working paper. We recapitulate those conclusions as follows:

The Matrimonial Home: Part 1 of the working paper made proposals for the introduction of a fixed principle of equal co-ownership of the matrimonial home. It also made proposals to improve a spouse's rights of occupation. On the question of *co-ownership*, our conclusion[4] was:

> "The present rules determining the interests of a husband and wife in the matrimonial home are in need of reform by the introduction of a principle of co-ownership under which, in the absence of agreement to the contrary, a matrimonial home would be shared equally between husband and wife."

We further concluded that the working paper's proposals in the field of *occupation rights* should also be implemented.

The Household Goods: Part 2 of the working paper made proposals aimed at protecting a spouse's use and enjoyment of the household goods. Our conclusion[5] was that recommendations for this purpose should be formulated.

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[1] (1968) Law Com. No. 14.
[2] Working Paper No. 42.
[3] Law Com. No. 52.
[4] Para. 61(a) of the first report.
[5] Para. 62(2) of the first report.

Family Provision: Part 3 of the working paper made proposals to extend the rights of dependants and the powers of the court in applications for family provision from the estate of a deceased person. Our conclusion[6] was:

> "So far as is practicable in differing circumstances, the claim of a surviving spouse upon the family assets should be at least equal to that of a divorced spouse, and the court's powers to order family provision for a surviving spouse should be as wide as its powers to order financial provision on a divorce."

Legal Rights of Inheritance: Part 4 of the working paper contained proposals for a system under which the surviving spouse would have a fixed legal right to inherit part of the estate of the deceased. Our conclusion[7] was that if our other proposals were implemented, it would be unnecessary to introduce any system of this kind.

Community of Property: Part 5 of the working paper contained proposals for a system under which on the termination of a marriage by death or divorce certain assets would be shared between husband and wife on fixed principles. On this we reached a similar conclusion[8]: that if our other proposals were implemented, a system of this kind would be unnecessary.

0.3. In summary, then, our conclusions in the first report were that the proposals made under the first three headings (and those only) should be implemented. The first report did not deal with the detailed implementation of these proposals; but it expressed our intention to publish further reports and draft legislation for that purpose.

0.4. In 1974 we carried out that intention, as regards the proposals under the third heading, by publishing our *Second Report on Family Property: Family Provision on Death*[9]. This present report carries out our intention with regard to the remaining proposals, that is to say those under the first two headings.

0.5. The conclusions set out in the first report were reached after careful consideration of the views of those who commented on the working paper and of other material[10]. Consultation on those parts of the working paper which form the subject of Books One and Two of this present report was particularly full. We are very grateful to the large number of representative bodies and members of the general public who wrote to express their views. Those who made particularly detailed comments are named in the Appendix at the end of this report. We have also to place on record our especial debt of gratitude to Mr. Peter Millett Q.C. and Mr. Richard Sax, who were the outside members of the working party (referred to in Appendix 1 to the first report) which we set up to advise us on the construction of the legislative scheme required to implement the working paper's proposals about the matrimonial home.

This report

0.6. We had planned to complete our detailed recommendations by

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[6] Para. 61(b) of the first report.
[7] Para. 61(c) of the first report.
[8] Para. 61(d) of the first report.
[9] Law Com. No. 61. The recommendations in our Second Report have been enacted as the Inheritance (Provision for Family and Dependants) Act 1975.
[10] The scope of our consultation is dealt with in detail in paras. 3–7 of the first report.

publishing two separate reports: one on the Matrimonial Home (including both co-ownership and rights of occupation), and the other dealing with Household Goods. In the end, however, we have decided that it is more convenient to deal with all these matters in a single report. We have also decided that this report is best represented in three divisions, which we call Books, as follows:

Book One: Co-ownership of the Matrimonial Home.

Book Two: Rights in respect of Occupation of the Matrimonial Home.

Book Three: Use and Enjoyment of the Household Goods.

0.7. Each of these Books ends with a summary of the recommendations made in it, and is followed by a separate draft Bill (with explanatory notes) to implement those recommendations.

Book One

0.8. Book One corresponds with Part 1B of the working paper, and deals with our detailed scheme for statutory co-ownership of the matrimonial home.

0.9. The first report dealt fully[11] with our reasons for deciding to recommend such a scheme. Of these the main one, confirmed by extensive consultation, is that justice requires such a scheme to be introduced. The present law about the ownership of the matrimonial home during marriage is not only highly technical and sometimes uncertain in application, but inappropriate in substance. The rules now applied to determine the ownership of the home are essentially the same as those which determine the ownership of a commercial or investment property: they ignore the fact that the home is the residence of a family as well as being, in many cases, its major capital asset. Husband and wife each contribute to the home in their different ways—the wife's contributions are no less real because they may not be financial—and the home is essential to the well-being of the family as a whole. In our view these factors make the matrimonial home a unique item of property, and one to which a unique law of co-ownership should apply. This view is echoed by the results of the Social Survey mentioned in the first report[12]. Married couples were asked the following question among others:

> "Some people say that the home . . . should legally be jointly owned by the husband and wife irrespective of who paid for it. Do you agree or disagree with that?"

91 per cent of husbands and 94 per cent of wives who took part in the survey agreed with the proposition; and a majority of home-owning couples provide voluntarily for the co-ownership of their homes[13].

0.10. An argument sometimes advanced against introducing a scheme for co-ownership during marriage is that property rights in the home do not matter while the marriage lasts and can be dealt with satisfactorily under the present law when it ends in death or divorce.

0.11. Even if the second part of this argument were true, we should not accept

[11] Paras. 12–30.

[12] A Social Survey carried out by the Social Survey Division of the Office of Population Censuses and Surveys, published in May 1972 as *Matrimonial Property*, by J. E. Todd and L. M. Jones (H.M.S.O., SBN 11 700129 5).

[13] Para. 23 of the first report.

the first part; for in our view it is a poor and incomplete kind of marital justice which is excluded from continuing marriage relationships and allowed to operate only when those relationships end.

0.12. But we do not think, in any case, that the second part of the argument is valid. In particular, we would draw attention to the fact that justice can be done on divorce or death only to the extent that valuable assets remain available for distribution. If the home—and the home is likely to be the most valuable asset of all—is sold, and the proceeds dissipated before the divorce or death occurs, the court's powers will be of no avail. One of the incidental advantages of our co-ownership scheme is that it will go far to prevent this situation in future—by imposing co-ownership and giving co-owning spouses a much greater and more effective measure of control over dispositions of the home during the marriage.

0.13. There is one further preliminary point which we should like to make. The proposal that matrimonial homes should, in the absence of contrary agreement, be co-owned, is a far-reaching one, and its implementation is not so simple as might be supposed. We became increasingly aware that it would involve changes in the law which were bound to be both radical and complicated; and because a considerable amount of innovation and complexity was inevitable, we have felt an obligation not to increase these things unnecessarily. So when we saw a choice between adapting for our purposes an existing legal concept or facility, and making some further innovation, we have usually taken the former course.

0.14. It is partly for this reason, for instance, that we have in the end framed our concept of co-ownership in terms of the beneficial joint tenancy taking effect behind the trust for sale – both of which are already very familiar to lawyers—even though the joint tenancy may not be in all respects perfectly suited to the purpose and the trust for sale may not be altogether free from elements of artificiality. It is partly for this reason, too, that we decided in the end to recommend that protection for a spouse who is not a legal owner should be afforded through the existing mechanism of registration (in the register of Land Charges or at the Land Registry) rather than by some wholly new mechanism, although we did canvass the possibility of a new mechanism in the working paper[14]. We deal with these and similar matters later in this report. Here we wish merely to record that we have made a deliberate attempt, for the reasons already given, to confiine our recommendations within a framework of established principles and concepts.

0.15. Despite this attempt, it cannot be denied that the provisions which we propose for co-ownership are complicated and difficult. But we do feel the need to take account of the many different situations which may exist in fact, and to deal with them fairly; and it is this need which largely accounts for the intricacy of the statutory provisions which we shall propose. Our draft Bill is detailed and, we think, inevitably so. It involves the immediate creation of property rights by means of statutory conveyancing, and these rights have to be clear and definite. The principle of statutory co-ownership may be simple; but there is an obvious need for precise statutory direction as to its effects.

[14] Paras. 1.108–1.113.

0.16. The summary of recommendations made in Book One is contained in paragraph 1.417 of this report, and this is immediately followed by the Bill drafted to implement them: the Matrimonial Homes (Co-ownership) Bill.

Book Two

0.17. Book Two corresponds with Part 1A of the working paper. It is concerned with rights of occupation in the home, a subject governed mainly by the Matrimonial Homes Act 1967, and most of the recommendations made are for amendments to that Act.

0.18. It is worth pointing out that the contents of Book Two are in no way dependent upon, or even connected with, the scheme for statutory co-ownership. Our decision to deal with them in a separate Book will serve to emphasise their distinctness.

0.19. Our summary of the recommendations made in Book Two appears in paragraph 2.91, and is followed by the draft Bill to implement them: the Matrimonial Homes (Rights of Occupation) Bill.

Book Three

0.20. Book Three corresponds with Part 2 of the working paper, and contains a scheme for protecting a wife or husband in the use and enjoyment of household goods. We have envisaged such protection as supplementing the protection of the occupation of the home itself which is afforded by the Matrimonial Homes Act 1967. We said in the working paper: "The Matrimonial Homes Act 1967 recognises the right of a spouse to occupy the matrimonial home and to protect this right . . . but . . . the right to occupy may be of little value unless there is a corresponding right to retain possession of the household goods . . ."[15].

0.21. Accordingly our proposal in this Book, briefly stated, is that at any time during the subsistence of the marriage (except while a decree of judicial separation is in force) the court should have power on the application of either spouse to make an order giving him or her the right, as against the other spouse, to use and enjoy the household goods. Our detailed recommendations to this end are in Part III of Book Three. In Parts I and II we discuss the scheme provisionally proposed in the working paper and explain the background to our present recommendations in Part III.

0.22. The detailed problems involved in arriving at a definition of the term "household goods" are discussed in Part IV of this Book. It is convenient, however, to say at the outset that we use the expression "household goods" in a broad sense to comprehend the contents of the home and goods (including a car or other family vehicle[16]) used in connection with the home. In Part V we deal with the special subject of caravans and houseboats.

0.23. The working paper contained provisional proposals relating to goods in the possession of one or both of the spouses under agreements for the purchase

[15] Para. 2.27.
[16] We explain our reasons for the inclusion of the car in paras. 3.117–3.121, below.

on credit terms of the goods in question[17]: we discuss the case of such items and of articles on hire in Part VI and we there conclude that goods which are the subject of a hiring, hire-purchase or conditional sale agreement should be excluded from the scheme we now recommend.

0.24. Our recommendations in Book Three are summarised in paragraph 3.161, and are followed by the draft Bill prepared to implement them: the Matrimonial Goods Bill.

[17] Paras. 2.17–2.21; 2.45–2.49; (summarised at 2.50(viii)).

BOOK ONE: CO-OWNERSHIP OF THE MATRIMONIAL HOME

PART IA STATUTORY CO-OWNERSHIP

Statutory co-ownership

1.1. Our basic recommendation is that, subject to the qualifications to be mentioned later, husband and wife should by statute become equal co-owners as

joint tenants
of any ownership interest
in the matrimonial home.

We have separated these three constituent parts of our general statement because we want to begin this Book by considering them separately one by one.

1.2. Before we do that, however, we want to introduce some shorthand terms which we shall find it convenient to use.

1.3. First, "statutory co-ownership". It is convenient to describe co-ownership which arises by operation of the proposed new legislation as statutory co-ownership, and the draft Bill which appears at the end of this Book adopts that usage[1]. It is of course open to married couples themselves to provide expressly for the co-ownership of their homes. The majority do so already[2] and it is to be hoped that still more will do so in the future because it is for several reasons more satisfactory that co-ownership should arise by act of parties than by operation of statute. If a husband and wife make express arrangements for their home to be co-owned, the co-ownership which thus arises is not statutory and Part IA of this Book does not affect them at all[3]. Nor, of course, do the corresponding provisions of the Bill; so the complexities of these provisions can in practice be avoided easily enough.

1.4. Second, "the owner spouse" and "the acquiring spouse". The former term will be used to describe the spouse who is, unless and until statutory co-ownership applies, the sole owner of the ownership interest[4]. And "the acquiring spouse" will mean the spouse who becomes, through statutory co-ownership, a co-owner of that interest.

1.5. Third, in order to avoid the constant repetition of phrases like "he or she", "him or her" and "his or hers", we shall assume (since this will most often be the case) that the owner spouse is the husband and the acquiring spouse the wife. We emphasise, however, that statutory co-ownership is to apply in exactly the same way if this situation is reversed.

1.6 There is another term which we have already used and which asks for a definition: "ownership interest". Very briefly, this means any absolute beneficial interest in possession which either spouse has in the home. But the ownership interest merits a section to itself[5], and we must postpone a final description of it (and an explanation of the technical terms used in this definition) until we reach that section.

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[1] Clause 1(1).
[2] See para. 23 of the first report.
[3] See paras. 1.135–1.141, below.
[4] As to "ownership interest" see para. 1.6 below and (for a full discussion) paras. 1.11–1.29, below.
[5] Paras. 1.11–1.29, below.

1.7. We now turn to a detailed consideration of the three constituent parts of the general statement made in paragraph 1.1 above.

"Joint tenants"

1.8. It is of course basic to our scheme that the interests of spouses under statutory co-ownership should be equal, but it has not been altogether easy to decide on the exact form they should take. The main question is whether the spouses should hold beneficially as joint tenants or as tenants in common[6]. In the working paper[7] this question was closely bound up with another question —namely, whether the interests, once acquired, should be capable of unilateral disposition—but consideration of this latter question will be postponed until later in the report[8].

1.9. One difference between joint tenancy and tenancy in common lies in the fact that tenants in common, unlike joint tenants, may hold in unequal shares. But that, clearly, is not an important factor from our point of view because statutory co-ownership is to be equal whatever form it takes. The other difference, and a much more significant one, lies in the fact that the interest of a joint tenant passes automatically to the other joint tenant (or tenants) on his death, whereas the interest of a tenant in common forms part of his disposable estate and passes under his will or intestacy. A joint tenant can, however, "sever" the joint tenancy by unilateral act at any time before his death (though he cannot do so by will[9]), so turning it into a tenancy in common.

1.10. We have come to the conclusion that spouses holding under statutory co-ownership should do so as beneficial joint tenants. Our main reasons for taking this view are as follows:

(*a*) We think that spouses are usually advised to hold as beneficial joint tenants, unless some special factor makes it desirable for them to take as beneficial tenants in common. One such factor might be their desire

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[6] For the benefit of non-lawyers we should explain that the word "tenant", which appears in both these expressions, merely denotes a "holding" and has nothing to do with tenancy in the "landlord and tenant" sense: these types of co-ownership can apply to freehold or to leasehold property.

[7] Paras. 1.78–1.85.

[8] Paras. 1.66–1.69, below.

[9] Para. 1.84 of the working paper suggested that it might be "essential under co-ownership for the law to be changed to allow severance by will". In fact we do not make any recommendations to this effect. Our main reasons are as follows:

(a) The suggestion in the working paper was made within the context of the proposal (in para. 1.83) that a beneficial joint tenancy arising under statutory co-ownership should be unseverable during the spouses' lives (except by mutual consent). Since we decide (in paras. 1.66–1.69, below) not to pursue that proposal, there is much less need to consider the question of severance by will.

(b) The proposal in the working paper was said (in para. 1.84) to be essential because "otherwise it would be impossible for the spouses to take advantage of estate duty concessions which apply on the passing of a survivor's life interest". Now that estate duty has been replaced by capital transfer tax, these concessions no longer apply: see n.10 and n.11, below.

(c) The question of allowing severance by will of a joint tenancy arising under statutory co-ownership could not be considered in isolation, At the least, we should have also to consider joint tenancies of homes arising in other ways. And there would be no logical reason to stop there. The real question is whether or not severance by will of any jointly held property should be permitted. There is certainly a case for permitting it; but it would be wrong to consider this as part of our present exercise.

It should also be noted that, even if severance by will were allowed, a desire to sever could not be inferred unless the will made clear reference to the interest in question and showed a clear intention to dispose of it in some particular way. A residuary gift, though the testator might intend it to include such an interest, would still not do so.

to take the property in unequal shares. The only other factor which militates with any frequency against joint tenancy is the spouses' wish to be able to dispose of their own interests by will. In the past this wish sometimes arose because of the estate duty advantage which such a disposition might have[10]. But this advantage was relevant in only a small proportion of cases, and the replacement of estate duty by capital transfer tax, one of the elements of which is that all transfers between spouses are normally exempt from tax[11], has made it obsolete. Although the power to dispose of an interest by will may still be desired in some cases, and may even have fiscal advantages of a different kind, we have no doubt that joint tenancy is in general the preferred means of holding matrimonial homes. There is of course no question of our interfering with the spouses' freedom to hold as tenants in common if they wish to do so (either by creating originally an express co-ownership of this kind, or by severing a joint tenancy arising through statutory co-ownership or otherwise).

(*b*) One of the reasons why a joint tenancy is so often adopted at present is precisely because (assuming that there is no subsequent severance) the survivor automatically becomes entitled to the whole when one spouse dies. Special considerations apart, we consider this a natural and desirable course of events[12], and one which we wish the co-ownership legislation to encourage.

"Of any ownership interest"

1.11. Our basic recommendation was that statutory co-ownership should make the couple equal co-owners as joint tenants of any ownership interest in the matrimonial home. We now turn to the second of our three elements: the ownership interest.

1.12. People are accustomed to the idea of home "ownership", but we doubt whether everyone who uses the term would agree about its precise meaning. Certainly it is too vague a concept for our present purpose. To begin with, a property may be either *freehold or leasehold.* And, in either case, the law speaks not of "owning" it but of having a particular *interest* in it.

Freehold or leasehold

1.13. Nowadays all land must be either freehold or leasehold. The difference is that a freehold endures for ever, while the duration of a leasehold is finite. Leasehold property may be held under anything from (at one end of the scale) a very long lease which is as valuable as a freehold to (at the other) a weekly tenancy.

1.14. We think that all leasehold, as well as freehold, property should be eligible for statutory co-ownership. The decision to include all leasehold

[10] Spouses who held as beneficial tenants in common could make wills whereby the survivor acquired a mere life interest in the share of the first to die, which then escaped estate duty on the survivor's death under the "limited interest of spouse" exemption: Finance Act 1894, s.5(2) (amended by Finance Act 1898, s.13), as restricted by Finance Act (1909–10) Act 1910, s.55 and Finance Act 1914, s.14.

[11] Finance Act 1975, s.29 and Sched. 6, para. 1. The "limited interest of spouse" exemption no longer applies.

[12] Compare the Intestates' Estates Act 1952, Sched. 2, which, by virtue of s.5 of the Act, has "effect for enabling the surviving husband or wife of a person dying intestate . . . to acquire the matrimonial home."

property within our proposals will mean, for example, that local authority lettings are included. It will also involve the inclusion of tenancies which are protected tenancies under the Rent Act 1977.

1.15. Protected tenancies must of course be distinguished from statutory tenancies. "Statutory tenancy" is a phrase used to describe the rights of a person who is not (or is no longer) a contractual tenant but who enjoys the security of occupation, and the restriction of rent, provided for by the Act. A "protected tenancy" is one which is still contractual but which carries with it the same advantages because it will, if terminated (and if the tenant stays in occupation), turn into a statutory tenancy. Our scheme for statutory co-ownership does not apply at all to *statutory* tenancies[13], because a statutory tenancy, despite its name, is not really a tenancy at all. A statutory tenant has in fact no actual *interest* in the property: he has merely a personal right to remain in occupation, often called a "status of irremovability"[14]. He cannot be affected by statutory co-ownership because he has nothing to which statutory co-ownership can apply. The same reasoning applies to cases in which spouses reside in a property by virtue of a mere licence to occupy. But there is a paradox here, because statutory tenancies (and licences) may be regarded as co-owned already. Precisely because they amount to nothing more than rights of occupation, they are in effect co-owned by virtue of the Matrimonial Homes Act 1967 which gives the spouse of a statutory tenant (or licensee) an equal right to occupy the matrimonial home. The rights which such a spouse enjoys by virtue of that Act (and otherwise) seem to us deficient in one or two respects and in Book Two of this report we make recommendations designed to remedy these deficiencies[15]. But when they have been remedied we think that the position of such a spouse will be as advantageous as that of an acquiring spouse under statutory co-ownership.

1.16. We recognise that if statutory co-ownership is to apply to all leasehold property, it may operate in cases where its operation confers comparatively little financial benefit on the acquiring spouse. But it is rarely, if ever, possible to say that any tenancy (except, perhaps, a council tenancy) is completely lacking in financial value; and in any case we think there are reasons (including psychological reasons) why statutory co-ownership should operate universally in this respect. If exceptions were made according to the duration or value of the lease or tenancy, the line would be very difficult to draw and would have to be arbitrary, and this of itself might give rise to a sense of injustice.

Interest

1.17. We now turn to the idea of the "interest". Interests in property are of various kinds. They may be beneficial or fiduciary (that is, held by a person as trustee for someone else). And in either case they may vary in extent and quality. In our view, statutory co-ownership should apply only to an interest which is beneficial, which amounts to an absolute interest in possession, and which is owned by one of the spouses. We enlarge on this statement in the paragraphs which follow.

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[13] Statutory tenancies within the Rent (Agriculture) Act 1976 are for our purposes in exactly the same position as statutory tenancies under the 1977 Act.

[14] See, e.g., R. E. Megarry, *The Rent Acts* (10th ed., 1967), pp. 196–198.

[15] See paras. 2.37–2.49, below. Such a spouse will also benefit from many of the more general recommendations made in Book Two of this report.

(i) *The interest must be beneficial*

1.18. This point is most easily understood if we imagine a freehold house held by a trustee, T, upon trust for a beneficiary, B. T's interest is not a beneficial interest because he does not hold it for his own benefit. It would be clearly wrong, therefore, if statutory co-ownership could apply to that interest. B, on the other hand, does hold his interest for his own benefit. It is to an interest of this kind that statutory co-ownership is properly applicable.

1.19. In the preceding paragraph we chose a case involving a trust because we wanted to show not only the kind of interest which is beneficial but also the kind of interest which is not. We should point out, however, that most beneficial interests do not subsist under trusts. The commonest beneficial interest is that held by a person who—in common parlance—simply owns his own home.

(ii) *The interest must be absolute and in possession*

1.20. Having decided that statutory co-ownership should apply to, and only to, beneficial interests, it remains to consider whether it should apply to all types of beneficial interest. We have come to the conclusion that it should apply only to those interests which are both absolute and in possession. To put the matter more precisely, so para-phrasing the draft Bill[16], the owner spouse must be (within the meaning of the Law of Property Act 1925) the estate owner in respect of the fee simple absolute in possession or in respect of a term of years absolute in possession, or he must have a corresponding equitable interest.

1.21. We can illustrate the interests which come within this definition. An "estate owner in respect of the fee simple absolute in possession" would be someone who simply holds a freehold property for his own sole benefit. An "estate owner in respect of a term of years absolute in possession" would be someone holding a leasehold property in the same way. Someone with "a corresponding equitable interest" might be B in the example given in paragraph 1.18 above. He is not the owner of the legal estate because T is that. But he holds what is called an equitable interest which, in the example given, corresponds to the fee simple absolute in possession.

1.22 It is made clear in the draft Bill[17] that the definition does not operate to exclude what we may call a "partial" interest from statutory co-ownership. Provided the interest of the owner spouse is an absolute interest in possession it should not matter, in our view, that it does not amount to the whole beneficial interest in the property in question. So if a spouse is one of two or more beneficial joint tenants or tenants in common, we consider that statutory co-ownership should be capable of applying to the interest[18] which he holds in that capacity.

1.23. But what interests fall outside the definition? First, interests which are not absolute. (Absolute interests, very broadly, are interests which are not liable to be defeated by the happening of some event.) This means, for example, that

[16] Clause 2(2).
[17] Clause 2(4).
[18] Strictly speaking such an interest, being technically an interest under a trust for sale and therefore subsisting only in the proceeds of sale, may not amount for some purposes to an interest in land (see, e.g., *Irani Finance Ltd.* v. *Singh* [1971] Ch. 59), but we treat it as such for our purposes (see clause 2(4) of the draft Bill).

we exclude life interests from statutory co-ownership. We suggested in the working paper[19] that they ought to be excluded, and this was generally accepted by those who commented—though one group did say that where an owner spouse had an interest in a house under a Settled Land Act settlement, the spouses could together constitute the tenant for life for the purposes of that Act. After further consideration we remain of the view that, even in that special case, it is not desirable to bring life interests within statutory co-ownership. We have several reasons for taking this view:

(*a*) To apply statutory co-ownership to life interests would, in our opinion, create many complications—of which the position of "protected" life interests[20] is only one example—without conferring any substantial benefit on the acquiring spouse: a half share in a life interest in a property used as a residence for a beneficiary is not normally a very valuable asset.

(*b*) It would also create anomalies. The possession of a life interest is not the only way in which a trust beneficiary may come to reside in trust property. He may have a mere right to occupy, without a life interest, or he may be allowed to occupy, through the exercise of the trustees' discretion, in circumstances which give him no actual right at all. Statutory co-ownership could not, on any view, apply in these situations; and we think it would be wrong if it were nonetheless to apply to life interests strictly so called.

(*c*) The scheme which we have devised for the protection of beneficial interests arising under statutory (or other) co-ownership, and with which we deal in Part 1B of this Book, could not be made to apply to co-owned life interests.

1.24. Secondly, an interest which is not in possession will fall outside the definition[21]. Again, we think that the inclusion of such interests would give rise to unnecessary difficulties without producing any worthwhile benefit. There may of course be rare cases in which a spouse who has an interest in remainder under a trust makes his matrimonial home in trust property, but his interest is of less value while it remains an interest in remainder than it will be when it falls into possession—and when it does fall into possession it will normally become subject to statutory co-ownership. This last point is one on which we shall later have to enlarge[22].

1.25. Most transactions for the sale and purchase of land take place in two stages: contract, followed later by completion. Provided the case is one in which a decree of specific performance could be obtained, the purchaser acquires an equitable interest in the land as soon as the contract becomes binding. We think it should be made clear, however, that this equitable interest does not amount to an ownership interest for our purposes so long as any purchase money remains to be paid to the vendor[23]. The practical result will be that

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[19] Para. 1.101.

[20] I.e., interests the same as, or similar to, those described in the Trustee Act 1925, s. 33.

[21] An interest "in possession" is simply an interest which entitles the owner to *present* enjoyment. It has little to do with possession in the physical sense, or with the phrase "vacant possession" often used in relation to houses.

[22] See para. 1.92, below.

[23] We refer, of course, only to money payable to the vendor in that capacity. A vendor may sometimes leave money outstanding on completion by way of mortgage loan, but that is a different matter.

statutory co-ownership cannot apply until completion. It could seldom do so in any case because (as we shall explain in more detail later) the use of the property as a matrimonial home is to be a pre-requisite to statutory co-ownership and such use would not normally begin until completion. But occasionally purchasers are let into occupation before completion, and we think the point must therefore be clarified. We have arrived at our recommendation for two main reasons:

(*a*) The equitable interest acquired under a contract is not really of sufficient substance to rank as an ownership interest. If it exists at all it is subject, until the purchase money is paid, to the vendor's lien for its payment. But it is in any case impossible to be sure, until the completion date has arrived, whether it ever did exist. Its existence depends, as we have mentioned, upon the case being one in which the court would order specific performance of the contract: the court could not do so until the time fixed for completion had arrived, and would not do so even then unless the circumstances existing at *that* time were such as to justify it. So the interest is inherently liable not only to vanish, but to vanish as though it had never been.

(*b*) When we come to deal with the exceptions to statutory co-ownership we shall want to recommend that a couple can exclude it if they themselves prescribe the ownership of the property—provided that they do so before statutory co-ownership would otherwise apply. The beneficial ownership of a matrimonial home, if expressed at all, is normally expressed in the conveyance, not in the contract. So if statutory co-ownership could apply before completion, the spouses' determination of their ownership might come too late to be effective, and we think this would be unsatisfactory. We emphasise that this recommendation applies only to transactions in which a preliminary contract is intended to be followed by a completion at which the purchase money (or the balance of it) is to be paid. We are not concerned with cases such as that of the "*Walsh* v. *Lonsdale*[24] lease" where the parties, although they make an agreement for the grant and acquisition of a legal lease, do not intend (save perhaps in exceptional circumstances) actually to implement that agreement and are content to rely on the equitable lease created by the agreement. Equitable interests arising in this way may well amount to ownership interests, and this is as it should be because of course the situation is quite different. What mainly distinguishes cases like this from the ones with which we have been dealing is that, in the latter, purchase money remains to be paid to the vendor, and this is why we have formulated our recommendation on that basis.

(iii) *The interest must be owned by one of the spouses*

1.26. This point is obvious enough, but it deserves to be emphasised. Suppose that in the example given in paragraph 1.18 above, T held upon trust for two beneficiaries, B_1 and B_2, who were entitled as beneficial tenants in common in equal shares; and suppose that B_1 set up home in the house with his wife. We have already pointed out that statutory co-ownership could not apply to the interest of T. It would of course be equally impossible for it to apply to

[24] (1882) 21 Ch. D. 9.

the interest of B_2. His interest is his own, and must remain so. The only interest which B_1 has is his half share, and it is to that alone that statutory co-ownership can apply.

1.27. So far we have assumed that only one of the spouses is the owner spouse. But it is possible that both spouses have beneficial interests in the property in question. Thus, in the example just given, B_2 might be the wife of B_1. In the overwhelming majority of cases this situation will have come about in such a way—by express agreement between the spouses, for example—that statutory co-ownership does not apply at all[25] and they continue to hold the beneficial interests which they already have. But this may not invariably be so. A house may for instance have been purchased in the name of the husband but the wife may have contributed part of the purchase money so that the husband holds the house on an implied trust under which both have beneficial interests, which are undeclared and may therefore be uncertain.

1.28. In such cases statutory co-ownership should in our view apply to the interests of both of them. Both interests, in other words, should be thrown into the melting pot and should emerge in the form of statutory co-ownership. One of the advantages of statutory co-ownership is indeed precisely that it will bring to an end uncertainties of this kind. It is often very difficult under the present law to determine the exact extent of spouses' interests in matrimonial homes[26]. Implied trusts, which may be disputed and which may be complicated by presumptions of advancement, are a frequent source of such uncertainty and we are clearly of the opinion that they should not survive the introduction of statutory co-ownership.

1.29. The term "ownership interest" is used in this Book to refer to an interest which is, under the principles outlined above, capable of forming the subject matter of statutory co-ownership. The draft Bill uses the word "own" and related terms in a similar sense[27].

"In the matrimonial home"

1.30. The concept of the matrimonial home needs to be refined in several ways.

Use as a matrimonial home

1.31. We should first make explicit a point which is implicit in much that we have said already—namely, that statutory co-ownership is to apply to an ownership interest only if the owner spouse has that interest at a time when the property in which it subsists is used as a matrimonial home. We deal later with the commencement[28] and duration[29] of statutory co-ownership. Here we are concerned only to emphasise that use as a matrimonial home is a pre-requisite for the application of statutory co-ownership to an ownership interest —and to add that each ownership interest should in our view be considered separately for that purpose.

1.32. This last point may be important if different ownership interests are acquired at different times in the same property. For example, the owner spouse

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[25] Paras. 1.135–1.141, below.
[26] See further paras. 0.15–0.17 of the working paper, quoted on pages 26–27 of the first report.
[27] Clause 2.
[28] See paras. 1.70–1.100, below.
[29] See paras. 1.101–1.103, below.

might have a lease of a house in which the couple make their matrimonial home. Clearly statutory co-ownership can apply to his leasehold interest. But if he subsequently acquired the freehold, the position would depend upon whether the couple were still using the property as a home. If they were, statutory co-ownership would apply to the freehold. If they were not, statutory co-ownership would not apply (though it might do so if they used the property as a home again later). In the rare case in which the property was no longer a home, so that statutory co-ownership did not apply, it would not necessarily follow that the husband held the freehold for his own sole benefit: in most circumstances he would still be treated, in law, as making the purchase as a trustee and thus as holding it upon the same trusts as the lease; but that is a question to be governed by the existing law.

1.33. In a very few cases, some theoretical doubt might thus arise in regard to property titles. If an owner spouse held the leasehold as trustee for himself and his spouse, but the freehold for himself alone, no merger of the two could take place because he would hold them in different capacities. And this is something which might affect a subsequent purchaser of the property from the owner spouse, for if such a purchaser, thinking that merger had taken place, took a conveyance[30] of the freehold interest alone, it may be that the leasehold interest would remain vested in the owner spouse in his capacity as trustee for his wife and himself. At first sight this situation might seem to infringe a principle which we are extremely anxious to maintain—namely, that a purchaser should not be affected by rights arising under statutory co-ownership unless those rights are brought to his attention in clear and specific ways to be discussed later in this report. But this is not really so. A purchaser who assumes that merger has taken place does so at his peril even under the present law. Having regard to the rules about implied trusts and presumptions of advancement to which we have already made brief reference, an owner spouse may well hold the freehold and the leasehold interests in different capacities even today. Merger, moreover, depends upon intention and this is not to be taken for granted. The solution to the difficulty is the solution which a prudent purchaser already adopts under the present law where there is any room for doubt—that is, to take a conveyance which not only gives him the freehold but which includes an express assignment of the leasehold as well.

Homes not amounting to "land": caravans, houseboats, etc.

1.34. Another point which is implicit in what we have already said is that, for statutory co-ownership to apply, the home must amount to "land". The system of law which in this country governs land differs from that which governs other kinds of property not only in its basic substance but also in its ancillary incidents, such as the "registration" facility which allows entries to be made in respect of land at a central registry. The scheme for statutory co-ownership which we present in this Book is set firmly within the context of land law and would not make sense in any other context.

[30] The word "conveyance" is appropriate only to a sale of unregistered land, and we use it here with that in mind. The problem is different for registered land, at least where both freehold and leasehold interests are registered, for in that situation the purchaser's position will depend in practice upon whether the two interests are "merged" on the *register*. Where the freehold is registered but the leasehold is not, the position seems much the same as in the case of unregistered land.

1.35. Of course in law "land" is a concept wider than the layman might suppose: a flat at the top of a tower block is technically land because the block is built permanently upon land and so amounts, in law, to land. And so, more obviously, does a house. And so, indeed, does any permanently fixed building.

1.36. But a caravan, houseboat or other moveable dwelling does not legally form part of land. It follows that the statutory co-ownership scheme put forward in this Book cannot apply to things like caravans and houseboats—unless the circumstances are unusual and they have acquired that degree of attachment to the land which makes them, in law, part of the land itself. The exclusion of these homes arises, therefore, solely from the basic nature of our present co-ownership scheme. They are considered again, however, in Book Three of this report, and we recommend their inclusion within the use and enjoyment scheme which is put forward there[31].

The extent of the matrimonial home

1.37. Suppose the circumstances are such that all the ingredients for statutory co-ownership are present in relation to a property in which the couple have their matrimonial home. It still remains to ask: how much of that property is to be co-owned?

1.38. In the vast majority of cases this question will be no sooner asked than answered, and the answer will be: all of it. The primary object of co-ownership is of course the accommodation in which the couple actually live; but it should clearly extend to any garage, outhouse, garden, yard and appurtenances which go with it.

1.39. Indeed it should, in our view, extend still further in certain cases. Property which does not form part of the immediate "home" as described in the preceding paragraph, either because it is used for some non-residential purpose or because it is not in the occupation of the spouses, should nonetheless be included in the statutory co-ownership if it goes with the home as an adjunct to it. This would include, in particular, property which, given its situation and relation to the home, is likely to have a primary use for, and subservient to, the domestic purposes of the occupiers of the home—and those purposes should include the provision of accommodation for a parent or other dependent and such professional or business activities as are commonly carried on at home. This is of course an objective test.

1.40. Our recommendation that statutory co-ownership should extend in this way a little beyond the home strictly so called is made for two main reasons. First, because it seems to us right in principle that premises of which the use is truly ancillary to the home should for this purpose be included in the home. And second, because any other decision would give rise to unacceptable difficulties. The "ancillary" premises, precisely because they were ancillary, would not normally be severable from the home and it would make no sense to apply statutory co-ownership to only one of two essentially indivisible parts of a single property. (We say more about this problem under the next heading.) The result might therefore be that we should have to exclude the whole property from co-ownership and that, indeed, would be a case of allowing the tail to wag the dog.

[31] See paras. 3.122–3.134, below.

1.41. Within the framework laid down in the last paragraph but one—which is in fact a paraphrase of the relevant provisions[32] of the draft Bill—each case must clearly depend upon its own facts. But with that qualification the position may be illustrated by a few examples:

(*a*) A house in the country has attached to it a small orchard which the husband looks after in his spare time. The mere fact that the husband sells the apples to supplement the family income ought not normally to take the orchard outside statutory co-ownership. The position would be different if the orchard were very large and run by the husband on a full time basis as a business venture for in that case it could hardly be said to go with the house as an adjunct to it.

(*b*) One spouse is an architect who practises in a small way from home: the mere fact that one or two rooms are set aside exclusively for the practice ought not normally to take those rooms outside the co-ownership provisions. Again, however, the position would be different if the spouse in question owned a very large architectural practice which occupied the whole of a commercial building save only for a few rooms at the top in which he made his matrimonial home.

(*c*) One or two rooms in the house are occupied by a lodger: normally this should not prevent statutory co-ownership applying to the whole house. Again, the position would be different if one of the spouses owned a hotel used mainly to accommodate guests but in which there was a small suite of rooms used as the matrimonial home.

1.42. Although we do not want to anticipate the points dealt with in later sections of this Book, it may serve to avoid confusion if we refer here to one matter with which we shall subsequently deal in greater detail[33]. Once statutory co-ownership applies to property, the property must continue to be co-owned even though it may cease to be used as a matrimonial home. It follows that the problems considered under the present heading—and indeed those considered under the next one—will not arise at all unless the non-matrimonial use of part of the property was already current at what we shall later call the "co-ownership occasion"—i.e., at the time when statutory co-ownership first applies. If, at this time, the whole of the property was used as the matrimonial home, the fact that some part of it ceased *subsequently* to be so used could not in any case take that part out of co-ownership.

1.43. The factual examples given above were chosen to provide simple instances of the principles we wished to illustrate. We are conscious that situations of this kind will not always be so clear cut in real life, and that there may be difficulty in applying our statutory formula to particular facts. But we do not think that we can improve upon the formula itself and it is unlikely that practical problems will arise in more than a small number of cases.

Homes forming part of a larger unit

1.44. Under this heading we continue to deal with the situation where the property in which the relevant ownership interest subsists, and the home is

[32] Clause 3(2) and (3).
[33] Paras. 1.101–1.103, below.

made, is such as to raise "geographical" doubts about the application of statutory co-ownership. To recapitulate, the first question to ask in this situation is whether any part of the property falls outside the primary definition mentioned in paragraph 1.38 above. If the answer is No, then of course there is no need to go any further because co-ownership will apply to the whole. If the answer is Yes, it is necessary to proceed to the second question and ask whether the part which falls outside the primary definition may be said to go with the home as an adjunct to it, under the principles discussed in paragraphs 1.39–1.41 above. If the answer to that question is Yes, there is no need to go further because the consequence, again, will be that co-ownership applies to the whole. So much we have already explained.

1.45. But what if the answer to the second question is No, or Yes as to part only? What, in other words, if there is some part which falls outside the primary definition and does not go with the home as an adjunct to it? (We will refer to that part as the non-home part, and to the part which does come within the primary definition, or goes with the home as an adjunct, as the home part). This is the problem we have now to consider. The easiest way to solve it, no doubt, would be to adopt one of two simple alternatives: to provide either that in these circumstances statutory co-ownership should apply neither to the home nor to the non-home part; or that it should apply to both. But either of these provisions would be plainly unfair to one spouse or the other and we have rejected them both in favour of a more discriminating scheme.

1.46. We suggest, in fact, that one should proceed to ask a third question: can the home part and the non-home part readily be severed from one another? —or, to come closer to the phraseology of the draft Bill[34]: would the difficulties or disadvantages involved in a severance be such that, if the whole property were to be sold in the open market, it would not be practicable for the home part to be sold without the non-home part or, if it had to be so sold, the price to be expected for the whole would be substantially reduced?

1.47. If severance is impracticable, then statutory co-ownership should not apply to either part of the property. This conclusion seems to us inevitable. It would be clearly wrong in these circumstances for statutory co-ownership to apply to the whole property, because that would give the acquiring spouse a half interest in, and a large measure of control over, a non-home part which would not, on this hypothesis, be an adjunct to the home and which might be very substantial and extremely valuable. And it would be almost equally wrong for statutory co-ownership to apply to the home part by itself, because although the acquiring spouse's interest would then be confined to the home part, the difficulty of severing the two parts would in practice give that spouse an almost equal measure of control over the non-home part. It is no part of our intention to thrust one spouse into the business or commercial activities of the other.

1.48. But if severance is practicable, then statutory co-ownership should apply to the home part and to that alone. Since in this case the two parts are readily severable, there is in our view no reason why statutory co-ownership should not apply to the home part.

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[34] Clause 13(1) (b).

1.49. While emphasising once more that each case must depend upon its own facts, it may be helpful to illustrate this point by one or two examples:

(*a*) One spouse owns a house containing two flats which are (or can easily be made) self-contained. He lives in one flat with his family and lets the other to tenants. The two flats, clearly, are readily severable and statutory co-ownership will apply to the one which is used as the home.

(*b*) One spouse is a farmer and makes his matrimonial home in the farmhouse which forms part of his farm. In some cases, a farmhouse could be readily severed from the rest of the farm, and in those cases statutory co-ownership would apply to it; in most, this would not be so and statutory co-ownership would not apply at all.

(*c*) One spouse owns a large hotel in the middle of which there is a suite of rooms used as his matrimonial home. Severance is obviously impossible and statutory co-ownership will not apply.

1.50. If statutory co-ownership applies to the home part but not to the non-home part of a property, it is obvious that questions may arise as to the exact boundary between the two and as to what rights[35] each part should have over the other. So far as the boundary is concerned, we are not greatly troubled: we think the parties will nearly always manage to reach agreement about it, and it could clearly be settled by the court if they failed to do so. The question of rights is not quite so easy. Statutory co-ownership is deemed to arise through a disposition by the owner spouse, and easements at least may arise on such a disposition by means of an implied grant or reservation. Such implied easements may not always be satisfactory. however, particularly from the point of view of the owner spouse as owner of the "retained" non-home part of the property (because easements implied by way of reservation are less generous than those implied by way of grant); and covenants do not arise by implication in any circumstances. We therefore considered whether we should provide some special means whereby reasonable mutual rights could be determined in a case of this kind. In the end we decided that any scheme we might devise would have to be very complex (having regard, in particular, to the fact that third parties might have interests in either part, or in both parts, of the property) and that it would give rise to more difficulties than it solved. It is necessary, we think, to see this problem in proper perspective. Three points should be borne in mind. First, that the questions to which we have referred are of no importance unless some disposition has actually to be made of or affecting one part but not the other; and this would be rare in itself. Second, that these questions would not be peculiar to statutory co-ownership: uncertainty about rights (and even boundaries) may easily arise today if two parts of a property become separately owned. Third, that the definition of boundaries and the framing of rights may be among "the difficulties and disadvantages involved in a severance"[36]; and if such difficulties and disadvantages are sufficiently great they would, as we have already noted, serve to prevent the application of statutory co-ownership altogether.

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[35] By "rights" we intend to refer not only to easements, such as rights of way and rights of support, but also to covenants, whether restrictive or positive, such as covenants to repair or covenants against using one part of the property in a way detrimental to the other.

[36] See para. 1.46, above.

1.51. We would make one concluding recommendation which follows logically from what we have already said. If statutory co-ownership is in fact excluded in respect of the home part of a property on the ground that it cannot readily be severed from the non-home part, and if the spouse who owned the non-home part subsequently ceases to own it (or a material part of it), then we think that that event should itself be a co-ownership occasion[37]. The result will be that the situation is looked at afresh. If the whole of the non-home part has ceased to be within the spouse's ownership there will normally be no reason why statutory co-ownership should not apply to the home, and under our proposals it will do so. If some part of the non-home part is still retained it will be necessary to re-apply the principles already explained in order to decide whether or not the non-home part of the property, though reduced, is still such as to cause the continued exclusion of the home part.

Effect

1.52. We have already indicated that the effect of statutory co-ownership is to make the spouses beneficial joint tenants of the ownership interest.

The operation of statutory co-ownership

1.53. But this general statement gives rise to two questions: what exactly is to happen?, and how exactly is it to happen? To these questions we now turn.

(i) *What is to happen?*

1.54. When the ownership interest, to which statutory co-ownership is to apply, is an equitable one, the process can be quite straightforward. We will not attempt to explain here in detail the distinction, on which we have already touched very briefly, between legal and equitable interests. It may suffice to say that the owner spouse will have an equitable interest in those cases in which the legal estate in the land is in the hands of a trustee who holds in trust for him, or for him and others. In these cases there is no difficulty in providing by legislation that the acquiring spouse shall become a direct joint tenant with the owner spouse of the equitable interest which belonged previously to the owner spouse alone, and our draft Bill[38] does so provide. Suppose, for example, that trustees hold a house upon trust for sale for two beneficiaries, B_1 and B_2, as equal tenants in common. B_1 marries and makes his matrimonial home in the house. Thenceforth his spouse will become a joint tenant of his half share, so that the trustees now hold the house upon trust, as to one half, for B_1 and his spouse as joint tenants, and, as to the other half, for B_2 as before.

1.55. But when the ownership interest is a legal one—that is to say, when there is no trust involved and the owner spouse has simply acquired the freehold, or taken a lease, for his own benefit, as will most commonly be the case—the process has, for practical reasons (given in paragraph 1.57), to be a little more complicated. In this situation statutory co-ownership cannot operate to make the acquiring spouse a direct joint tenant of the owner spouse's interest —the legal interest or, to be more technically correct, the legal estate—but must operate instead to make the owner spouse a trustee of the legal estate for himself and the acquiring spouse as beneficiaries. The legal estate thus remains in the sole ownership of the owner spouse, but it is held upon trust, and the two spouses become equitable joint tenants under the trust.

[37] Co-ownership occasions are explained in paras. 1.71 *et seq.*, below.
[38] Clause 6(1) (b).

1.56. So we may sum the matter up in this way. Statutory co-ownership can operate only to make the acquiring spouse a joint tenant of an equitable interest: when the owner spouse's interest is already equitable, it makes the acquiring spouse a direct joint tenant of that; but when the owner spouse's interest is legal, it operates so as to create a subsidiary equitable interest and to make the acquiring spouse a joint tenant of that subsidiary interest.

1.57. The question which springs to the layman's mind, we suspect, will be why? Why, when the owner spouse's interest is a legal one, can statutory co-ownership not make the other spouse a direct joint tenant of that interest? Theoretically, it is true, it could do so. But this sudden accession of the acquiring spouse to the legal ownership, because it was automatic, would not be signalled by any documentary evidence, and a subsequent purchaser[39] of the house might know nothing about it. So what would be the position of such a purchaser? Under the general law, a purchaser who takes a conveyance or transfer from only one of two legal owners gets neither the property itself nor a good receipt for his money. For their own protection, therefore, the vast majority of purchasers would be forced to satisfy themselves by prolonged and perhaps impertinent enquiries (involving the vendor's marital status and the uses to which the property had been put), that statutory co-ownership had not arisen.

1.58. We have no doubt that this would be totally unacceptable. In the working paper[40] we were at pains to stress that "third party interests must be adequately protected and conveyancing must not be made unduly complicated." Several of those who commented on the working paper were concerned, in our view rightly, to emphasise the importance of these considerations. The only way of avoiding the consequences mentioned above, if the acquiring spouse were brought automatically on to the legal title, would be to provide that a purchaser should be entitled to act as though she was not there at all. This would be a self-evidently pointless exercise as well as being contrary to legal principle and this possibility, too, must clearly be rejected.

1.59. The discussion in the foregoing paragraphs is not intended to imply that we propose to leave a spouse who has acquired a beneficial interest through statutory co-ownership with no means of protecting that interest against a purchaser of the legal estate. On the contrary, much of Part 1B of this Book is devoted to devising such means. But the need to devise them springs from the practical impossibility of projecting the acquiring spouse, automatically and effectively, into the legal ownership of the property, and it is this point which we want to emphasise here.

(ii) *How is it to happen?*

1.60. We turn now to what may perhaps be called the "mechanics" of the operation of statutory co-ownership. If the legislation merely provided that the spouses became co-owners in the way described above, several loose ends would remain untied. A statutory magic would have achieved the immediately desired result, but since it would have violated (as magic does) the accepted order of things no one would know precisely what the consequences were. The simplest way to deal with this problem is to provide that the result must be

[39] We use the word "purchaser" as a shorthand term. Others, particularly mortgagees, would be in the same position.
[40] Para. 1.114.

treated as having been achieved, not by magic, but by a declaration of trust or an assignment by the owner spouse.

1.61. These two alternatives correspond with the two types of ownership interest mentioned above[41]—the legal estate and the equitable interest. If the owner spouse's interest is an equitable one, he must be treated as having simply assigned it to himself and the acquiring spouse as joint tenants. If his interest is a legal estate, he must be treated instead as having made a declaration of trust, so that he retains the legal estate but holds it upon trust for himself and the acquiring spouse as joint tenants. Several consequences follow from the activities thus deemed to have occurred. At this stage we would mention two in particular.

1.62. First, the creation of a trust for sale. Section 36(1) of the Law of Property Act 1925 provides: "Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale . . .". It follows that where statutory co-ownership affects a legal estate, the declaration of trust notionally made by the owner spouse will create the familiar trust for sale[42] which applies under the present law in all cases of absolute co-ownership.

1.63. Second, severance of a joint tenancy. If the owner spouse's interest is an interest which he has in a property as a beneficial joint tenant with another person or other people (so that it will necessarily be an equitable interest) the effect of the assignment which he is deemed to make will be to sever the existing joint tenancy. For example, if trustees hold property on trust for B_1 and B_2 as beneficial joint tenants absolutely and B_1 sets up his matrimonial home there, the effect of the notional assignment of B_1's interest to himself and his wife is to sever the beneficial joint tenancy between himself and B_2, so that B_2 becomes a tenant in common holding a one half share in the property. The other half share is henceforth held by B_1 and his wife as beneficial joint tenants as between themselves.

1.64. We must pause here to add a few words about the trust for sale. In our working paper[43] we suggested that "the beneficial interests of the spouses (under statutory co-ownership) should become direct equitable interests in land, rather than, as now, interests in the proceeds of sale, under a trust for sale." We no longer feel able to support this suggestion. The main reasons for our change of view are these:

(*a*) The weight of opinion expressed in consultation was against the proposal. There is certainly a strong element of artificiality in the trust for sale, and couples with no legal knowledge find it hard to understand why co-ownership should involve a trust for sale being imposed upon property which they have no immediate intention of selling and may only just have bought. But of course the trust for sale is only a legal device and there is no need for it to be expressly mentioned even where the co-ownership arises by written document. And consultation has served to emphasise that the elements of innovation inherent in replacing the interests of co-owners under a trust for

[41] Paras. 1.54 and 1.55, above.
[42] The statutory trust for sale is set out in s. 35 of the same Act.
[43] Para. 1.116.

sale by direct equitable interests in the land would be so great as to involve many ramifications, with all of which we should have to deal if our scheme were to work satisfactorily. We have already mentioned[44] our reluctance to add avoidable complexities to a set of proposals which are unavoidably complex in themselves.

(*b*) There is also another difficulty. Would this new form of trust be confined to statutory co-ownership or would it be available to those spouses who created an express co-ownership for themselves? We have noted earlier in this report that most spouses already do impose express co-ownership on their homes, and we have expressed the hope that still more will do so in future because it is more satisfactory that co-ownership should arise by act of parties than by operation of law[45]. If the new form of trust were generally desirable, therefore, we could not logically reserve its benefits exclusively for those couples who had refrained from creating their own co-ownership[46]. We should thus be committed to an exercise still wider in its scope.

(*c*) The point made in sub-paragraph (*b*) combines with the considerations mentioned in sub-paragraph (*a*) to force us towards one general conclusion—namely, that although the concept of the trust for sale may deserve to be re-examined in the light of present day needs and present day thinking, such re-examination cannot and should not be confined to cases of statutory co-ownership, nor even, for that matter, to cases where the property affected is a matrimonial home. It follows that we cannot embark upon it here.

It is worth noting, however, that our present proposals do incidentally dispose of one of the difficulties inherent in the application of the trust for sale to matrimonial homes, by providing that (in general) no sale should take place without the consent of both spouses[47].

1.65. If our scheme for statutory co-ownership is to be effective, one further provision needs to be made in the field of "mechanics". The owner spouse may hold his interest subject to a limitation, covenant or condition which takes away or limits his right to assign or declare a trust of it. He may for example have entered into an agreement to take a lease which forbids him to assign his interest. It is clear, we think, that no such restriction ought to prevent the operation of statutory co-ownership, and the draft Bill so provides[48].

Should interests held under statutory co-ownership be inalienable?

1.66. The working paper[49] expressed the provisional view that neither spouse should have power to dispose, without the consent of the other, of his or her own beneficial interest arising through statutory co-ownership. (We pause to emphasise that we are concerned here with the disposability of the beneficial interest held by an individual spouse in the home, not with the disposability

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[44] Paras. 0.13 and 0.14, above.
[45] Para. 1.3, above.
[46] Although couples who create an express co-ownership are apparently prepared to accept the existence of a trust for sale, it is doubtless because they have no alternative under the present law.
[47] Paras. 1.270–1.292, below.
[48] Clause 6(2).
[49] Para. 1.83.

of the home itself—a matter dealt with in section B of this Part of the report.) The purpose of this suggestion was, of course, to preserve the integrity of the matrimonial home, which might otherwise be prejudiced by the introduction, by one of the spouses acting alone, of strangers into the beneficial ownership. The working paper referred to the possibility of third parties actually acquiring occupational rights concurrently with the spouses; but we think it doubtful whether such rights would be acquired in these circumstances and virtually certain that, if acquired, they would not be exercised. It is true, however, that if one spouse sells or mortgages his or her own beneficial interest under the trust for sale, that transaction may later prove prejudicial to the prospects of replacing the matrimonial home if the present one is disposed of.

1.67. If the policy outlined in the working paper were implemented, it would certainly have to apply to all cases of co-ownership of the matrimonial home, whether the co-ownership was statutory or not. And implementation would have to take the form of making the forbidden disposition void. This would create considerable conveyancing difficulties, because in the ordinary way there is nothing to prevent a beneficial co-owner from dealing as he likes with his individual interest.

1.68. Further consideration of the suggestion in the working paper has led us, moreover, to doubt whether (in spite of theoretical arguments in its favour) there is any practical need for it. Matrimonial co-ownership is already very widespread, and husbands and wives do not in practice seem to sell or mortgage their individual interests. This may be partly because they do not think of doing so; but the main reason, we think, lies in the fact that such interests are virtually unmarketable. A beneficial interest in a matrimonial home (or a charge on such an interest) is a thoroughly unsatisfactory investment for a third party. It conveys no right to vacant possession, and produces no income. And it seems clear that the third party has no better right than the spouse from whom he acquired his interest to obtain an order for the sale of the home itself[50].

1.69. We conclude, therefore, that the beneficial interests of the spouses under statutory co-ownership should take the form of interests already known to the law and should not be subject to any special bar against disposition.

Commencement

1.70. If statutory co-ownership applies it should commence, in our view, at the time when three relevant factors first coincide: the married state; the possession of an ownership interest; and the use as a matrimonial home. Statutory co-ownership applies only as between husband and wife, so it cannot commence before the date of the marriage. It applies only to interests amounting to what we have called ownership interests, so it cannot commence until such an interest is acquired. And it applies only if the property in which the interest subsists is used as a matrimonial home, so it cannot commence until the property is put to that use.

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[50] Cf. *Stevens* v. *Hutchinson* [1953] Ch. 299, 307 (C.A.), referred to with approval in *Jones* v. *Challenger* [1961] 1 Q.B. 176, 182 (C.A.). It is relevant to mention that the other spouse will, in a normal case, continue in these circumstances to enjoy the new co-ownership rights which we recommend in Part 1B of this Book (see the recommendation made in para 1.266, below), including the new consent requirement (described in paras. 1.270 to 1.292, below).

Co-ownership occasions

1.71. We can now explain a concept of which extensive use is made in the draft Bill and which has already been mentioned: the co-ownership "occasion". This is simply the occasion on which the three factors mentioned above first coincide. As the Bill[51] recognises, it is possible to distinguish four such occasions. (References to "the property" include references to a part of the property, and references to "the couple" having an ownership interest include the case where either of the spouses has such an interest.)

(i) When the couple, already married and already having an ownership interest, set up home in the property.

(ii) When the couple, already married and already having a home in the property, acquire an ownership interest (or a further ownership interest) in it.

(iii) When the couple, already having an ownership interest and a home in the property, marry one another.

(iv) When the couple, already married and already having both a home in the property and an ownership interest, acquire an ownership interest in other property forming an addition to the home[52].

1.72. It is appropriate now to analyse more fully the three ingredients from which each of these co-ownership occasions is compounded.

Marriage

1.73. A couple should be treated as being married if, and only if, their marriage is recognised as valid by English law (including English private international law). But one or two points deserve discussion.

(i) *Polygamous marriages*

1.74. We have not found it easy to decide how to treat polygamous marriages[53]. In devising a solution to the problem which such marriages present, we have had to keep two considerations in mind. On the one hand, the solution must be a logical and workable one within the general context of our scheme for statutory co-ownership. But on the other, it should not be such as to cause unnecessary offence to those people in England whose marriages are actually or potentially polygamous. This latter point is particularly important, because we would not wish to venture unthinkingly into a sensitive area such as this; and it prompted us to postpone the taking of a final decision until we had carried out a special round of consultation on this issue. We did in fact consult a representative selection of groups and individuals who had a special concern with polygamy or with those immigrant communities to whom it is particularly relevant. We are very grateful to those who assisted us: their names are included

[51] Clause 5. This clause in fact lists five ocasions, but one of them (the first) is relevant only in a "transitional" situation and so is dealt with later in this report: see paras. 1.216 and 1.217, below.

[52] It is necessary to have occasion (iv) in addition to (i) because, although the couple may be said to move into the additional property, they do not "set up home" afresh.

[53] It should be emphasised that our references to polygamous marriages are to be understood in the light of the preceding paragraph of the text – that is, as references to marriages which, though polygamous, are *valid* according to English law. In some cases (depending on the personal law of the parties) the fact that a "marriage" is polygamous renders it altogether invalid under our law. Such cases do not fall under this heading at all, but under that of "Void marriages": paras. 1.82–1.87, below.

in the list in the Appendix to this report[54]. The results of the consultation will be referred to in the paragraphs which follow.

1.75. Before going any further we must distinguish between marriages which are actually polygamous (that is to say, cases in which the husband actually has more wives than one [55]) and marriages which are only potentially polygamous (that is to say, cases in which the husband has in fact only one wife, but in which the law of the country where he married permits him to take a second wife and English law would recognise a second marriage as valid if it took place).

1.76. We see no reason why marriages which are only potentially polygamous should not qualify as marriages for the purpose of attracting statutory co-ownership, unless there is any special factor likely to cause offence in the way described above. In the field of matrimonial relief greater recognition has now been given, at our instigation, to polygamous marriages[56], and it seems to us consistent with that trend to include such marriages within the co-ownership scheme so far as possible. In the case of potentially polygamous marriages, such inclusion is perfectly possible. It seems clear that of the people living in this country whose marriages are polygamous, most have marriages which are only potentially polygamous, and most of those have no intention of taking another spouse. There is no obvious reason to treat such people differently from a person whose marriage is legally monogamous. Consultation has confirmed this view. Most of those whom we consulted welcomed the idea that co-ownership should apply to potentially polygamous marriages, and none felt that objections would be raised on grounds which had to do with polygamy[57].

1.77. But what if the marriage is actually polygamous, so that the husband has on the co-ownership occasion (or on the occasion which would be a co-ownership occasion if his marriage qualified) more than one wife?

1.78. To start with, it seems to us that if all actually polygamous marriages were included, without exception, within the co-ownership scheme, special provisions would have to be introduced into the draft Bill to deal with the case where two wives lived in the same home. Many questions would have to be answered. If all three went to live there at once, should all share equally or should the husband have a half and the wives a quarter each? If a husband and one wife went to live in the home and were later joined there by a second

[54] This Appendix appears after Book Three.

[55] In our references to polygamy we intend, of course, to include the converse case where the wife has, or may have, more than one husband.

[56] See Matrimonial Proceedings (Polygamous Marriages) Act 1972, s. 1, now s. 47 of the Matrimonial Causes Act 1973, passed as a result of our Report on Polygamous Marriages (1971) Law Com. No. 42.

[57] There was some conflict of view amongst our consultees as to whether the co-ownership scheme would be at variance with the teachings of Islam. One correspondent said that these teachings do not permit property to be taken from one person, or acquired by another, save in circumstances which were defined and which would not include anything in the nature of co-ownership by statute. As against this, others pointed out that Islamic law requires a husband to share his property with his wife. Whatever the position may be, it is clear that this point has really nothing to do with polygamy; and although we would not wish in any way to belittle it we do not think we should recommend that purely religious beliefs should serve by themselves to exclude statutory co-ownership (particularly since we are leaving couples free to exclude it voluntarily if they so desire). The reactions of our other consultees lead us to hope that this will not prove to be a substantial problem in practice.

wife, should the second wife share only the husband's interest (so that the first wife would have a half and the husband and the second wife a quarter each), or should the advent of the second wife reduce the share of the first? And of course there might, in theory at least, be more wives than two.

1.79. It is true that these questions do not arise unless two wives have a matrimonial home in the same proprety; and we understand this situation to be extremely rare. Our consultation suggests that even if a marriage is actually polygamous it is exceptional for both wives to be in England, let alone in the same home: one of them generally remains abroad. Since this situation is so rare, it could be argued that we should apply statutory co-ownership to all actually polygamous marriages and simply make no special provision for it at all. But that solution does not appeal to us. First, because the situation, though exceptional, is not unknown. And second, because although the solution would promote equal treatment as between a wife in a potentially polygamous marriage on the one hand and a wife in an actually polygamous marriage on the other, it would clearly promote inequality as between the two wives in an actually polygamous marriage.

1.80. A solution which would at least avoid the need for special provisions in the draft Bill would be to include all cases of actual polygamy *except* those in which two wives lived in the same home. But this solution would not overcome the point made at the end of the preceding paragraph, and it would of course give rise to further anomalies of its own.

1.81. It seemed to us, in the end, that the difficulties of trying to bring actually polygamous marriages within the co-ownership scheme on any coherent and logical basis were really too great. The truth is, we think, that not only the scheme itself but also the rationale which underlies it are framed essentially for marriages which are monogamous in fact or in law and cannot readily be applied to marriages of a different kind. The results of our consultation were not such as make us re-examine this view: the exclusion of actually polygamous marriages from statutory co-ownership was not generally opposed. The result will be that if, on any potential occasion for co-ownership, the husband has more than one wife, or the wife more than one husband, statutory co-ownership will not apply.

(ii) *Void marriages*

1.82. We do not think that a marriage which, according to English law (including English private international law), is void should qualify for the purposes of the co-ownership scheme.

1.83. This conclusion is not so obvious as it may seem, but before we explain it we must clarify our terms. When we refer to void marriages we mean, of course, marriages which are void *ab initio*—void from the beginning. We do not include marriages which are merely voidable[58]. We see no reason why voidable marriages should not rank as marriages for our present purposes, particularly as, since the Nullity of Marriage Act 1971[59], a nullity decree operates to annul a

[58] The grounds on which marriages are void and voidable are now set out in ss. 11 and 12 respectively of the Matrimonial Causes Act 1973.

[59] Sect. 5. (The Nullity of Marriage Act 1971 was enacted as a result of our report on the subject: (1970) Law Com. No. 33.) This provision is now to be found in s. 16 of the Matrimonial Causes Act 1973.

voidable marriage "only as respects any time after the decree has been made absolute", and the marriage is "notwithstanding the decree, . . . treated as if it had existed up to that time"[60].

1.84. In considering void marriages, we must bear in mind that one or both of the parties may (or may not) know, at the time of the ceremony, that the marriage is not valid. There is, we think, no case on policy grounds for allowing statutory co-ownership to operate in favour of a "spouse" who has entered into a void marriage in bad faith. There might be a case, on such grounds, for allowing it to operate in favour of one who had done so in good faith. This distinction presents an initial difficulty, because it would obviously be unsatisfactory for the existence or non-existence of a present interest in property to depend upon the state of mind of the party in question at the time of the marriage. If void marriages were to rank as marriages for co-ownership purposes in any circumstances, it might be preferable for them to do so in all. Co-ownership would then operate in favour both of the "spouse" who had acted in good faith and of the one who had acted in bad, though the courts could discriminate between the two types in readjusting property rights if and when a nullity decree was obtained.

1.85. But that question may be left on one side, because the real problem about allowing a void marriage to rank as a marriage for co-ownership purposes arises whether or not the marriage was entered into in good faith. It has to do with the possibility that one of the spouses might have made another marriage in addition to the void one. This other marriage might itself be valid or void and might precede or follow the void marriage which we are considering[61]. The point is that if we treat a void marriage as a marriage for co-ownership purposes we open up the possibility of a husband having, for those purposes, two wives, or a wife two husbands.

1.86. The problems to which this possibility gives rise are exactly the same as those discussed above in connection with polygamy. And it would seem sensible at first sight to solve them in the same way, by providing that statutory co-ownership should not arise on any occasion if at the time the husband had more than one wife (or vice versa). But we think this would be wrong. It would mean that a genuine wife could be debarred from gaining a co-ownership interest simply because the husband had (after her marriage but before the relevant co-ownership occasion) entered into a bigamous marriage with someone else. It would also mean that however obviously void a husband's first marriage was, his second (and only genuine) wife could not acquire a co-ownership interest unless and until he or the first "wife" obtained a nullity decree; and this neither of them might do. Results of this kind seem to us

[60] The provision covers all degrees of nullity "in respect of a voidable marriage", so it is applicable not only where English domestic law applies but also to cases where the marriage is annulled because it is voidable under a relevant foreign law (see s. 14(1) of the Matrimonial Causes Act 1973) – but of course it does not apply at all unless the decree is actually pronounced by an English court. There may still be cases, therefore, in which a decree, though *recognised* by English law, was *pronounced* by a foreign court and did operate to make the marriage void from the beginning. This is why the draft Bill (clause 1(3)) needs to provide expressly that references to marriage apply to a voidable marriage "notwithstanding that it is retroactively annulled".

[61] If it was valid and preceded the void marriage, then clearly the void marriage would be void because it was bigamous, though it might be void for other reasons as well.

unacceptable and we therefore reach the conclusion that a void marriage should not in any circumstances rank as a marriage for co-ownership purposes.

1.87. It is true, of course, that this may be hard on a "spouse" who enters into a void marriage in good faith. But such a spouse may obtain financial provision through the court during the other spouse's lifetime if a nullity decree is obtained, and may do so on the other spouse's death under the Family Provision legislation[62]. And we think that the hardship suffered by such a spouse is less than the potential hardship to a genuine spouse which would be inherent in a scheme which regarded void marriages as marriages for co-ownership purposes.

(iii) *Terminated marriages*

1.88. It goes almost without saying that a marriage which has been terminated cannot rank as a marriage on any occasion after its termination.

(iv) *Third parties*

1.89. It follows from the matters discussed under sub-headings (i) to (iii) above that third parties who purchase or otherwise acquire, or who lend money on the security of, a beneficial interest which is said to have been acquired under statutory co-ownership, must do so to some extent at their peril. This is true, of course, quite apart from the status of the marriage: such persons have to be sure that the owner spouse's interest was sufficient to attract co-ownership, that the property has been used as a matrimonial home, and that it has not been excluded from co-ownership. But they have also to be sure that the marriage took place, that it was not actually polygamous at the relevant time, that it was not void and that it has not been terminated; and the marriage certificate, though it may be good evidence of the first requirement, is no evidence of any of the others. This does not trouble us. The difficulty applies only to transactions involving the individual beneficial interests held under statutory co-ownership, not to those affecting the home itself, and we see no need to encourage transactions of the former kind[63].

Acquisition of the ownership interest

1.90. The acquisition of an ownership interest is in two particular respects a wider concept than might at first appear.

1.91. First, the Bill expressly provides[64] in effect that for the purposes of the second of the co-ownership occasions listed in paragraph 1.71 above[65], a spouse is to be treated as acquiring an ownership interest whenever he comes to have such an interest, whether he does so by acquiring an interest (or further interest) which is itself an ownership interest, or by some change occurring in an interest which he already has, or otherwise.

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[62] The relevant law on this topic is now contained in the Inheritance (Provision for Family and Dependants) Act 1975, passed as a result of our Second Report on Family Property: Family Provision on Death (1974), Law Com. No. 61. The Act enables greater provision to be made for a spouse of the deceased including (subject to certain conditions) a "spouse" who entered in good faith into a void marriage with the deceased.

[63] Cf. para. 1.68, above.

[64] Clause 5(3) (b).

[65] ("When the couple, already married and already having a home in the property, acquire an ownership interest (or a further ownership interest) in it").

1.92. The concluding words of this extended definition have an important application. There are, for example, cases where a spouse who has one interest in a property acquires another interest in the same property – and although neither interest is by itself an ownership interest they do, taken together, amount to such an interest. Thus a spouse with an interest in remainder under a settlement becomes absolutely entitled in possession when the life tenant dies, or if the life interest is surrendered or sold to him. And a spouse who is a life tenant becomes similarly entitled if he acquires the remainder[66].

1.93. Again, there are cases where a spouse who has an interest which is not absolute because it is defeasible, or liable to be affected by the exercise of a power of appointment or (being an interest acquired by a class gift) to be diminished by the birth of further members of the class, does get an ownership interest when the interest ceases to be defeasible, when the power ceases to be exercisable, or when the birth of further members of the class becomes impossible.

1.94. And there is one other case in this category which should be mentioned. One of the exceptions from statutory co-ownership which we shall later recommend is an interest which a spouse has as a member of a partnership[67]. So long as he has the interest in that capacity it is not to amount to an ownership interest. But the time may come, perhaps after dissolution of the partnership, when he still holds the interest but no longer does so as a member of the partnership—and at that time he is treated for present purposes as acquiring it as an ownership interest, so that statutory co-ownership can apply to it.

1.95. The second respect in which the concept of acquisition is wider than it might seem is more easily disposed of because it has already been mentioned[68]. It has to do with the situation where a single property unit comprises both a home and a non-home part and where, because the two are not readily severable, statutory co-ownership does not apply at all. We have already recommended that if the whole or a material part of the non-home part ceases to be within the spouses' ownership, that should amount to a co-ownership occasion[69]. The Bill[70] implements this by providing that in these circumstances the statutory co-ownership provisions shall have effect as if the ownership of the home part were acquired at that time.

1.96. The only other point we want to make under this heading relates to the time at which an ownership interest is acquired. Usually there can be little doubt about this. If one spouse takes a lease or an assignment of a lease, or a conveyance or transfer, without having made any preliminary contract to do so, he acquires an ownership interest when the document in question comes into effect. And even if he does make a preliminary contract, we have already recommended that he should not acquire an ownership interest until all the purchase money is paid to the vendor[71]. But we have also explained that an

[66] It should be borne in mind, of course, that in some of these cases the spouse in question will not acquire an ownership interest unless the two lesser interests merge with one another, and that they will do this only if the necessary conditions for merger are present, including intention.

[67] See paras. 1.164–1.166, below.

[68] See para. 1.51, above.

[69] Para. 1.51, above.

[70] Clause 13(2).

[71] Para. 1.25, above,

agreement for a lease may sometimes give rise to an ownership interest even though the lease itself has not been granted[72].

1.97. The same principle applies when property is acquired under a will or a settlement. In certain circumstances a full ownership interest may pass to the donee before a formal assent has been executed in his favour. In these cases, therefore, statutory co-ownership will be capable of operating in advance of the assent.

Use as a home

1.98. Use as a home is the third ingredient of a co-ownership occasion. The question whether a couple's behaviour in regard to a property does amount to using it as a home must of course be one of fact in every case, and there is little we can usefully add by way of guidance.

1.99. It may be appropriate, however, to emphasise that the property must be used by the spouses as *their* home: use of a property, perhaps after separation, as a home by one spouse alone cannot be sufficient. This is not to suggest, of course, that the spouses must make equal use of the property, nor even to rule out the possibility that the spouses may in special circumstances have a home in a property in which one of them has never set foot. We think, for instance, that if a happily married couple agree to move house, and the husband happens to be on an overseas posting at the time, so that the wife moves into the new house alone, statutory co-ownership would nonetheless apply on the basis that the true use of that house was as a home of both spouses.

1.100. It may be appropriate also to emphasise the use of the indefinite article; the property must be used as *a* home, not as *the* home. If a couple have homes in two or more properties simultaneously, therefore, co-ownership may apply to all of them. Any scheme designed, in cases where several homes are maintained simultaneously, to restrict statutory co-ownership to one of them, would in our view be unworkable as well as being wrong in principle. In saying this we have in mind, among other things, the fact that statutory co-ownership, conferring as it does a full and absolute property right, cannot cease when the couple cease to use a property as their home. At any one time, therefore, it may embrace several properties used successively as matrimonial homes; and if we accept this it becomes illogical to exclude co-ownership on the ground that such use is simultaneous rather than successive. But this point brings us to the subject of the duration of statutory co-ownership, which deserves a short section to itself.

Duration

1.101. A basic element in our proposals is that statutory co-ownership should operate to confer a true property right—a full and absolute beneficial interest in the home. This interest must have all the characteristics, including permanence, that such an interest would have if expressly created.

1.102. As we pointed out at the end of the preceding section, this involves the consequence that co-ownership may outlast the use of the property as a matrimonial home. A home which is no longer used as such but is retained as an investment, perhaps for letting, will not cease to be co-owned merely because the spouses cease to occupy it.

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[72] Para. 1.25, above.

1.103. It also involves the consequence, in regard to any particular property, that co-ownership will extend (subject, of course, to the rules about exceptions from statutory co-ownership discussed elsewhere in this Book) to any parts of that property which have at any time[73] been used as the spouses' home. The extent of the property which is co-owned may thus be greater than the extent which has at any one time been so used.

Major exceptions

1.104. It is appropriate to group the cases in which, we think, statutory co-ownership ought not to operate under two headings: major exceptions and minor exceptions. The major ones are recommended as matters of policy, whereas the minor ones tend to be dictated by the demands of logic and the need for consistency with the main proposals in this report.

1.105. For convenience of reference we intend—except in the one case about to be mentioned—to set out under these two headings *all* the exceptions to statutory co-ownership, even though the full details of some of the minor exceptions appear in other parts of this Book: in these cases the appropriate cross-reference is given. The one case in which this rule is not applied is that of exceptions which are to operate only during the transitional period immediately after the Bill comes into force: we think that transitional matters are best treated separately[74]. We turn first to the major exceptions.

Exclusion by owner spouse of an interest acquired before (or on) the marriage

1.106. The working paper[75] considered whether a home owned by one spouse before the marriage should be excluded from statutory co-ownership, and expressed the tentative view that it should not. The reactions of those who commented on this part of the working paper were divided.

1.107. The question is not easy to decide because strong arguments may be advanced on both sides. To quote from the working paper:

> "[T]he arguments against applying co-ownership are first, that the home did not derive from the actual or notional efforts of the spouses during marriage; secondly, a spouse who owned a family home which passed from generation to generation and who wished to continue this tradition might be forced to seek legal advice; thirdly, there might be hardship to a person who entered into a second marriage, e.g. a widow with young children who owned her home absolutely would have to surrender a half interest in it on re-marriage. On the other hand there are strong arguments in favour of applying co-ownership universally. First, the matrimonial home is, in terms of value and use, the principal family asset, and it should be irrelevant who paid for it or when it was acquired. Secondly, co-ownership, if introduced, should apply as widely as possible. Thirdly, it would be unfair to leave it to the non-owner spouse to attempt to reach an agreement with the owner spouse. Where a home has been in the family for generations it is likely that legal advice would be taken in any event."

1.108. In the end we have decided to adopt a compromise solution and to recommend that a home of this kind *should* be subject to statutory co-ownership

[73] At any time, that is, after the marriage and the acquisition of the ownership interest.
[74] See paras. 1.212–1.225, below.
[75] Paras. 1.98 and 1.99.

unless the owner spouse takes express action to exclude it. This action should take the form of a written declaration, signed by him[76], and attested by a witness, to the effect that statutory co-ownership is not to apply. In paragraph 1.113, below, we recommend that the declaration should be ineffective if not made before the marriage. Since it need not be shown to anyone or recorded in any way, an owner spouse who regretted the operation of statutory co-ownership might be tempted to make it after the marriage and ante-date it. We recommend signature in the presence of a witness (who is likely to remember the real date fairly well) mainly for this reason[77].

1.109. In deciding to modify to this extent the provisional conclusion reached in the working paper we have had in mind the facts first, that there is at least an arguable case for not forcing co-ownership upon homes of this kind; second, that there may be particular circumstances (as the working paper recognised) in which it would be positively wrong to do so; and third, that means are in any case available to an owner spouse in this situation (as the working paper also recognised when it referred to the taking of legal advice) to avoid co-ownership if he wishes.

1.110. If the owner spouse is to be allowed to exclude co-ownership in this way, we do not think it right to require him to name a particular person in the declaration. He should be able to make it generally, so that it can be made when he has no particular marriage in contemplation and perhaps at the time when he acquires the house in question. There are two main reasons for this. First, we think it important to ensure (particularly, perhaps, when the owner spouse is a woman) that a declaration can be made at a time when the owner spouse is already in receipt of legal advice and when no influence can be exerted by the prospectively acquiring spouse. Secondly, we think that most owner spouses who make the declaration will do so from a general desire to avoid sharing the property with anyone they may marry, not from a special desire to avoid sharing it with a particular spouse. To name a particular person in the declaration would usually, therefore, be to convey a false impression—and even if the impression is not false it may still be better not to convey it.

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[76] The draft Bill (clause 8 (4)) contains a provision that whenever a document is required to be signed by a person, it is sufficient if that document is signed by his agent. We note this point here and shall not refer to it again.

[77] The majority of us feel that this requirement of attestation is on balance preferable to a requirement that the declaration be communicated to the other spouse before the marriage. We have several reasons for this. One is that the right of an owner spouse to exclude a home of this kind is intended to be absolute and not subject in any sense to the concurrence of the other spouse. Another is that it would be necessary to provide for adequate evidence of the communication, and we think that the resultant formality would be inappropriate. And a third is that since a home might fall outside the statutory co-ownership scheme for any one of several other reasons, to which a duty of disclosure would not attach, the other spouse could not take its impending application for granted even if a duty of disclosure were imposed in this case.

Mr. Marsh considers, however, that it would be potentially harmful to good matrimonial relations to allow one spouse by his own secret reservation to spring a surprise, perhaps after years of marriage, on the other spouse as to the ownership of the matrimonial home. He thinks therefore that a declaration should not have effect unless it has been communicated to the other spouse before marriage (which he emphasises does not necessarily mean that the other spouse consents). For similar reasons, he would require a declaration made by a spouse during the transitional period (see paragraphs 1.219–1.221, below) to be brought to the notice of the other spouse before the end of that period in order to be effective to prevent property from passing into statutory co-ownership.

We are all agreed that if, in respect of a declaration before marriage or during the transitional period, notice to the other spouse were required, it would no longer be necessary for the declaration to be witnessed.

1.111. Equally, however, we think he should have power, by further writing signed by him, to revoke the declaration[78], either totally, or partially by declaring that it is not to apply in relation to a particular person. If the declaration is thus revoked, totally or in relation to the spouse in question, before the first co-ownership occasion, it will then have no effect. If the declaration serves to exclude statutory co-ownership on some occasion but is later revoked, a spouse for whose benefit the revocation was made will be eligible for statutory co-ownership on any occasion which may subsequently occur (as, for example, if a couple ceased for a time to have a home in the property but made their home there again later).

1.112. We think it logical that the owner spouse's power of exclusion should apply not only to an interest acquired before the marriage but also to one acquired *on* the marriage, so that it includes an interest which, by reason of a provision in the instrument under which he acquires it, passes to him at the moment when the marriage takes place. Since the excluding declaration must be made before the marriage, it follows that in these latter cases the declaration must be made before the interest is actually acquired.

1.113. In other respects we think the owner spouse's power should be severely restricted. We recommend that it should be capable of exercise only up to the time of the marriage. We also recommend that it should affect only the particular home in question: it should not operate to exclude any subsequent home even if that home is purchased with the proceeds of sale of the first one. Finally, we emphasise that the owner spouse is to have this power of exclusion only when he holds what the draft Bill[79] calls a separate interest[80]—an interest, that is, which is held by him otherwise than as a joint tenant or tenant in common *with the other spouse* (or, more accurately, with the person who is to become the other spouse).

1.114. This last point deserves an explanation. There are two main reasons for it. First, it was implicit in the working paper[81] that this exception would not apply when the property was in some way already co-owned by the spouses: the reasons for allowing it become much weaker in that situation. Secondly, the fact that it is co-owned will serve of itself to exclude statutory co-ownership on other grounds[82] unless the co-ownership is left uncertain, in which case exclusion would serve only to perpetuate the uncertainty (which would be contrary to our general policy[83]).

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[78] We see no need, in this case, to recommend that attestation should be essential to the validity of the declaration: the reason mentioned in para. 1.108, above, does not apply in these circumstances.

[79] Clause 8(3).

[80] The interest may of course be the separate interest of one spouse even if it is subject to a mortgage, and this gives rise to the possibility that a home may be excluded from co-ownership by the owner spouse even though it is heavily mortgaged and even though the mortgage is to be paid off after the marriage and through the joint efforts of both spouses. This would be unfair to the other spouse and would normally, in our view, amount to an abuse of the declaration facility. But it would be extremely difficult to frame any legislative provision designed specifically to guard against it and, having regard to the fact that the declaration operates only in respect of the one home, we doubt whether the other spouse will in many cases be worse off at the end of the day. It should also be borne in mind that if the mortgage is paid off out of a fund to which the other spouse actually contributes, that spouse may acquire a beneficial interest in the home under the existing law.

[81] Paras. 1.98 and 1.99.

[82] Paras. 1.135.1.141, below.

[83] Para. 1.130, below.

1.115. It will be noticed, however, that an owner spouse's interest may be a separate one even though he holds it as a joint tenant or tenant in common with some third party. And we think that if he makes an excluding declaration while he is a joint tenant, and the joint tenancy is later severed, the declaration should serve equally to exclude the interest which he thus acquires as tenant in common.

Exclusion by a donor

1.116. The Working Paper[84] also considered whether statutory co-ownership should apply to a home acquired by one spouse from a third party by gift or inheritance during, or by gift in contemplation of, the marriage. To quote again from the working paper:

> "If co-ownership were to apply automatically, the donor could not make an absolute gift to one spouse without asking the other spouse to agree to exclude co-ownership. It seems undesirable that a donor should have to ask for such an agreement. The result would probably be that the donor would either refrain from making the gift or resort to some other device (such as granting a life interest) to achieve his purpose."

In working paper, therefore, we reached the provisional conclusion that homes of this kind should not be subject to co-ownership at all (though it was recognised that the donee spouse could always agree to share with the other spouse if he wished to do so).

1.117. The weight of opinion expressed in consultation was against this conclusion. We see the force of the views expressed by those who disagreed. It can certainly be argued, for instance, that a spouse who acquires a home by gift is already fortunate enough, and that there is no reason to multiply his good fortune, and at the same time to prevent his spouse from participating in it, by excluding her from co-ownership. On the other hand we think the arguments advanced in the working paper are also sound.

1.118. We have therefore arrived once more at a compromise solution—namely, that co-ownership *should* apply to a home of this kind *unless* the donor (a term which we use to include a testator or settlor) directs, in the instrument making the gift, that it shall not.

1.119. Our reasons for recommending this solution are much the same as our reasons for recommending a similar solution to the problem of homes owned by one spouse before the marriage[85]. In this case, however, the solution was considered in the working paper and provisionally rejected on the ground that a declaration by the donor "could appear invidious, and may be even more undesirable than an agreement to exclude." Although the first part of this statement is obviously true—we deal in a moment with one factor which may mitigate it—we are no longer inclined to support the second part. We feel, moreover, that this solution, imperfect though it may be, is really the only one open to us. In view of our consultation and the further thought which we ourselves have given to the matter, we no longer feel able to recommend the automatic exclusion proposed in the working paper. But we do not feel it right to deny the donor any means whatever of bringing about an exclusion.

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[84] Para. 1.100.
[85] Para. 1.109, above.

And the only course that we can chart between these two extremes is one involving a direction by the donor.

1.120. Since the provision we now suggest stops short of the absolute exclusion proposed in the working paper, we have felt free to consider whether it should apply rather more widely than the working paper proposals; and we have decided that in two respects it should.

1.121. The first of these may serve slightly to mitigate the invidious character of the donor's direction to which the working paper referred. We recommend that this direction should be effective no matter when the gift is made—no matter, that is to say, whether the gift is made during the marriage or before the marriage (and no matter, in the latter case, whether it is made in contemplation of the marriage or not). One of our reasons for reaching this conclusion lies in the sheer practical difficulty of implementing the more restricted scheme envisaged in the working paper. If a direction were to be effective only if the gift was made during or in contemplation of the marriage, it would be necessary to lay down rules to determine the time at which, for this purpose, a gift was to be treated as made. Gifts by will create an obvious difficulty: are they to be "made" at the date of the will or at the date of the testator's death? And gifts under settlements create another: are they to be "made" at the date of the settlement or at the date on which, under the terms of the settlement, the spouse in question first acquires some interest in the property, or at the date on which, under those terms, his interest first amounts to an absolute interest in possession (an ownership interest)? And gifts in a settlement created by will raise all these questions together.

1.122. Answers could of course be devised to all of them, though the resulting provisions would be complex and we doubt whether the distinctions drawn could ever be wholly logical. But we think these problems are better by-passed altogether. There seems to us no reason in principle why the donor's power of exclusion should be confined to gifts made after or in contemplation of a particular marriage. Indeed such confinement seems to us to add to its invidious character. It can no doubt be argued that the power is not needed in respect of gifts made before the marriage because the donee spouse has power himself to exclude co-ownership in relation to property owned before marriage, but we do not find this a compelling argument. It would be false to equate the desire of the donor with that of the donee and wrong to create a situation in which the donor could fulfil his own desire only by putting pressure on the donee to make a declaration which, left to himself, he might not wish to make and which might well cause misunderstanding between him and his spouse.

1.123. The other respect in which we wish our recommendation to be wider than the working paper's proposal is this. The working paper envisaged that if statutory co-ownership were to be excluded, the gift would have to be a gift to one spouse alone. We think, however, that if the donor makes a gift to both spouses, whether or not they are married at the time, that should exclude statutory co-ownership even though the donor has not made a direction to that effect. The spouses would thus hold the property in the way determined by the donor despite the advent of a co-ownership occasion. If the donor gave them the property as beneficial joint tenants the result would of course be the same either way, but if he gave it to them as beneficial tenants in common (whether in equal

or unequal shares) we think the interests thus created should prevail—and prevail, in this case, whether or not the donor has expressly directed that statutory co-ownership should not apply, because in choosing to impose a co-ownership of his own we think he must be taken to have made such a direction impliedly. We have decided to widen our recommendation in this way because it seemed to us illogical not to do so: admittedly it may result in one spouse receiving an interest less than statutory co-ownership would confer, but if the donor is to have power to exclude that spouse from benefit altogether it seems pointless to deny him this lesser power.

1.124. We think it necessary to include in the draft Bill two provisions[86] to deal with cases in which the property is acquired under a settlement which incorporates a power of appointment capable of being exercised in favour of the donee spouse (or spouses). If the property is acquired through the *exercise* of the power, we think the gift should be treated as made by that exercise rather than by the settlement—but that it should not be treated as a gift at all unless both the settlement and the exercise were made without consideration. (This exception should be strictly confined to gifts and we think that any element of monetary consideration at either stage of this process should make it inapplicable.) If the property is acquired through the *release* of the power, we think the releasor should be treated as a donor for this purpose, so that if he makes a release which causes the property to pass to a single spouse, and incorporates in it a direction that co-ownership is not to apply, that direction should be effective to prevent its application.

1.125. We think it necessary to make, in relation to this exclusion, the same provision in relation to joint tenancies with third parties as that made in connection with the last one[87] that for its purposes an interest as joint tenant and the interest derived from it by severance should be treated as one. An exclusion made by a donor in regard to any interest as beneficial joint tenant will thus serve as an exclusion of the interest as tenant in common which may arise from it through severance.

1.126. Finally we would emphasise that the exclusion effected by the donor —in common with all the other exclusions discussed here—is an exclusion only of *statutory* co-ownership: it does not prevent the spouses from agreeing between themselves to co-own the property in any way they wish.

Exclusion by agreement between the spouses

1.127. This is certainly the most important of the exceptions. We have never thought that statutory co-ownership should be imposed against the wishes of both spouses, and the working paper[88] expressed the view that a couple should "remain free to contract out and make other arrangements as to the beneficial interests in the home." This received overwhelming support in consultation.

1.128. But the detailed implementation of this principle and its expression in the co-ownership legislation has caused us more difficulty than any other aspect of our proposals. On the face of it, the principle seems simply to require

[86] Clause 10(3) and (4): a fuller explanation of these is to be found in the explanatory notes on the draft Bill.
[87] Para. 1.115, above.
[88] Para. 1.86.

that the spouses should, in order to exclude a particular property from statutory co-ownership, make an agreement (with some degree of formality) that it shall be so excluded. But we feel that the requirement should not be formulated in this way and that an agreement in these terms would be in some circumstances unnecessary and in others insufficient.

1.129. We are impressed by the fact that many cases exist, and will continue to exist, in which married couples have provided the clearest possible documentary evidence (for example, by devising some different co-ownership of their own) of their mutual desire not to hold their matrimonial home in the way prescribed by statutory co-ownership. It seems to us that in such cases this evidence alone should be enough to exclude statutory co-ownership and that we should not require the spouses in addition to make some explicit excluding agreement which would serve only to state the obvious. This is why such an agreement is thought to be in some circumstances unnecessary.

1.130. But it is thought also to be in some circumstances insufficient. One of our objects in recommending the introduction of statutory co-ownership is to achieve a greater degree of certainty as to the beneficial ownership of the matrimonial home. Statutory co-ownership is intended to replace those situations in which, under the present law, the interests of the spouses are unclear, are not formally agreed, and may be the subject of dispute. It follows from this that a mere agreement to exclude statutory co-ownership ought not to be sufficient to bring about an exclusion unless it leaves the spouses' actual interests clear. In other words, statutory co-ownership should be excluded only when the spouses have spelt out the beneficial holding which is to replace it.

1.131. The principles expressed in the two preceding paragraphs are no more than guidelines: they will have to be refined and modified in some respects. It is nonetheless important to grasp them at this stage because it is these guidelines which have led us to reformulate our ideas about the agreement necessary to exclude statutory co-ownership.

1.132. The working paper[89] also asked what formalities a contracting out agreement should comply with, and added: "In order to protect the weaker spouse, consideration should be given to requiring the signature to be witnessed by a solicitor, or even by independent solicitors acting for each spouse." So far as this latter possibility is concerned, we have decided not to pursue it. This is partly because of the problems we think it would cause for both spouses and solicitors, and partly because it does not fit into the reformulated ideas about excluding agreements outlined in the preceding paragraphs. We accept, of course, that the exclusion of statutory co-ownership must be attended by some degree of formal documentation but (as will appear later) we do not think it possible to lay down a single set of formal requirements applicable to all circumstances.

1.133. With that preamble we must now formulate in detail the rules according to which statutory co-ownership may be excluded by mutual agreement. What we want to frame are rules which ensure (so far as possible) that statutory co-ownership does not apply in cases where there is sufficient documentary evidence of an agreement—

[89] Para. 1.86.

(*a*) to exclude statutory co-ownership, and

(*b*) to hold the property in some other way—

subject, however, to the proviso that in some cases (as suggested in paragraph 1.129 above) an agreement as to (b) alone may be sufficient if an agreement as to (a) may be inferred from it.

1.134. We shall consider the rules under two sub-headings:

(i) *Agreements for express co-ownership.*—Here we shall discuss cases in which the spouses replace statutory co-ownership with an express co-ownership of their own.

(ii) *Agreements for sole ownership.*—Here we shall deal with situations in which the spouses have agreed that one of them shall have the whole ownership.

(i) *Agreements for express co-ownership*

1.135. We think that a couple who agree to create an express co-ownership of their own should be taken, merely by doing so, to have provided sufficient evidence of their wish to exclude statutory co-ownership. It seems to us self-evident, for example, that two spouses who, on buying a house, agree expressly to hold it as beneficial tenants in common in equal shares must both wish to hold it in that way and in no other, and would not want the holding thus carefully determined to be upset the moment they set up home there (an event which is likely to be the first co-ownership occasion).

1.136. It may be argued that the inference we draw from express co-ownership —that it is intended to replace statutory co-ownership—should be drawn only when the express co-ownership is agreed in contemplation of the property being used as a matrimonial home. But we do not recommend a rule to that effect. This is partly because spouses rarely become co-owners of residential property unless they do contemplate its use as a home. And it is partly because of the difficulties of proof, and the resulting uncertainty, which such a rule would produce: a dispute on this point between the spouses would not arise unless there was marital disharmony, and if marital disharmony did exist it is obvious that recollections of past states of mind, perhaps hazy to start with, would be further clouded by present difficulties.

1.137. We do think, however, that the Bill could usefully provide a facility[90] for the spouses specifically to agree that an express co-ownership should not operate to prevent statutory co-ownership arising on a subsequent co-ownership occasion, and we so recommend.

1.138. So what exactly must the spouses do if they want to exclude statutory co-ownership in favour of an express co-ownership of their own? Our answer is this:

(1) *They may make a written agreement signed by them both, specifying an express co-ownership of their own and, if the co-ownership is a tenancy in common, the relative size of their shares.* This might be described as the "classic" way of excluding statutory in favour of

[90] This is in fact provided by the words, "Subject to any written agreement to the contrary signed by the husband and wife", which open clause 12 of the draft Bill.

express co-ownership. But it requires the signatures of both spouses and we think there are cases in which, although these signatures are absent, statutory co-ownership ought to be excluded. The remaining heads are designed to catch those cases. The present case, however, covers a wide field. The written agreement may either be one which creates the holding it specifies, or be one which merely declares the spouses' existing holding to be that specified. Suppose a house is bought in the sole name of the husband but because the wife contributed one third of the purchase money he holds upon trust for himself and her as beneficial tenants in common in the proportions 2:1. If a co-ownership occasion occurs while this situation still exists, statutory co-ownership will apply: the 2:1 holding has not been specified in any written instrument. But if, before the co-ownership occasion, the spouses decide (perhaps for the express purpose of excluding statutory co-ownership, perhaps for some other reason) to declare formally what their interests are, and they do so in a written instrument signed by them both, then statutory co-ownership will not apply.

(2) *They may simply take an instrument which makes them co-owners, specifying their interests in the same way—provided (a) that it implements a prior agreement (however informal) between them, or (b) they both adopt it by some act of acceptance before the co-ownership occasion.* This covers the case where the spouses take a conveyance (or transfer, lease, etc.) of the property expressly as co-owners with specified beneficial interests, but do not sign the conveyance[91]. But since the signatures *are* lacking, we think it necessary to stipulate that one of two situations must exist. Either the holding which appears from the instrument must accord with a prior agreement made between the spouses—though this agreement need not be written, still less signed. Or both spouses must adopt the instrument, by some act showing an intention to accept it, before the co-ownership occasion in question. Otherwise an unscrupulous husband might try to avoid statutory co-ownership merely by giving his wife a one-hundredth share by the purchase document and telling her nothing about it. We think, however, that the holding which appears from the instrument should be presumed to accord with a prior agreement unless the contrary is shown.

(3) *They may produce the express co-ownership by a disposition of part ownership by one to the other, provided that the instrument of disposition specifies their respective holdings—and provided (a) that it implements a prior agreement (however informal) between them, or (b) that the disponee spouse adopts it by some act of acceptance before the co-ownership occasion.* This covers the case where one spouse gives the other a partial interest in the property but where, although the donor spouse signs the instrument of gift, as he would have to do, it lacks the signature of the donee spouse. We think it necessary, for reasons similar to those mentioned under the last head, to make a

[91] If the instrument was by way of gift, statutory co-ownership would in any case be excluded under the principle explained in paras. 1.116–1.126, above (exclusion by a donor)—unless the donor was one of the spouses, in which case exclusion would not occur under that principle but might well do so under this head or the next.

similar stipulation. Either the holding produced by the instrument must accord with a prior agreement (however informal) between the spouses—and it should, again, be presumed to do this unless the contrary is shown. Or the donee spouse must adopt the instrument, by some act showing an intention to accept it, before the co-ownership occasion.

1.139. We have said, of all three of the types of excluding instrument described in the preceding paragraph, that they must specify the spouses' respective interests in the property. The draft Bill actually says that they must specify what those interests "are or are to be". The last four words require some explanation. They are in fact designed to cover cases where, although the instrument does specify the interests, the interests thus specified do not come into existence (or do not assume the size and nature specified) until some future time. The obvious example is an instrument made under head (1), before the date on which the relevant ownership interest is acquired, whereby the spouses agree to hold it in a certain way when it is acquired.

1.140. A tiresome point has finally to be mentioned. Suppose an effective instrument is in fact made, specifying the spouses' respective interests, but they no longer have the same interests when the co-ownership occasion later occurs. Of course if the change is effected by another excluding instrument there is no problem: that instrument itself will serve to exclude statutory co-ownership. But what if it is not? In other words, must the interests which subsist on the co-ownership occasion be the same as those specified in the excluding instrument?

1.141. Our first impulse was to say that they must. After all the whole purpose of stipulating that the excluding instrument must specify the holding was to ensure that matrimonial homes, if they were not held in some clear and expressly defined way, should be swept into statutory co-ownership; and here would be a case where there would be neither statutory co-ownership nor (necessarily) a clearly defined holding. But we have come to the conclusion that this small potential inroad into the principle of certainty must be accepted. This does indeed become obvious when factual situations are considered. Suppose a husband and wife buy a house as beneficial tenants in common in equal shares, the conveyance being an effective excluding instrument, but that before the co-ownership occasion the wife makes a gift of her share to her mother. Clearly she ought not, by disposing of the interest she had, to qualify for co-ownership of the husband's interest on a subsequent co-ownership occasion. Again, suppose they took the conveyance as unequal[92] tenants in common and that before the co-ownership occasion the wife made improvements to the home which increased her beneficial share under section 37 of the Matrimonial Proceedings and Property Act 1970: it would be clearly wrong if this event were to vitiate the conveyance as an excluding instrument. We must recommend, therefore, that the excluding instrument should be effective as such even though the interests it specifies have changed before the co-ownership occasion; and we are satisfied that this will not in practice deal any significant blow at the principle of certainty which we are anxious to uphold.

[92] The facts have to be varied in this way, because we recommend (see para. 1.389, below) that s. 37 of the 1970 Act should have no effect in cases where the spouses' holding is an equal one.

(ii) *Agreements for sole ownership*

1.142. We propose that, if the couple wish one spouse to be sole owner of the matrimonial home even after a co-ownership occasion, it should normally be necessary for them to enter into a written agreement which specifically excludes statutory co-ownership. In this respect our recommendations differ from our proposals about agreements for express co-ownership, and we explore these differences in the paragraphs which follow.

1.143. If we were to follow strictly the analogy with agreements for express co-ownership we should provide as our "classic" case for exclusion under the present heading, an agreement signed by both spouses to the simple effect that one of them *is* the sole owner. But we do not intend to do this, because we think the analogy is not a true one. Exclusion through an agreement of that kind would constitute a trap for the other spouse. That spouse would almost certainly have played no part in creating the sole ownership[93] (so that the case is in this respect radically different from that of express co-ownership), and there would be nothing at all on the face of the agreement to warn her that, although it did no more than state the simple truth about the existing ownership, it amounted in law to a renunciation of her future rights under statutory co-ownership. The strangeness of this result would be even more striking if, at the time of the agreement, she did not contemplate the property being used as a matrimonial home at all. In short, it would be very much more dangerous to draw from a simple agreement of this kind the inference which we draw from an agreement for express co-ownership.

1.144. But in fact there is no need, in the case of sole ownership, for the drawing of inferences, and this constitutes another significant difference. The kind of document which is used today to create an express co-ownership will usually be sufficient of itself, and without any additions, to exclude statutory co-ownership under our scheme. We have set out deliberately, and for reasons already given, to achieve this result, and our desire to achieve it has dictated the form of our recommendations about express co-ownership. This is why we have not insisted, in the case of express co-ownership, on any declaration which specifically excludes statutory co-ownership. But in the case of sole ownership we are under no such constraint. A document which simply creates a sole ownership cannot be allowed, on any view, to exclude statutory co-ownership: it must contain something more (or be supplemented by another document which contains something more). And this "something more" will be something inserted with the sole object of excluding statutory co-ownership. There is therefore no reason, in this case, why we should not remove any possibility of a trap and recommend that the "something more" should include an express declaration against statutory co-ownership.

1.145. We readily admit that the rigid dividing line which we are drawing in this respect between express co-ownership and sole ownership may in some circumstances seem artificial. It is easy to feel sure that if the spouses have agreed to hold as equal tenants in common, neither wants to be turned by statutory co-ownership into a beneficial joint tenant, but it is less easy to feel sure of this if they have agreed to hold in markedly unequal shares—unless, of course, the

[93] In the rare case where she does play such a part, we make an exception to the general rule: see head (2) in para. 1.146, below.

unequal co-ownership represents a gift by one spouse to the other of more than the other could have expected to receive under statutory co-ownership. Some element of trap may conceivably exist in some cases of express co-ownership, and the inference drawn from it may conceivably be mistaken. But we think there has to be a dividing line, and that the only place to draw it is between sole ownership on the one hand and express co-ownership on the other.

1.146. It is appropriate now to state precisely the ways in which the spouses should, in our view, be able to exclude statutory co-ownership in favour of the sole ownership[94] of one of them:

(1) *They may make a written agreement, signed by them both, that one of them is, or is to be*[95]*, the sole owner and is to hold free of statutory co-ownership.* This is the primary head and we have already explained our reasons for framing it in this way.

(2) *The sole ownership of one may be produced by the other, through an express disposition in that one's favour giving the ownership or making it sole or enlarging or improving it.* The rationale behind this head is that a spouse who goes out of his way to make the other spouse the sole owner may fairly be assumed not to want co-ownership. This is the one exception which we think should be allowed to the general rule (with which we have been concerned up to now) that statutory co-ownership should not be excluded in favour of sole ownership unless an intention to exclude is actually stated. One spouse may make the other sole owner in a variety of ways. The most obvious is a gift of the whole house by a husband to a wife: it would be ridiculous, we think, if statutory co-ownership were subsequently to return half the property to him. Another example would be a gift by a husband of his whole interest as tenant in common to a wife who was already a tenant in common with him, or a gift by a husband of his interest as tenant for life to a wife who was already entitled in remainder. But we think that it should be obvious, on the face of the disposition, that it is indeed a disposition by one spouse in favour of the other; for otherwise uncertainties might arise. Suppose, for example, that a husband enters into a contract to buy a house but the conveyance or transfer is to the wife. In law, the conveyance or transfer may amount to a disposition by the husband to the wife, or (if, for example, the husband entered into the contract on the wife's behalf, so that she was the beneficial owner all along) it may not. And even if it does, there may be nothing in it to indicate that it is a disposition. We think, therefore, that if it is to qualify under this head the disposition should be written and should be a disposition by one spouse (or expressly at his or her direction) made expressly to the other spouse beneficially.

1.147. We were faced, in regard to sole ownership, with the same problem as that described in paragraphs 1.140 and 1.141 above in relation to express co-ownership: whether the holding specified in the excluding instrument need

[94] Since the text becomes more technical at this point, we should notice a technical matter. When we speak in this context of "sole ownership" we refer of course to sole ownership *as between the spouses*. It should be borne in mind that a spouse may be the sole owner for this purpose even if he holds the interest as one of several tenants in common or joint tenants, provided that the other spouse is not among them.

[95] As to the significance of those words, see para. 1.139, above.

remain the same on the co-ownership occasion. Again, and for similar reasons, we came to the conclusion that it need not. In this connection, therefore, we recommend that the excluding instrument should operate to exclude from co-ownership, not only the sole ownership which it specifies, but any interest of the solely owning spouse which derives from it, and any interest subsequently acquired out of it by the other spouse[96].

1.148. We think it useful, however, to give the spouses powers, similar to those recommended in cases of express co-ownership[97], to agree that an excluding instrument shall not after all operate to exclude statutory co-ownership.

1.149. A final point, which corresponds with points made elsewhere in this report: we think that for present purposes an interest as joint tenant and the interest as tenant in common which results from its severance, should be treated as one. This will make it clear that if, for example, an excluding instrument is made in respect of the interest which a husband has as joint tenant with his brother, its effect will not be negatived merely because the beneficial joint tenancy is later severed.

Minor exceptions

1.150. Under this heading we group together a number of miscellaneous exceptions to statutory co-ownership which, though by no means unimportant, do not seem to us to involve any basic decisions of policy.

Exclusion to avoid severance from other property

1.151. This exception is listed here for completeness, but its details are to be found elsewhere in this Book[98] and we say no more about it.

Exclusion when the acquiring spouse is bankrupt

1.152. This exception, too, is dealt with elsewhere[99].

Exclusion when the spouses are already beneficial joint tenants

1.153. If, when a co-ownership occasion occurs, the spouses already hold the property as beneficial joint tenants, it is clear that statutory co-ownership does not need to apply. The state of affairs which it would bring about is the one which already exists. In these circumstances, therefore, it is appropriate that statutory co-ownership should be excluded.

1.154. It is worth pointing out that if the spouses have formally agreed the beneficial joint tenancy in such a way as to bring themselves within the provisions discussed above under the heading "Exclusion by agreement between the spouses"[100], then statutory co-ownership will be excluded under those provisions. So also, when the beneficial joint tenancy arose through a gift, statutory co-ownership will be excluded under the provisions discussed above under the heading "Exclusion by donor"[101]. Normally, therefore, the only case

[96] The recommendation contained in the last dozen words of the text is in fact achieved, not by the clause of the draft Bill which deals with exclusion of statutory co-ownership in favour of sole ownership (clause 11), but through the minor exception dealt with in paras. 1.155–1.158, below, and contained in clause 7(c) of the draft Bill.
[97] Para. 1.137, above.
[98] Paras. 1.44–1.51, above.
[99] Paras. 1.168–1.176, below.
[100] Paras. 1.135–1.141, above.
[101] Paras. 1.116–1.126, above.

in which statutory co-ownership will be excluded under the present heading, and would not be excluded under any other, is that where the spouses have bought the property in such a way as to become beneficial joint tenants but have not formally declared the beneficial joint tenancy. If, for example, they have taken a conveyance which merely vests the property in them as legal owners and says nothing about their beneficial entitlement, the law will usually presume a beneficial joint tenancy. That is not enough to exclude statutory co-ownership under any other heading, but it *is* enough to exclude it under this one. The uncertainty which is inherent in the situation does not matter in this context: whether or not the spouses really do hold as beneficial joint tenants before the co-ownership occasion, the result will be the same after it. If they do hold in that way, statutory co-ownership will be excluded, but if it is excluded they will hold as beneficial joint tenants—and this is also the way they will hold if it applies. The point, therefore, is purely a technical one and there is normally no need to know whether statutory co-ownership has applied or not.

Exclusion of an interest acquired by one spouse out of an interest of the other which is itself excluded

1.155. We recommend that, if one spouse has an interest which is, for one reason or another, excluded from statutory co-ownership, any interest which the other spouse may acquire out of it should likewise be excluded. This should be so whether the acquisition results from a disposition, or from the automatic operation of the law.

1.156. The former case has in fact been illustrated already in another context[102]. Suppose that a husband is sole owner of a house and that his interest is excluded from statutory co-ownership by an agreement for sole ownership. Suppose, however, that before the co-ownership occasion he nonetheless makes a gift of part of his interest to his wife. His interest (or so much of it as he still has) remains excluded; and it would obviously be wrong if the wife's interest were not excluded too.

1.157. We shall have occasion to refer later[103] in more detail to the fact that one spouse may, even today, acquire an interest from the other automatically by operation of law. This may happen by virtue of section 37 of the Matrimonial Proceedings and Property Act 1970, when one spouse makes a substantial contribution to the improvement of property in which the other spouse has an interest. It may also happen, in some circumstances[104], if one spouse makes a capital repayment under a mortgage of property in which the other has an interest. The property in question need not, in either case, be the matrimonial home. The result is that the spouse who makes the improvement or the repayment acquires some part of the interest of the other spouse. Later in this report[105] we recommend in relation to land that this result should normally be confined, for the future, to cases in which the spouses' interests were unequal when the improvement or repayment was made. In those cases, however, it will continue to occur. If it does occur, and if the interest is acquired out of an interest of the other spouse which is itself excluded from statutory co-ownership, it is clear that statutory co-ownership ought not to apply to the interest acquired.

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[102] See para. 1.147, above, and especially n.6 and the text thereto.
[103] Paras. 1.387–1.400, below.
[104] Para. 1.398, below.
[105] Paras. 1.389 and 1.397, below.

1.158. Nor should the position be different, in either case, if the interest of the one spouse which was originally excluded (and out of which the other spouse's interest has been acquired) is in fact disposed of altogether before the co-ownership occasion. Although in these circumstances the interest of the first spouse is not technically an "excluded" interest, because he no longer has it, justice still requires (and perhaps even more clearly) that statutory co-ownership should not apply to the interest which the other spouse has acquired.

Exclusion of an interest acquired by one spouse from the other while they have a home in the property

1.159. The need for the exception which we are about to recommend arises where the spouses are already married and already have a home in the property concerned. Suppose that in these circumstances one of them acquires from the other an interest in the property to which statutory co-ownership is capable of applying. This acquisition might occur either through the act of the parties or one of them (e.g., a gift by one to the other), or by operation of law in the way already briefly described[106]. In the absence of a special provision to the contrary, the acquisition would be a co-ownership occasion and statutory co-ownership would operate, in effect, to give back half the interest thus acquired. We are satisfied that this would be wrong. In certain circumstances, of course, there may be an overlap between this exception on the one hand and, on the other, the preceding exception and the one dealt with under the heading "Exclusion by agreement between the spouses".

Exclusion if a beneficial joint tenancy is severed while the spouses have a home in the property

1.160. This exception has something in common with the last one. It is concerned with the case where the spouses, already married and already having an ownership interest, have already made a home in a property—so that a co-ownership occasion has occurred—and where they now hold the property as beneficial joint tenants. This may be because statutory co-ownership applied on that occasion and made them such, or it may be because, although statutory co-ownership was excluded, they were beneficial joint tenants anyway or they have since become such.

1.161. Suppose that, in this situation, the joint tenancy is severed. We have already mentioned[107] that a beneficial joint tenancy may at any time be severed and so converted into a tenancy in common; and this will be true, of course, whether the joint tenancy is created by the parties or through the operation of statutory co-ownership. And severance may be a unilateral act: it may be carried out by one spouse alone and does not require the co-operation, or even the consent, of the other.

1.162. Unless special provision to the contrary were made, it might be argued that such a severance would in these circumstances be in itself a co-ownership occasion, since each spouse would acquire through the severance a new or different interest of a kind to which statutory co-ownership was capable of applying. The result, if it was a case of severance pure and simple, would simply be to undo the severance: statutory co-ownership would operate to make the

[106] Para. 1.157, above.
[107] Para. 1.9, above.

spouses joint tenants once more. This would clearly be wrong: we have already rejected the idea of making joint tenancies unseverable[108], and to make them unseverable in these circumstances and in this concealed and tortuous manner would be quite unacceptable. If the severance occurred because one spouse made a disposition of his or her interest the result would, if anything, be even worse; for statutory co-ownership would then operate, presumably, to make the spouses joint tenants of the other spouse's half share.

1.163. We have no doubt, therefore, that statutory co-ownership should not apply merely because a beneficial joint tenancy is severed at a time when the spouses have a matrimonial home in the property.

Exclusion of partnership property

1.164. We consider that if a spouse holds an interest as a member of a partnership it should not be treated as an ownership interest for the purposes of statutory co-ownership. It seems to us wrong that the other spouse should be projected into the ownership of property in which business partners of the owner spouse have interests.

1.165. It should be emphasised that this exception applies only to an interest held *as* a partner. Two examples may illustrate the significance of this.

(*a*) Suppose that the partnership property is freehold and includes residential accommodation. The partnership grants a lease of that accommodation to one of the partners for his private use. Statutory co-ownership can apply, despite this exception, to the leasehold interest, because he does not hold it as a partner. But he does hold his interest in the freehold as a partner, so statutory co-ownership cannot apply to that.

(*b*) Conversely, suppose that one partner alone owns the freehold of premises used by the partnership and has granted the partnership a lease of those premises. Here the leasehold interest, and that alone, is partnership property. So if that partner uses any part of the premises as a home, statutory co-ownership can apply to the freehold interest in that part—subject, of course, to the partnership lease. But it cannot apply to his interest as a partner under that lease.

1.166. This exclusion has something in common with exclusion to avoid severance from other property[109], in that outside events may at any time destroy the qualifying condition for its applicability: the owner spouse may cease to hold the interest as a member of a partnership and come to hold it as an ordinary beneficial owner. If this happens, he will be treated as having acquired an ownership interest under the principles discussed in paragraph 1.94 above, and a co-ownership occasion may occur. But we do not think it should be treated as happening merely because the partnership is dissolved or the spouse ceases to be a member of it. In these circumstances the equitable lien which each partner may be said to have, for the purpose of ensuring that the partnership property is applied in discharge of the firm's debts and liabilities, will assume more concrete form[110] and will continue so

[108] Paras. 1.66–1.69, above.
[109] Paras. 1.44–1.51, above: see especially para. 1.51.
[110] Partnership Act 1890, s. 39.

long as it has a purpose to serve. We do not think the spouse's interest should be treated as an ownership interest until the lien ceases.

Bankruptcy

1.167. The relationship between bankruptcy and statutory co-ownership has to be considered from two points of view: the bankruptcy of the acquiring spouse; and the bankruptcy of the owner spouse.

Bankruptcy of the acquiring spouse

1.168. We consider that if, at the time of the co-ownership occasion, the spouse who would (but for this recommendation) be the acquiring spouse is bankrupt[111], statutory co-ownership should not operate at all. If it did, of course, the interest thus acquired would pass straight to the trustee in bankruptcy and thus to the acquiring spouse's creditors.

1.169. It may perhaps be argued that this latter result is as it should be: the creditors ought in justice to have this asset. But that argument seems to us to miss the main point: statutory co-ownership is not, as a matter of policy, to be forced upon unwilling couples, and any couple in this situation would certainly be unwilling.

1.170. The same exception should apply, in our view, if at the time of the co-ownership occasion the potential acquiring spouse has, in bankruptcy proceedings, made a composition or arrangement under which her assets are to be administered by a trustee for the benefit of her creditors[112]: if the interest acquired through statutory co-ownership would be included among the assets to be administered in this way, then statutory co-ownership should not operate.

1.171. When we say that statutory co-ownership ought not to operate if, at the time of the co-ownership occasion, the potentially acquiring spouse is bankrupt, we recognise that the last two words may have a special meaning. The spouse in question may *be* bankrupt at that time although she is not *adjudged* bankrupt until later. The reason is, of course, that once a person is adjudged bankrupt, the bankruptcy relates back to the time of the first available act of bankruptcy[113]. If a co-ownership occasion occurs between the relevant act of bankruptcy and the bankruptcy adjudication, it will occur at a time when, although the spouse in question has not been adjudged bankrupt, she is subsequently adjudged to have *been* bankrupt. For our purposes, therefore, it should be treated as occurring at a time when she is bankrupt.

1.172. A similar position may arise if she makes a composition or arrangement; for that too may extend, by relation back, to a previous time[114]. We therefore make a similar recommendation: that no statutory co-ownership should be deemed to operate at any time in a spouse's favour if, though no composition has then been made, a subsequent composition relates back to that time.

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[111] We think it should not matter for this purpose under the law of what country the bankruptcy arises.

[112] Bankruptcy Act 1914, s. 16. It is appreciated that arrangements with creditors may be made privately outside the bankruptcy legislation; but it does not seem to us necessary or appropriate to recommend any special provisions in regard to these.

[113] Bankruptcy Act 1914, s. 37.

[114] Bankruptcy Act 1914, ss. 16(18) and 37.

1.173. In the situations dealt with in the preceding two paragraphs there can be no certainty, at the time of the co-ownership occasion, as to whether a subsequent bankruptcy adjudication, or a subsequent composition or arrangement, will be made and will relate back to that time. If one is made, and does relate back, then statutory co-ownership should be deemed not to have occurred; but there will have been a period (the period between the occasion and the adjudication, composition or arrangement) when this outcome is not known.

1.174. During this period the potential acquiring spouse may have dealt in some way with the interest she thought she had obtained through statutory co-ownership. We recommend that the validity of any such dealings should be preserved out of fairness to third parties. The result will be that when statutory co-ownership is deemed not to have occurred, and the owner spouse is once more established as the sole owner of the ownership interest in question, he should nonetheless hold it subject to the rights of any third parties who may have acquired interests through dealings of this kind[115].

1.175. The question discussed above—whether statutory co-ownership should operate to confer an interest on a spouse who is bankrupt—must be distinguished from another and quite different question: what happens on a spouse's bankruptcy to an interest acquired through the operation of statutory co-ownership at some previous time? The answer to this question is that the interest will form one of the assets available to the creditors of the bankrupt spouse in the normal way. The fact that the interest was acquired through *statutory* co-ownership can make no difference: the trustee in bankruptcy will have the same powers in relation to it as he has in relation to any similar interest held under a non-statutory co-ownership.

1.176. Thus he can of course sell the interest, but since one of two or more co-ownership interests is not readily saleable on its own he will usually prefer to seek a sale of the property itself with a view to collecting the bankrupt spouse's share of the total proceeds. The question whether he will succeed in this endeavour will depend upon the particular facts of the case. The court has a discretion in the matter, and it seems clear that, in the absence of special factors, the claims of the trustee in bankruptcy of one spouse will normally prevail over those of the co-owner spouse who may oppose the sale[116]. If they do, a sale will be ordered. The welfare of any children who may have a home in the property will be considered, but it seems that a sale will not normally be refused on their account unless it would cause exceptional hardship[117]. Later in this report, we recommend that the new co-ownership rights proposed in Part 1B of this Book should normally continue to apply in this situation[118]. These include, in particular, a right for the non-bankrupt spouse to withhold consent to a disposition of the property; and although we recommend that the court should have power to dispense with such consent[119], we also recommend

[115] These dealings may be such that, had the bankrupt spouse entered into them in relation to an asset which was really hers, the trustee in bankruptcy could have set them aside; or they may not. But we propose no distinction on that ground for our present purposes. We are concerned here with a conflict of interest between the third parties and the owner spouse, not with a conflict between the third parties and the bankrupt spouse's creditors.

[116] *Re Solomon* [1967] Ch. 573; *Re Turner* [1974] 1 W.L.R. 1556; *Re Bailey* [1977] 1 W.L.R. 278; and see *Re McCarthy* [1975] 1 W.L.R. 807.

[117] *Re Densham* [1975] 1 W.L.R. 1519, 1531; *Re Bailey* [1977] 1 W.L.R. 278.

[118] Para. 1.266, below.

[119] Paras. 1.280–1.285, below.

that its discretion should clearly extend to considering the needs of any children[120]. These recommendations are not calculated to make any fundamental changes in the law summarised above, but they may result in some small change of emphasis.

Bankruptcy of the owner spouse

1.177. We have already recommended that statutory co-ownership should apply only to an ownership interest—that is, a beneficial interest of the requisite quality[121]. We have also recommended that statutory co-ownership, when it does arise, should be treated as doing so through a declaration of trust or an assignment made by the owner spouse[122]. In regard to the owner spouse's bankruptcy, our recommendation is simply that the existing law should apply on the basis of these principles. Thus:

(*a*) If a co-ownership occasion occurs after an adjudication order has been made in respect of the owner spouse, statutory co-ownership cannot occur because the owner spouse will no longer be an owner spouse: his property will have vested in the trustee in bankruptcy[123]. The same principle will normally apply if the owner spouse, without being formally adjudicated bankrupt, has in bankruptcy proceedings made a composition or arrangement of a kind already described[124]. In that case—and indeed in the case of a private arrangement with creditors not made in bankruptcy proceedings at all—the owner spouse's interest in the property will usually be included amongst the assets which have ceased to be in his beneficial ownership. It is of course just possible, in any of these cases, that the owner spouse will later get his interest back: certainly he will do so if, in the event, his debts can be paid without it. If he does get it back, and he and the other spouse still have a home in the property, this reacquisition will be a co-ownership occasion[125].

(*b*) If a co-ownership occasion occurs at a time when the owner spouse has not been adjudicated bankrupt but when he is, through the doctrine of relation back, subsequently declared to have been bankrupt, the trustee in bankruptcy will have the same powers as he has under the the existing law[126] to set aside a transaction of the kind which (under the principles recapitulated above) the commencement of statutory co-ownership is deemed to be. A similar result will follow if the owner spouse subsequently makes (in bankruptcy proceedings) a composition or arrangement which relates back to the time of the co-ownership occasion in the way already described[127].

(*c*) If a co-ownership occasion occurs before any relevant act of bankruptcy, but the owner spouse later becomes bankrupt (or makes a composition or arrangement in bankruptcy proceedings) the interest

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[120] Para. 1.282, below.
[121] Paras. 1.11–1.29, above.
[122] Paras. 1.60 and 1.61, above.
[123] Bankruptcy Act 1914, s. 53.
[124] Para. 1.170, above—i.e., a composition or arrangement under s.16 of the Bankruptcy Act 1914.
[125] Para. 1.71, above.
[126] Bankruptcy Act 1914, Part II.
[127] Para. 1.172, above and Bankruptcy Act 1914 s. 16(18).

which passed to the acquiring spouse will be vulnerable in the bankruptcy only in those cases in which the assignment or declaration of trust which is deemed to have been made would be vulnerable under the existing law.

1.178. We must, however, add a further word about the case mentioned in (*c*) above. A co-ownership occasion may occur at a time when the spouses are already beneficial tenants in common of the property in question. This situation will normally be within one of the exceptions to statutory co-ownership but it will not always be so. If statutory co-ownership does apply to the interests of both spouses, each of them will be treated as having disposed of his or her individual interest in favour of both of them as beneficial joint tenants. At the end of the day, however, only one of them can be "better off", and only to the extent that his or her former interest as tenant in common amounted to less than half of their combined interests. If either spouse should subsequently become bankrupt (or make a composition or arrangement in bankruptcy proceedings), we recommend that the trustee in bankruptcy, in avoiding the bankrupt's deemed disposition of his original share as tenant in common, should be restricted to recovering from the other spouse the gain (if any) made by that other spouse through the overall operation of statutory co-ownership[128].

Divorce, etc.

1.179. We have emphasised more than once in this report that the interests of husband and wife arising under statutory co-ownership should be of the same nature as those arising under a co-ownership expressly created. Consistently with this principle a court will, on granting a decree of divorce, a decree of nullity[129] or a decree of judicial separation, or at any time thereafter, be able to make such orders in regard to those interests as it can make in respect of the other property of the spouses.

1.180. The relevant powers are now contained in section 24 of the Matrimonial Causes Act 1973. Briefly they comprise power to order a transfer by one spouse to the other or to or for the benefit of any child of the family; power to order a settlement by one spouse for the benefit of the other and of the children of the family or either or any of them; and power to make orders affecting ante-nuptial and post-nuptial settlements. And these powers could be used to alter the interests which the spouses have obtained through statutory co-ownership.

1.181. At first sight it may seem wrong that this should be so. If the purpose of statutory co-ownership is broadly to do justice to the acquiring spouse by giving her an equal interest in the matrimonial home to which she has contributed through care if not in cash, then surely her interest should not be put in jeopardy at the very moment when she needs it most, on divorce?

1.182. There is something to be said for this argument but there is, in our view, much more to be said against it. It would of course be totally illogical to confer a special status of inviolability upon interests in the home arising under statutory co-ownership unless that status were conferred also upon those arising

[128] This is illustrated in our note on clause 14(5) of the draft Bill.

[129] It should be noted, however, that the point will not arise if the nullity decree is granted on the basis that the marriage was void from the beginning (rather than merely voidable) for in that event statutory co-ownership will not have operated at all: see paras. 1.82–1.87, above.

under express co-ownership, so the adoption of the argument just mentioned would lead to a major change in the law. Such a change would in our view be wrong and unnecessary. It would be wrong because although the purpose of statutory co-ownership (and the result of express co-ownership) is indeed to do broad justice to the acquiring spouse, the justice done on divorce needs to be precise rather than broad and needs to take account not only of particular factors affecting the position of individual spouses but of the situation of the children as well; and all the family assets have to be available for the exercise of the court's discretion. And it would be unnecessary because the courts have demonstrated an increasing willingness to order substantial capital provision for a wife out of the family assets (including the matrimonial home) where this is warranted: it was indeed precisely this attitude of the courts on divorce which strengthened our resolve to recommend the introduction of statutory co-ownership during the marriage[130]. We would hope that the introduction of statutory co-ownership will serve in its turn to confirm and reinforce the judicial attitude on divorce: there will, we think, be many cases of divorce (or nullity or judicial separation) in which, although the courts have power to alter the equal holding resulting from statutory co-ownership, they choose not to do so—or do so only in order to safeguard the interests of children.

Minority

1.183. The problems which arise when one spouse is a minor, or both spouses are minors, are not large ones in relation to statutory co-ownership; but they must nonetheless be faced. We say they are not large because comparatively few people marry, and fewer still acquire an ownership interest in a matrimonial home, under the age of eighteen. But they may, and we need to know what happens if they do.

Minority does not of itself exclude statutory co-ownership

1.184. It would be possible to argue that statutory co-ownership should not apply at all in these circumstances. People aged between sixteen and eighteen (it might be said) are not old enough to take decisions about the ownership of property, so the status quo should be preserved until they come of age. But we are unconvinced by this line of argument. The whole of our co-ownership scheme rests on the belief that co-ownership of the matrimonial home is a desirable norm for married couples, and we see no reason to think it less desirable merely because a couple (or one spouse) is not yet of age.

1.185. We do not suppose that anyone would argue that an acquiring spouse should be deprived of the benefit of our proposals merely because of his or her minority: it is only when minority affects the owner spouse that concern might be felt. But the usual methods of excluding statutory co-ownership will be available in this situation (we say more about these in a moment), and if a minor spouse is old enough to take the important decision to marry then he or she must be considered old enough to decide whether and how to use these methods. Of course the making of this latter decision will to some extent depend, as indeed it will in the case of adult spouses, upon proper advice being given about the legal situation; but in this respect minor spouses are particularly fortunate. A minor cannot hold a legal estate in land, so if a minor spouse does

[130] Paras. 16–18 of the first report.

acquire a home it will normally have to be held by adult trustees on his behalf and his ownership interest (if he has one at all) will be equitable. This will ensure not only that the minds of the parties and their advisers are clearly focussed on the question of the owner spouse's minority, but also that adults with a fiduciary duty towards him (the trustees) are directly involved in the purchase transaction.

1.186. Our conclusion is, therefore, that statutory co-ownership should operate on the ownership interest of a minor spouse in the same way as if he were an adult. It follows that there is no question of the assignment which the spouse is deemed to make [131] being void, or voidable, by reason of his minority.

1.187. We now turn to the exclusion of statutory co-ownership, to which we have already referred briefly. Minority has no particular effect upon most cases of exclusion, and we deal here only with those on which it has such an effect.

Unilateral exclusion by the owner spouse

1.188. We have already dealt[132] with the major exception which enables an owner spouse to exclude statutory co-ownership, in relation to an interest held before marriage, by making a written declaration before the marriage takes place. If statutory co-ownership is to apply despite the minority of the owner spouse, then clearly this right to exclude it should also apply despite his minority, and we so recommend.

1.189. We also recommend that the owner spouse's right to exclude statutory co-ownership by unilateral declaration in a transitional situation, with which we deal later in this Book[133], should apply despite his minority.

1.190. We further recommend that the owner spouse's ability to revoke a declaration of either kind, thus allowing statutory co-ownership to operate, should be unimpaired by his minority.

Exclusion by agreement between the spouses

1.191. The other relevant exception to statutory co-ownership is exclusion by agreement between the spouses with which, again, we have already dealt[134]. It is much more difficult to work out the impact which minority should have upon the various documents which are apt to exclude statutory co-ownership by agreement than it is to work out its impact on those which exclude it unilaterally. The reason is simple enough. Documents of the latter kind do nothing but exclude statutory co-ownership, and since statutory co-ownership is an innovation there is no existing body of law about the effect of minority on documents of this kind. We can therefore start afresh and recommend any rules which seem sensible.

1.192. In relation to the documents with which we are now concerned, however, the position is less straightforward. Although we have treated them all as bringing about "exclusion by agreement", their nature is in fact diverse. Some do amount to pure and simple agreements to exclude statutory co-ownership: this is the simplest category. But outside that category they vary

[131] Para. 1.61, above.
[132] Paras. 1.106–1.115, above.
[133] Paras. 1.218–1.222, below.
[134] Paras. 1.127-1.149, above.

widely in the extent to which they can be said to amount legally to *agreements* at all (whether to exclude statutory co-ownership or to do anything else). Some of them will serve also, or serve exclusively, as dispositions of property or to bring some present or future state of affairs with regard to the spouses' ownership of property.

(i) *Avoidance*

1.193. If all the documents excluding statutory co-ownership by agreement fell exclusively into what we have called the simplest category, we might well recommend a simple rule of our own about the effect of minority upon them, as we did in the case of unilateral exclusion. But they do not; and in so far as they do not the effect of minority upon them is, and would continue to be, governed by the already existing law. To apply both a new rule and a body of existing law to documents, some of which would attract the operation of both, would produce a quite unacceptable degree of complexity. For purely practical reasons, therefore, we think it best not only to leave the present law in command of the territory with which it has already concerned itself, but also to extend its provisions in such a way as to cover the rest of it as well.

1.194. We therefore recommend that, to the extent that an agreement has the effect of excluding statutory co-ownership, the existing law about the effect upon a contract of the minority of a party to it should apply *as if* that agreement were a contract under which the *owner* spouse was acquiring from the *other* spouse the interest which that other spouse would have received (but for the exclusion) through statutory co-ownership. We think, however, that this recommendation should be confined to cases where the agreement was made in contemplation of the use or possible use of the property as a matrimonial home: if there was no such contemplation, then the hypothesis just mentioned is obviously quite unreal.

(ii) *Effect of avoidance*

1.195. *Avoidance before the occasion.*—If an excluding document is avoided before the relevant co-ownership occasion, then clearly it cannot serve to exclude statutory co-ownership on that occasion. A document of a description which would otherwise serve to exclude co-ownership will not do so unless it is, at the relevant time, a valid and effective document of that description.

1.196. *Avoidance after the occasion.*—If a spouse avoids an excluding document which has already served to exclude statutory co-ownership, we think it only fair that his act should amount in effect to a new co-ownership occasion. We therefore recommend that in this event each spouse should be treated as acquiring (otherwise than from the other or out of the other's interest[135]) the interest which that spouse holds after the avoidance. The result will be that if and when the excluding document is avoided, statutory co-ownership will at once apply—provided the couple are living in the property, and provided that co-ownership is not excluded for any other reason.

Mental incapacity

1.197. The possibility that one of the spouses may be mentally incapable seems to us to pose no real problems in relation to the scheme for statutory co-ownership.

[135] These words are necessary because of the exception discussed in para. 1.159, above.

Incapacity does not of itself exclude statutory co-ownership

1.198. We see no reason why statutory co-ownership should not operate in favour of an acquiring spouse who is mentally incapable.

1.199. Nor do we see any reason why the incapacity of the owner spouse should prevent its operation, and the draft Bill makes it clear that it does not[136]. An express provision on this point is desirable because it might otherwise be argued that since statutory co-ownership is deemed to come about through a declaration of trust or assignment[137] it could not take place unless the owner spouse was capable of making one.

Exclusion of statutory co-ownership by an incapacitated spouse

1.200. The views which we express in the preceding paragraphs might be different if the incapacity of either spouse made it impossible for unilateral exclusion, or exclusion by agreement, to take place. But we are satisfied that this is not so. The declarations or agreements required to achieve an exclusion by act of parties are in our view such that they could be made on behalf of an incapacitated spouse under the provisions of the Mental Health Act 1959, sections 102–104.

Taxation

1.201. The working paper[138] put forward one proposal in the field of taxation: that "an interest created for a spouse under co-ownership ought not to be considered as a dutiable gift" for estate duty purposes. This idea, perhaps fortunately, has been overtaken by events. Estate duty is now replaced by capital transfer tax and the new tax does not normally apply at all to transfers between spouses[139].

1.202. We would, however, make one comparatively minor recommendation about stamp duty. Despite the safeguards which we have sought to build into our scheme for statutory co-ownership, a couple may occasionally find that statutory co-ownership has caught them unawares and has applied to a property to which they do not wish it to apply. They are of course quite free to reverse its effect by making appropriate transfers between themselves but if the property is very valuable these transfers might attract stamp duty. We therefore recommend that any instrument executed within two years after statutory co-ownership has applied should be exempt from stamp duty, in so far as its effect is merely to restore the spouses to their former positions.

1.203. Before leaving the subject of stamp duty we would make one further point. There is of course no question of stamp duty becoming payable when statutory co-ownership *arises*. Although it is deemed to arise through a declaration of trust or assignment[140], no such document exists in fact and there is therefore no instrument liable to duty.

Insurance

1.204. There are two quite different topics which we want to discuss under this heading.

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[136] Clause 15.
[137] Para. 1.61, above.
[138] Para. 1.95. It was recognised that the proposal might need to embody restrictions in order to prevent abuse.
[139] Finance Act 1975, s. 29 and Sched. 6, para. 1.
[140] Para. 1.61, above.

Insurance of the home

1.205. The interest which the acquiring spouse takes through statutory co-ownership will carry with it a right to share in money received under any insurance policy which is taken out to cover the whole of the property itself. This clearly is as it should be. It would be possible in theory, though unlikely in practice, for the other spouse to take out a policy limited to the value of his own beneficial interest in the property after statutory co-ownership: if he did so, the acquiring spouse could, by the same token, insure her own beneficial interest. And the acquiring spouse would always be free to effect her own insurance cover if the insurance would otherwise be inadequate or non-existent.

Endowment life assurance

1.206. Endowment life assurance plays a part in the story of the matrimonial home because it is one of the ways in which the purchase of houses is now commonly financed; and the effects of adopting this method are rather different from those of adopting an ordinary Building Society repayment mortgage.

1.207. If a home is acquired with the assistance of a substantial mortgage, the value of the equity of redemption (that is, the value of the property less the amount required to pay off the mortgage) is initially small—and so, therefore, is the value of the acquiring spouse's share under our proposals. But if the mortgage is of the normal repayment type both these values gradually increase because the regular payments made are in part repayments of the mortgage loan.

1.208. No such gradual increase occurs, however, if the mortgage loan is to be repaid by means of an endowment policy on the life of the mortgagor. If the arrangement is made on that basis, the regular payments made to the mortgagee are of interest only: the loan itself is to be paid off in full on the maturity of the policy (which will be kept up by the mortgagor paying the premiums). In other words the "equity" value builds up, as it were, not in the property but in the policy; and since the acquiring spouse would have no interest in the policy she would derive no benefit until the policy matured and the loan was repaid.

1.209. We have therefore considered whether statutory co-ownership should be extended to cover policies of assurance effected in these circumstances. We have come to the conclusion that it should not, mainly for the following reasons:

(*a*) We doubt whether the acquiring spouse would, at any rate in most cases, be worse off through having no interest in the policy. While the mortgage is still outstanding the value of the owner spouse's equity in the home will be similarly restricted, and he will generally have no realisable interest in the policy either, because it will have been assigned to the mortgagee. If the policy matures during the currency of the mortgage, the proceeds will go not to him but to the mortgagee: and both spouses will at once become unencumbered owners of their shares. If the mortgage is paid off before the policy matures (and otherwise than out of the proceeds of sale of the home itself) the acquiring spouse will obtain an unencumbered share in the home then (and there is no reason why she should share also in the proceeds of the policy in due course). And if the mortgage is prematurely paid off out of the proceeds of sale of the home, the probability is that another equivalent home will be acquired with the help of a new loan and that the proceeds of the policy will, in due course, be applied in

discharge of that second mortgage. In each of these cases the acquiring spouse will, eventually, have obtained an unencumbered share in a home at her husband's expense—just as though he had had a repayment mortgage.

(*b*) The principle upon which we have based our proposals is that the rights of the spouses in their matrimonial home should (unless they agree otherwise) be *equal*; and this principle seems not to be breached by adoption of insurance-linked mortgage arrangements. We have not set out primarily to give non-owner spouses realisable assets (though that may be a consequence of equality); and we positively decided in our first report not to recommend the adoption of a general scheme of community of property[141]. The inclusion of policies of life assurance within our co-ownership scheme would run counter to that decision.

(*c*) Finally, such inclusion would undoubtedly give rise to numerous problems. Subject-matters other than land would not fit into a legislative scheme the provisions of which are specifically designed to fit the case of land; it would be exceedingly difficult to define with any acceptable degree of precision the policies to which co-ownership should apply; and special arrangements would have to be made for "with profits" policies, that is to say for policies calculated to yield more than the capital loan to be redeemed. Even if the policy were one which, in the circumstances, might be co-owned, it should clearly be co-owned only to the extent necessary to provide the redemption money.

Disputes and doubts

1.210. Cases are bound to occur in which husband and wife are in dispute about statutory co-ownership. The dispute may be a comparatively simple one, as to whether, on the facts, statutory co-ownership has applied or not; or it may be more complicated—for example, as to the eventual effect of a series of events and transactions in which statutory co-ownership may have played a part. Cases may also occur in which the possible effect of statutory co-ownership gives rise not so much to a dispute as to a state of simple, and perhaps mutual, doubt.

1.211. We hope it will be possible in most cases for the couple to resolve these disputes and doubts by themselves, but we are conscious that if they fail to do so they ought to have a means of applying in a summary way to the court for resolution of their problem. Fortunately such a means lies ready to hand in the shape of section 17 of the Married Women's Property Act 1882, which reads in part:

> "In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to . . . the High Court . . . or . . . to the judge of the county court of the district . . . in which either party resides, and the judge . . . may make such order . . . as he thinks fit . . .".

Transitional

1.212. Under this heading we want to discuss some special problems which would arise in relation to statutory co-ownership during the period immediately after a Bill in the form appended to this Book reached the statute book as an Act.

[141] Law Com. No. 52, paras. 59–60.

Existing homes to be subject in principle to statutory co-ownership

1.213. The first and most basic question is whether statutory co-ownership should apply at all to existing matrimonial homes. We think that it should. Our main reason is one of policy: we consider that co-ownership is desirable, and we think it just as desirable for these homes as for those acquired in the future.

1.214. There is admittedly this difference between the two—that homes acquired in the future will be acquired at a time when statutory co-ownership is an established part of the law and when, therefore, couples will have their minds directed, at the time of purchase, to the question of co-ownership and can take steps at that time to exclude it in favour of sole ownership or of an express co-ownership of their own; but none of this is true of existing homes. These considerations are important ones, but we think they are taken fully into account in the provisions which we recommend in the following paragraphs.

The one year's "breathing space"

1.215. We recommend, first, that there should be a period of one year between the passing of the Act and the application of statutory co-ownership to any property. Throughout this year the content of the Act will be ascertainable, and we hope publicity will ensure that not only its existence but also its import is widely known. This year, therefore, will be a "breathing space" during which couples can consider statutory co-ownership, obtain advice about it, and take steps to exclude it if they wish.

Homes owned (and not excluded) at the end of the year: a new co-ownership occasion

1.216. The means of excluding statutory co-ownership during the year are discussed below, but before we deal with them we want to complete the story so far as it concerns homes *not* excluded.

1.217. We recommend that there should be a new, fifth co-ownership occasion to add to the four already listed[142], but one which is applicable in this situation only:

(*v*) When the couple, at the end of the transitional year, are already married, have both an ownership interest and a home in the property, and have (or one of them has) an ownership interest in it (or in part of it).

This will mean that if the three ingredients of statutory co-ownership are present at the end of the year, and statutory co-ownership has not been excluded, it will then apply.

Exceptions from statutory co-ownership: a special unilateral power of exclusion

1.218. We now return to the question of excluding statutory co-ownership during the year. It can of course be excluded, during this period as at any other time, in any of the ways already discussed in this report[143]. But we recommend one special exception to statutory co-ownership, additional to those already mentioned and applicable during this period only.

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[142] Para. 1.71, above.

[143] We refer to "Exclusion by owner spouse of an interest acquired before (or on) marriage" (paras. 1.106–1.115, above), "Exclusion by a donor" (paras. 1.116–1.126, above) and "Exclusion by agreement between the spouses" (paras. 1.127–1.149, above).

1.219. In brief, we think that a spouse should have power, at any time before the end of the year, unilaterally to exclude statutory co-ownership in relation to any interest held at that time. To explain this in more detail, we must introduce once more the idea of the "separate interest", which we have already explained[144]. Briefly, a separate interest is a beneficial interest which is held by one spouse but not as joint tenant or tenant in common with the other spouse. Our full recommendation is as follows:

(*a*) If a spouse holds a separate interest he should have power, at any time before the end of the year, by writing signed by him, to declare that it is to be free of statutory co-ownership.

(*b*) If the interest in question is not separate, so that the couple already hold as co-owners, *either* of them should have power, at any time before the end of the year, by writing signed by him or her, to declare that *both* their interests are to be free of statutory co-ownership.

(*c*) In either case, the declaration should be effective only if it is attested by a witness[145]; and the spouse who makes it should have power to revoke it before the relevant co-ownership occasion, thus allowing statutory co-ownership to apply after all.

1.220. We would make two points about sub-paragraph (*b*) above. First, it will be noted that, in our view, either spouse alone should have power to exclude statutory co-ownership. But it would be clearly unfair if one spouse could exclude it in relation to that spouse's own interest, leaving it to apply to the interest of the other; so we think that the exclusion, if made at all, must be of both interests. Second, this sub-paragraph will be of comparatively rare application. If the couple are already co-owners, the chances are that they will have declared their co-ownership in a way specific enough to exclude statutory co-ownership under the principles discussed in an earlier part of this report[146].

1.221. If an excluding instrument is made before the end of the year under the principles just discussed, we think it should be effective to exclude statutory co-ownership in relation not only to an interest in respect of which it is made, but also to any interest derived from that interest. This is consistent with our recommendations about other excluding instruments. We would also make it clear that the instrument should, in our view, be effective to exclude statutory co-ownership on any future co-ownership occasion, not merely on the occasion described in paragraph 1.217 above. In our view it should only be necessary, at the time when the declaration is made, for the interest to be held[147]: the property need not be a home at that time nor, for that matter, need the marriage have taken place.

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[144] Para. 1.113, above.

[145] Our reason for recommending attestation by a witness is analogous to our reason for recommending attestation in the case of a declaration excluding statutory co-ownership in relation to a property owned by one spouse before marriage: see para. 1.108 above. A spouse who regretted the operation of statutory co-ownership might be tempted to make a declaration after the co-ownership occasion and pretend that it had been made before. Attestation by a witness is intended to fix its real date. Attention is drawn, however, to the contents of n. 77, above.

[146] Paras. 1.135–1.141, above. Their declaration will probably have been made at a time before the Act came into force, but that does not affect its efficacy as an excluding instrument. We say more about this point in para. 1.225, below.

[147] It will be remembered that in a normal purchase transaction an ownership interest is not acquired until completion: para. 1.25, above.

1.222. The recommendations which we have just made represent a compromise between applying the regime of statutory co-ownership rigidly and without modification to property already acquired when the Act comes into force, and not applying that regime to such property at all. We think it should apply, as we have already said, but at the same time we are conscious that spouses will not have been able to utilise some of the normal means of exclusion —unilateral as well as bilateral—which would have been available to them if the contents of the Act had been known earlier. Some homes, for example, will have been owned solely by one spouse before the marriage, and so could have been excluded unilaterally in any case. We would also wish to avoid any suggestion that the provisions of the Act amount to an expropriation of existing property. All in all, therefore, we think that individual spouses should have complete freedom to prevent the application of statutory co-ownership to property which they already own, but that positive acts should be required of them to achieve this end.

Additional matters

1.223. Before we leave the subject of transitional problems, we would like to make two further points.

1.224. First, we would re-emphasise that spouses, acting in concert, are free to discard statutory co-ownership at any time. So if they let the year pass and then realise that they are subject to an unwanted co-ownership they can still put matters right by mutual agreement and (if they act within two years) with no risk of having to pay stamp duty[148].

1.225. Second, all the various types of excluding instrument discussed in this Book are effective to achieve exclusion even if they are made before the Act comes into force. Some of them, of course, are hardly likely to be made before this time: those which have to refer expressly to statutory co-ownership will obviously not be made until people know what statutory co-ownership is; but there is no reason in principle why such instruments should not be made before the Act is in force, and this may become a real possibility as legislation nears the completion of its journey through Parliament[149]. Other types of excluding instrument are very likely to have been made before the Act comes into force: for example, those which exclude statutory co-ownership merely by declaring an express and specific co-ownership of the spouses' own making[150] would clearly fall into this category. We think it essential that express co-ownerships of this kind should automatically survive the introduction of statutory co-ownership.

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[148] Para. 1.202, above.

[149] This is true even of the new means of unilateral exclusion discussed in paras. 1.218–1.222, above: that is why we have taken care to refer there to a declaration made "before the end of the year" rather than to one made "during the year".

[150] Paras. 1.135–1.141, above.

PART IB INCIDENTS OF CO-OWNERSHIP

Introductory

1.226. Part IA of this Book dealt with statutory co-ownership of the matrimonial home. This Part deals with the rights of husband and wife *as* co-owners, whether statutory or not.

1.227. Since the rights which they enjoy, in this capacity, under the existing law seem to us deficient, we recommend certain new rights. These were originally conceived as being applicable only to cases of *statutory* co-ownership. We were conscious that in proposing a scheme for statutory co-ownership we ought to place it within a framework of ancillary rules which would make it sensible and fair to both parties. But we came quickly to the conclusion that the benefits of this framework could not logically be confined to cases where the co-ownership was statutory. We mentioned at the beginning of Part IA[151] that most couples already impose an express co-ownership on their matrimonial homes. We mentioned, too, our hope that the scheme for statutory co-ownership which we propose, so far from diminishing the number of couples who brought their homes expressly into co-ownership, would increase it: as we said there, "it is for several reasons more satisfactory that co-ownership should arise by act of parties than by operation of statute." To confine the application, and the benefit, of the new rights to cases where the co-ownership was statutory would clearly be inconsistent with, and indeed might militate against, this hope.

1.228. It is true, of course, that most of the rights are designed for a wife[152] who is not on the legal title, and this situation will arise most often in cases of statutory co-ownership. But it can arise in other cases too[153]. And in any case, some of the rights apply even when the wife is on the title[154].

1.229. To sum up, then, the rights discussed here are to apply whenever the spouses share in the ownership interest—whether they do so because of statutory co-ownership, because of an express co-ownership, or for any other reason.

The rights spouses need

1.230. We think it will be helpful at this stage if we give a brief description of the rights which each spouse ought in our view to have. They fall conveniently under two headings (which we shall continue to use when we come to describe them more fully).

1.231. *Homes in general (including former homes).*—There are, first, the rights

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[151] Para. 1.3, above.

[152] For the sake of brevity we shall continue to assume that the spouse who is not on the legal title is the wife rather than the husband. We emphasise, however, that the same rules are to apply in either case.

[153] A wife will not normally be on the title if the co-ownership is implied rather than express, and cases of implied co-ownership may still arise: for example, a property owned solely by the husband and excluded from statutory co-ownership would become co-owned if the wife subsequently acquired an interest under section 37 of the Matrimonial Proceedings and Property Act 1970 by making an improvement. And there may even be cases of express co-ownership in which the wife is not on the title: for example, if a property were bought at a time when one spouse was still a minor, that spouse might expressly be made a co-owner of the beneficial interest but could not be on the legal title.

[154] For example, the "New rights in respect of the replacement home": paras. 1.365–1.376, below.

which each spouse needs to have in respect of any home (or former home) to protect his or her interest and position as co-owner:

(1) A right to ensure that the property in question is not sold, mortgaged or otherwise disposed of without his or her consent.

(2) A right to ensure that he or she is not deprived of his or her due share of money realised by any dealing which does take place.

For convenience we shall call the first right a "right of control" and the second a "money right". The purpose of the money right is obvious enough; but the purpose of the right of control deserves to be amplified. Its primary purpose, of course, is to enable the spouse in question to keep a roof over his or her head: to that extent it largely corresponds with the right of a spouse to protect his or her occupation rights under the Matrimonial Homes Act 1967—a point to which we shall shortly return[155]. But that is not its only purpose. A co-owning spouse needs a say not only in the question whether the property is to be disposed of, but also in the terms (including the price) on which the disposition is to be made. The right of control is designed for that purpose too. And with this in mind we would mention now another point to which we shall return later[156]: that the right of control and the money right, precisely because they are not designed merely to protect rights of occupation, must continue to apply to a property even when it has ceased to be used as a matrimonial home and even though it is no longer occupied by either spouse. They must, in other words, apply to former homes as well as current ones.

1.232. *The replacement home.*—In our view each spouse also needs, in cases where one home is acquired to replace another:

> Rights to ensure that the other spouse's share of the proceeds of sale of a former home are used in the acquisition of a new one.

Our reasons for recommending these rights are given later[157].

1.233. In the course of this Part of the Book we shall deal with all these rights in much more detail. This general description is given here so that the reader can see what we are working towards, and against what standard we are judging the present law, to which we now turn.

Deficiencies of the present law

1.234. Under this heading we discuss those aspects of the present law which go some way towards providing the rights which co-owning spouses ought to have. We do this partly in order to demonstrate that they do not go far enough, and partly because we shall need in some respects to build upon the present law and it is therefore convenient to establish its details at this stage.

Homes in general (including former homes)

1.235. We said above that co-owning spouses should, in relation to any home (or former home), have both a right of control and a money right[158]. We can say, speaking broadly[159], that both these rights will in practice be possessed under the present law by a spouse who is on the legal title to the property. It

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[155] Para. 1.238, below.
[156] Para. 1.264, below.
[157] Paras. 1.366 and 1.367, below.
[158] Para. 1.231, above.
[159] One small exception is mentioned, and a remedy proposed, in paras. 1.277–1.279, below.

is only when a spouse is not on the legal title—as she will not be, for example, if the co-ownership is statutory co-ownership—that her rights are substantially deficient.

1.236. To show how they are deficient, we must now examine briefly the protection given by the present law to a spouse who is a beneficiary under a trust for sale but does not appear on the legal title. We shall do this under three separate sub-headings.

(i) *Matrimonial Homes Act* 1967

1.237. Under section 1 of the Matrimonial Homes Act 1967 a spouse who is not on the legal title to property may have statutory *rights of occupation* in respect of it. These rights can exist even when the spouse has a beneficial interest in the property[160]. The Act of 1967 not only confers these rights of occupation but goes on to provide the spouse in question with a means of protecting them against third parties. In a straightforward case in which the legal estate is in the name of the husband, the wife's rights would constitute a charge on the husband's estate and this charge could be protected by registration as a Class F land charge (if the property is unregistered land) or by the registration of a corresponding notice or caution (if the property is registered land[161]). If such a registration is made before completion[162] of any sale the wife's rights of occupation may be enforced against the purchaser. That by itself would not, of course, preserve the property as a matrimonial home because the wife's rights of occupation are hers alone and apparently might not entitle her husband to continue to occupy the property with her[163]. In practice, however, the wife would often, by maintaining her registration, be able to ensure that completion did not take place at all[164]. (It goes almost without saying that the sale of the property is only one example, though no doubt the most important example, of the many transactions which may affect it and against which the wife may protect her rights in this way).

1.238. It is obvious, therefore, that the mechanism of registration provided by the Matrimonial Homes Act 1967 could be used by a wife who is a co-owner. But although it would give her some of the rights she needs, it would not give her all. Clearly it would not directly give her the money right. It would go some way towards giving her the right of control, but not the whole way. Her rights under the Act are designed primarily to keep a roof over her head, and in so far as the right of control is designed for that purpose it would be largely covered by those rights. But as we have already pointed out[165], the right of control is needed also in relation to a property which has ceased to be used as a matrimonial home and the 1967 Act rights, though they may continue to apply in those circumstances, might well prove ineffective in practice. The upholding of the wife's rights under the Act is ultimately a matter for the

[160] Matrimonial Homes Act 1967, s. 1(9) (added by Matrimonial Proceedings and Property Act 1970, s. 38).
[161] Matrimonial Homes Act 1967, s. 2.
[162] The usual protection is of course available to a purchaser who obtains an official search certificate and completes within 15 working days of its date.
[163] Cf. the judgment of Megarry J. in *Wroth* v. *Tyler* [1973] 2 W.L.R. 405, 423.
[164] On this point, see *Wroth* v. *Tyler*, above. This case is discussed in detail in paras. 2.74–2.90, below.
[165] Para. 1.231, above.

discretion of the court, and in exercising that discretion the court would have regard only to the objectives of the Act itself: if the wife did not need the property in question as a current home there might be no reason, within the context of the 1967 Act, to uphold her rights.

1.239. This serves to emphasise the fact that a wife who did use the 1967 Act to protect her position as a co-owner would really be using it for a purpose for which it was not intended. And not only that: there are cases in which a wife, although she was a co-owner, would have no protection at all under the 1967 Act[166].

1.240. These considerations lead us to the conclusion that the protection given by the 1967 Act falls far short of the protection which, in our view, a co-owning spouse should have.

(ii) *The right to be consulted*

1.241. Section 26(3) of the Law of Property Act 1925 provides:

> "Trustees for sale shall so far as practicable consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this sub-section have been complied with.
>
> In the case of a trust for sale, not being a trust for sale created by or in pursuance of the powers conferred by this or any other Act, this sub-section shall not apply unless the contrary intention appears in the disposition creating the trust".

1.242. This duty is a wide one and covers all aspects of the trust[167]. It is true that it does not apply automatically unless the trust for sale is "created by or in pursuance of the powers conferred by this or any other Act", so that in the case of a trust for sale imposed expressly the duty is inapplicable "unless the contrary intention appears in the disposition creating the trust". But this limitation is not very serious in the present context because if a trust for sale is expressly imposed it will almost always be imposed by a document which also vests the legal estate in both spouses, and a spouse who is on the legal title has no need to have recourse to section 26(3). The protection of the subsection would clearly apply automatically if the trust for sale arose by reason of statutory co-ownership because it would then be a statutory trust for sale, not an express one.

1.243. But even if there is no doubt about the applicability of section 26(3), there is doubt about the adequacy of its provisions in the present context. In trying to analyse them, one notes first that "the general interest of the trust" is

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[166] Thus she cannot have registrable occupation rights in more than one property at a time (Matrimonial Homes Act 1967, s. 3). And she has no occupation rights in a property after the death of the husband or the termination of the marriage (unless the rights are extended by the court) (ss. 1(8) and 2(2)); whereas the right of control and the money right of a co-owning spouse should in our view (see paras. 1.265 and 1.266, below) continue in these circumstances. Further, although the court cannot terminate the beneficial interest of a co-owning spouse, it can terminate her occupation rights under the 1967 Act (s. 1(2)).

[167] *Re Jones, Jones* v. *Cusack-Smith* [1931] 1 Ch. 375.

an overriding consideration. The significance of these words in the present context is not altogether clear. They may have been intended to be relevant only to a continuing trust designed to provide for successive beneficiaries (some of whom may be unborn or under age) and not to a trust of a single asset held for two people absolutely entitled. Subject, at any rate, to this consideration, the trustees have a duty to give effect to the wishes of the beneficiaries. But if these wishes conflict, how is the matter to be resolved? It would seem that if one spouse happens to own a greater share of the beneficial interest, that spouse's wishes should prevail. This in itself seems to us unsatisfactory in a matrimonial context. If the sharing is equal, as more often than not it will be, there is no such guidance. There is perhaps some reason[168] to think that in the event of a dispute of this kind the criteria to be applied may be similar to those which guide the court on an application under section 30 of the Law of Property Act 1925. It is firmly established that a court will not exercise its discretion under that section, and order a trustee to carry out the trust for sale, if the effect would be to defeat the purpose for which the trust was established; and the court has often invoked this principle in refusing to order the sale of a house which is a matrimonial home[169]. (The reference to "the general interest of the trust" may conceivably lend support to the view that criteria of this kind should be applied, though the words can hardly have been inserted for this purpose because the principle to which we have referred was not developed in 1925.) To the extent that these criteria are indeed the ones to be applied under the sub-section, we would regard its effect as being broadly satisfactory to a wife in the situation we are considering. But it is not by any means certain that these criteria are applicable, and it is still less certain that they would apply when one spouse's share is greater than that of the other.

1.245. Moreover, as the section itself makes clear, the fact that the wife has not been consulted, or that her wishes have been ignored, does not prevent a purchaser acting in good faith from acquiring a good title to the property. So even if section 26(3) is disregarded altogether by a trustee the wife's only remedy will be an action for damages[170], and if the full value of the house has been realised and she has had her share of the proceeds, she may have incurred little or no monetary loss for which damages can be awarded. And since the erring trustee, against whom an action would lie, would normally be the husband, damages would seldom be sought even if they were available.

1.246. So section 26(3) fails in its turn to provide the wife with the protection she needs. It seems to us nonetheless to point in the right direction, and one of the new rights which we recommend for a co-owning wife—we shall call it the consent requirement[171]—is in some respects similar to her rights under that section. It differs from them, first, in that it amounts to a positive right to

[168] See the judgment of Stamp J. in *Waller* v. *Waller* [1967] 1 W.L.R. 451, 453–454.

[169] See further para. 1.278, below.

[170] In one case, *Waller* v. *Waller* [1967] 1 W.L.R. 451, a wife with a beneficial interest obtained an injunction to restrain her husband, as sole trustee, from selling the home against her wishes. Stamp J. pointed out that the general law of trusts seeks to prevent a single trustee from selling land he holds on trust for sale, and that a breach of trust would be committed if, the husband having appointed an additional trustee, the two were then to sell the property without ascertaining the wife's wishes under s. 26(3). But there was still no certainty that the wife's wishes would in the end prevail; and in any case few wives would wish to go to the length of obtaining an injunction, even if they could act quickly enough to do so.

[171] Paras. 1.270–1.292, below.

prevent a disposition and, secondly, in that the purchaser (or other disponee) may be affected by its violation.

(iii) *The two trustee rule*

1.247. The rule which we shall refer to as the "two trustee rule" involves several interlocking ideas:

(*a*) Section 27(2) of the Law of Property Act 1925 (as amended) says:

> "Notwithstanding anything to the contrary in the instrument (if any) creating a trust for sale of land . . ., the proceeds of sale or other capital money shall not be paid to or applied by the direction of fewer than two persons as trustees for sale, except where the trustee is a trust corporation . . .".

(*b*) Section 14 of the Trustee Act 1925 (as amended) is to much the same effect. After dealing with the powers of a trustee to give receipts, it proceeds, in subsection (2):

> "This section does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for . . . the proceeds of sale or other capital money arising under a trust for sale of land . . .".

(*c*) Section 2(1) of the Law of Property Act 1925 provides that if the requirements about the payment of capital money are complied with, a conveyance to a purchaser[172] of a legal estate in land will overreach any beneficial interest under the trust for sale. (This means, in the situation we are considering, that the purchaser would take free of the wife's interest).

(*d*) From the foregoing it might seem that a purchaser who failed to comply with the requirements about the payment of capital money would always take subject to beneficial interests under the trust; but this is not so. There is nothing in the statutory provisions to displace the long standing principle that a bona fide purchaser of a legal estate in land without notice of a trust will take free from it. (Stated in this way the principle applies only to unregistered land. The position in regard to registered land is a little different, and we discuss it later on[173]). So even if the purchaser does not comply with the requirements he will still take free from the trust if he has no notice of it[174]. And despite the statutory provisions it is accepted that a purchaser will in these circumstances obtain a good receipt from a single trustee.

1.248. To what extent does the two trustee rule—by which we mean the complex of interacting rules outlined in the preceding paragraph—protect a co-owning wife not on the legal title?

1.249. At the moment it hardly operates at all to give her a right of control. It is true that a purchaser who had notice of the trust (or the registered land equivalent of notice) would not be prepared to take a conveyance from a sole individual trustee (and in the case of statutory co-ownership there is likely to be

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[172] In this context, "purchaser" means anyone who takes a legal estate in good faith for money or money's worth, and includes a lessee or mortgagee: Law of Property Act 1925, ss. 2(1) and 205(1) (xxi).

[173] Para. 1.253, below.

[174] See, e.g., *Megarry and Wade on the Law of Real Property* (4th ed., 1975), p. 378.

only one trustee: the husband) because he would know that he would not then take free of the trust. But as the law now stands this would not hold the transaction up for very long, because the remedy would be obvious and simple: to appoint an additional trustee. In other words the two trustee rule, in itself, gives the wife virtually no say in the disposition and no power to prevent it.

1.250. What the two trustee rule does do, however, is to safeguard, in large measure, the wife's money right. It is in fact the money rights of beneficiaries which the statutory provisions mentioned above were intended to preserve, on the basis that a payment made to two trustees or to a trust corporation was much less likely to be misappropriated or misapplied than a payment made to a single individual. For our part, we fully accept that this is so. Our main efforts to give the wife a money right will in fact be directed to ensuring that she has power to prevent capital money being paid to a sole individual trustee (especially when that sole trustee is her husband).

1.251. But in pursuing this course we shall have to remedy certain shortcomings in the two trustee rule as it exists at present. The main shortcoming is that it does not apply at all unless the purchaser has notice, or the registered land equivalent of notice, of the trust.

1.252. To explain this we must deal separately with unregistered land and with registered land, and we shall deal first with the former. Here the doctrine of notice governs the matter. Notice may be actual or constructive[175]. A person is said to have actual notice of all facts of which he has (or has had) knowledge. He is said to have constructive notice of everything which he ought to have discovered by making such investigations, inspections and enquiries as were appropriate in the circumstances. Unfortunately the circumstances in which a purchaser has a duty to make enquiries about the rights of a wife in a dwelling, so discovering the existence of a trust (if there is one), are not very well settled. In *Caunce* v. *Caunce*[176] it was held that where a vendor is himself in possession or occupation of the property (as would be the case if the property were currently a matrimonial home and the husband were the only person on the legal title), the purchaser is not prejudiced by a failure to make enquiries about the rights of other people who may be resident there if their presence is wholly consistent with the title offered. From this it looks as though the mere presence of a wife is not enough to affect a purchaser with constructive notice of her rights. But some doubt has been cast upon this simple conclusion by the case of *Hodgson* v. *Marks*[177], where Russell L. J. said[178]:

> "I would only add that I do not consider it necessary to this decision to pronounce on the decision in *Caunce* v. *Caunce* . . . In that case the occupation of the wife may have been rightly taken to be not her occupation but that of her husband. In so far, however, as some phrases in the judgment might appear to lay down a general proposition that inquiry need not be made of any person on the premises if the proposed vendor himself appears to be in occupation, I would not accept them".

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[175] It may also be imputed. Imputed notice is actual or constructive notice which the purchaser's solicitor or other agent has, and which is imputed to the purchaser himself.
[176] [1969] 1 W.L.R. 286.
[177] [1971] Ch. 892 (C.A.).
[178] At pp. 934–935.

On balance we incline to the view that the mere presence of a wife is probably not enough, under the present law, to put a purchaser upon enquiry[179]. This means that in very many cases (and especially in cases of statutory co-ownership, of which the purchaser will not obtain notice from the title deeds) the purchaser will have no notice of the fact that the wife has a beneficial interest under a trust, and will therefore take free of her interest even if he pays the purchase money to a sole trustee. This, therefore, is a substantial shortcoming, for which we shall have in due course to suggest a remedy.

1.253. Turning now to the case of registered land, we must note that the position is rather different. There is no doctrine of notice as such: the purchaser will take free of the wife's interest unless it is protected by an entry on the register or it amounts to an "overriding interest":

(*a*) So far as protection by entry is concerned, the wife's primary right is to have registered a restriction which serves actually to prevent the registration of any disposition under which capital money arises unless it is made by at least two trustees or by a trust corporation (or the court or the registrar orders its registration[180]). This restriction can be entered on the application of someone other than the registered proprietor[181], but it cannot be entered unless the Land Certificate is produced to the registrar[182]. This latter rule (which will be the subject of a recommendation later[183]) may not be an obstacle in practice because if the property is mortgaged by registered charge the Land Certificate will be deposited at the registry in any case[184]. But if this is not so, and if the registered proprietor will not co-operate by depositing it (or the wife does not wish to ask him), the wife can obtain protection by registering a caution or, very rarely, an inhibition[185].

(*b*) As to the possibility that the wife might have an "overriding interest", this depends upon section 70(1)(g) of the Land Registration Act 1925, which includes among such interests:

> "The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed".

If the wife's interest does amount to an overriding interest, it will bind a purchaser even though it is not protected by any entry on the register. But it is very doubtful if it does. Since the interest of a beneficiary under a trust for sale is inherently overreachable, it seems unlikely that it was intended to amount to an overriding interest just because the beneficiary happened to be in possession—particularly since it can be protected by an entry on the register. And section 74 of the Land Registration Act 1925 provides that no-one dealing with registered land "shall be affected with notice of a trust express implied

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[179] See also *Emmet on Title* (16th ed., 1974) p. 167.
[180] Land Registration Act 1925, s. 58(1).
[181] Land Registration Act 1925, s. 58(5), and Land Registration Rules 1925, r. 236.
[182] Land Registration Act 1925, s. 64 (1) (c).
[183] Para. 1.329, below.
[184] Land Registration Act 1925, s.65.
[185] *Ruoff and Roper on The Law and Practice of Registered Conveyancing* (3rd ed., 1972) p.811. The right of a wife in these circumstances to register a caution appears to be confirmed by *Elias* v. *Mitchell* [1972] Ch. 652.

or constructive". But decided cases and legal argument leave the question in some doubt and no firm conclusion can be drawn one way or the other[186]. This matter, too, will be the subject of recommendations later in this Book[187].

1.254. So far as registered land is concerned, the practical shortcomings of the two trustee rule are in our view very slight. By having an entry made on the register the wife is able to ensure that the rule is complied with. We shall propose no major change in the provisions which affect registered land in this area: our object, in fact, will be to devise an analogous system for unregistered land.

The replacement home

1.255. We have said[188] that each spouse ought in our view to have a right to ensure that the other spouse's share of the proceeds of sale of a former home are used in the acquisition of a replacement home.

1.256. It is easy to state the existing law on this subject, because there is none. To implement this recommendation we shall have to devise a set of rules which are wholly new, and this we shall endeavour to do in due course.

New rights in respect of homes in general (including former homes)

1.257. We turn now to the details of the provisions which we want to recommend in order to confer upon each spouse the right of control and the money right[189]. They take the form of three main interlocking proposals, none of which serves of itself fully to confer either of these rights, but which, taken together, do confer both. Before we come to these, however, we have to explain a concept which will play a large part in the discussion: "relevant land".

Preliminary: the meaning of "relevant land"

1.258. None of the rights which we recommend is to apply unless the property in question is "relevant land". This is the phrase used in the draft Bill, and it is obviously convenient to use it here as well.

(i) *When land becomes relevant land*

1.259. Land becomes "relevant land" if, after the appropriate provisions of the draft Bill are in force—

> a husband and wife are co-owners of an ownership interest in the land at a time when it comprises a matrimonial home of theirs.

1.260. Some of the terms and ideas embodied in this description are of course to be understood in the special senses explained in Part 1A of this Book. "Ownership interest" means an absolute beneficial interest in possession[190]. "Husband and wife" means a couple married in the sense explained under the sub-heading "Marriage" in Part IA[191]. The home itself must amount to land in

[186] For a discussion, see *Emmet on Title* (16th ed., 1974) p. 193.
[187] Para. 1.333, below.
[188] Para. 1.232, above.
[189] These terms are explained in para. 1.231, above.
[190] The term is explained more fully in paras. 1.11–1.29, above. It should be noted that an interest held by a spouse as a member of a partnership does not amount to an ownership interest: this exclusion applied in relation to statutory co-ownership (paras. 1.164–1.166, above), and we recommend, for similar reasons, that it should continue to apply for present purposes.
[191] Paras. 1.73-1.89, above.

the way explained in that Part[192]. And the extent of the home is to be determined according to the principles discussed in that Part (and is, in particular, to include any property which goes with the home as an adjunct to it)[193].

1.261. It may perhaps be asked why property should not be relevant land, and thus subject to the new recommendations, until it has actually been used as a matrimonial home. Of course if the co-ownership first arises under our proposals for statutory co-ownership, it cannot be relevant land until it is so used, because the co-ownership itself does not arise until that time. But if the co-ownership arises in some other way, it can be argued that the new rights should apply as soon as it does arise.

1.262. In the end, however, we decided that the new rights should be confined (as statutory co-ownership is confined) to properties which are or have been used as homes. We think that any attempt to extend them, for example to properties bought with the intention that they be so used, would run into difficulties of definition. Must the intention be mutual? When must it be formed? How is it to be established? What happens if it changes? These and other questions spring immediately to mind, but the answers do not. It seems to us that once we began to extend the new rights beyond properties which are or have been used as homes, there would be no satisfactory stopping point, and we should have to end by applying them to any property of any kind of which a husband and wife happened in any circumstances to be co-owners, no matter what its nature or their intentions with regard to it. And that would take us much further than we propose to go. We are, after all, setting out in this report to deal with the matrimonial home and with that alone, and a home is really not a home until it has been used as a home. Intentions may be vague or conditional, they may change, and circumstances may prevent their fulfillment; but the actual use of a property as a matrimonial home is conclusive of its status as such.

(ii) *When land continues to be relevant land*

1.263. Once land has become relevant land, we recommend that it should continue to be relevant land, so that the new rights still apply, despite certain subsequent changes in the situation.

1.264. *Property ceasing to be a home*—We have already indicated[194] that the new rights ought not, in our view, to cease merely because the property ceases to be used by the couple as a matrimonial home. Once statutory co-ownership arises, it continues despite changes in the use of the property. By the same token, it seems to us, the new rights should continue despite such changes, because the protection which they afford still remains necessary.

1.265. *Spouses ceasing to be married*—We do not think that the land should cease to be relevant land merely because the couple's marriage ends through divorce, or through a nullity decree given in respect of a voidable marriage[195]. We think the new rights should continue in the same way that statutory co-ownership continues in these circumstances.

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[192] Paras. 1.34–1.36, above.
[193] Paras. 1.37–1.43, above.
[194] Para. 1.231, above.
[195] If the marriage was void rather than voidable, the land will never have become relevant land at all: paras. 1.260 and 1.82–1.87, above.

1.266. *One spouse ceasing to be an owner*—Changes in the size of the interests which the spouses respectively hold as co-owners will not, of course, affect the status of the property as relevant land. But what happens if one spouse (we shall assume that it is the husband) loses his ownership interest altogether? This is bound to happen on his death; and it may happen during his lifetime, through a voluntary disposal, or involuntarily through his bankruptcy. If he does lose all his ownership interest, we recommend that the land should nonetheless continue to be relevant land so long as the wife retains her ownership interest or part of it, and so long as the land continues to be held by trustees. In referring to the wife's ownership interest we mean, of course, the interest which made her a co-owner with her husband: so long as she retains any of that interest the land should remain relevant land, but it should not do so by virtue of any other interest which she may happen to have in it. Our reference to the land continuing to be held by trustees is to be explained in this way. The husband's loss may well be the wife's gain: in many circumstances he will, in effect, lose his interest to her and she will become the sole owner of the property. This may happen through a lifetime disposition in her favour, and it may happen on death. In the latter case, it will happen automatically if the couple were beneficial joint tenants; and it may equally well happen if the wife acquires the husband's interest under his will or intestacy. In these cases the legal ownership will normally be vested in the wife as soon as possible, the trust will cease, and there will be no further need for the rights which attach to relevant land.

1.267. When we come to describe the new rights in detail, we shall do so by reference to the most usual case: that where the property continues to be owned by both spouses. But the preceding paragraph must be borne in mind, and the necessary translations made. When we later refer to cases in which the spouses are co-owners we shall be referring also to those rarer cases in which one spouse has remained an owner and the other has not, although the land remains relevant land. In such cases, of course, the right in question is to be enjoyed only by the spouse who remains an owner.

(iii) *When land ceases to be relevant land*

1.268. It follows from the preceding paragraphs that once land has become relevant land it ceases to be such only when neither spouse retains any part of the interest which previously made him or her a co-owner with the other spouse; or when one becomes solely entitled and the trust ceases.

1.269. Having dealt with the meaning of "relevant land", and with the exceptions, we turn now to the three substantive rights which we want to recommend.

(1) The consent requirement: both spouses' consent required to dispositions

1.270. Subject to what follows we recommend, first, a new statutory requirement that if land is relevant land, the trustees of the trusts under which the co-ownership subsists must not make any disposition *unless both*[196] *spouses consent to it.*

[196] This and similar references are qualified by the point made in the latter part of para. 1.267, above.

1.271. This consent requirement will give each spouse a right which bears some resemblance to the right of a beneficiary under section 26(3) of the Law of Property Act 1925[197]. But it is of course much stronger, because this new requirement is a positive requirement of consent and will give each spouse a right, by withholding consent, to prevent the disposition being made at all. An explanation of this latter point, and of the way in which the consent requirement is to affect purchasers, must be postponed for the moment. Here we are concerned to delineate more clearly the nature of the requirement and its applicability.

(i) *The need for sole co-ownership*

1.272. Land may be relevant land even if third parties co-own it with the spouses. But we do not think that the consent requirement should apply unless the spouses have, at some time when the property was a matrimonial home (and when the relevant provisions of the draft Bill were in force), been the *sole* co-owners of the ownership interest. If the ownership interest is shared, throughout that use, with a third party, we do not think that the requirement should arise at all.

1.273. If, for example, a house is owned by two brothers equally as tenants in common, and one brother goes to live there with his wife, so that (unless one of the exceptions is applicable) the wife becomes a joint tenant of her husband's share, we do not think that this should affect the other brother's rights. If the other brother wants the house to be disposed of, and the spouses do not (or one of them does not), we think the matter should be decided according to the existing law. His wish may prevail or it may not, depending on the facts; but we do not think he should be faced with any added obstacle arising from the matrimonial occupation of the property. And we think it wrong that the spouses should have a weapon with which to resist a sale which he himself would not possess if their roles were reversed.

1.274. But the position is different if the third party is not introduced into the ownership until after the property has been occupied by the spouses as their home. If the spouses are once sole co-owners at a time when it is their home, the consent requirement should not become inapplicable merely because they are subsequently joined in the ownership by a third party. We think it reasonable that the third party should take his interest subject, as it were, to the spouses' existing rights. We are conscious, too, that if the position were otherwise an unscrupulous spouse could defeat the other spouse's rights merely by giving a token share in his interest to someone else; and that would be plainly wrong.

(ii) *The dispositions for which consent is required*

1.275. The consent requirement applies to the trustee or trustees of the trust under which the husband and wife are co-owners, and its purpose is to prohibit him or them from making any disposition of the trust property, or of any estate or interest in it, without the necessary consents[198]. (Dispositions necessitated by changes in the trusteeship must be exempted from this requirement because they fall within the ambit of our next recommendation[199]).

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[197] Paras. 1.241–1.246, above.

[198] The taking of a further advance under an existing mortgage or charge does not amount to a disposition; but see paras. 1.345–1.364, below.

[199] Paras. 1.293–1.309, below.

1.276. It is of course dispositions of, or out of, the *trust* property held by the *trustees* which must not be made without consent: the spouses remain free to deal as they wish with their own individual beneficial interests *under* the trust. But it should not be assumed that the trustees and the spouses are necessarily different people. On the contrary, they are likely to be the same. Thus, in a typical case in which statutory co-ownership has applied to a freehold house formerly owned solely by the husband, the husband will be the only trustee and, although he may deal as he pleases with his own beneficial interest as joint tenant under the trust, he must not make any disposition affecting the freehold—the house itself—which he holds as trustee, unless his wife consents.

(iii) *Spouses who are trustees*

1.277. The consent requirement is to apply in favour of all spouses. A husband who, as in the last example, is a trustee, should have the benefit of it no less than his wife who is not. At first sight this may seem unnecessary. Surely, it may be said, there is no need for the requirement to apply when the spouse is a trustee: if he does not want to make a disposition, he can simply refuse to make it.

1.278. But the position is not so simple as this. The trust will be a trust for sale, and a wife who is a beneficiary can apply to the court under section 30 of the Law of Property Act 1925, or under section 17 of the Married Women's Property Act 1882, for an order directing her trustee husband to exercise this trust and sell the property. It is perfectly true that the husband could then try to persuade the court to exercise its discretion and refuse the application, and in some circumstances he would succeed. But we cannot say that his chances of success would be exactly the same as if he could call in aid the consent requirement. Under section 30 and section 17 the husband would have to rely on the principle that a sale will not be ordered if its effect would be to defeat the purpose for which the property was acquired[200]. But although this principle is currently being developed by the courts, it is not yet as wide as we wish the consent requirement to be. The principle certainly applies, while a couple's marriage subsists, to a property used as a matrimonial home by them both, and normally it will continue to apply even if one of them leaves[201]. Sometimes, it seems, it will continue to apply even after divorce[202]. But it seems unlikely to apply to a property which is no longer used as a home by either spouse. We think the consent requirement should apply in all these cases. Nor is width the only difference. Although we later recommend that the court should have power to dispense with the consent requirement[203] so that its enforcement, like the principle just discussed, depends in the last resort upon the court's discretion, the discretion is not quite the same. For one thing, we later recommend[204] that the Court should have power, in deciding whether to dispense with the consent requirement, to take into account the welfare of any children, and there is some doubt as to how far the court can take this into account under sections 30

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[200] *Jones* v. *Challenger* [1961] 1 Q.B. 176 (C.A.) at 181, 183.

[201] See, e.g. *Bedson* v. *Bedson* [1965] 2 Q.B. 666 (C.A.); *Appleton* v. *Appleton* [1965] 1 W.L.R. 25 (C.A.); and *Hayward* v. *Hayward* (1974) 237 *Estates Gazette* 577.

[202] *Williams* v. *Williams* [1976] 3 W.L.R. 494 (C.A.), and see *Martin* v. *Martin* (1977) 121 Sol. J. 335 (C.A.).

[203] Paras. 1.280–1.284, below.

[204] Para. 1.282, below.

and 17[205]. And for another thing, the discretion is in a sense differently weighted. Under the existing law the primary rule is that property held on trust for sale should be sold, and a spouse who wishes to resist a sale must make out a case against it. But a spouse with the benefit of a consent requirement will *prima facie* be entitled to withhold consent and thus prevent a sale, and the onus will lie upon the spouse who wants a sale to take place. In practice, these differences may not often be of great importance, but they are differences nonetheless, and it would be wrong if a trustee spouse were in any respect worse off than a spouse who was not a trustee.

1.279. We therefore think it necessary that a trustee spouse should have the benefit of the consent requirement. To avoid duplication, we recommend that this statutory requirement should take the place of the existing principle described in the preceding paragraph.

(iv) *Court's power to dispense with consent*

1.280. A requirement that no disposition of trust property should take place without the consent of a particular person (usually a beneficiary) is already familiar to the law. And the law has recognised that a right of this kind must be subject to some safeguards. The person concerned cannot be allowed to prevent a disposition indefinitely, however unreasonable his opposition may be and however damaging to other beneficiaries. Section 30 of the Law of Property Act 1925 (to some provisions of which we have had occasion to refer already) says:

> "If the trustees for sale refuse to sell or to exercise any of the powers [of management, etc., and of delegation] conferred by either of the last two sections, *or any requisite consent cannot be obtained*, any person interested may apply to the court for a vesting or other order for giving effect to the proposed transaction or for an order directing the trustees for sale to give effect thereto, and the court may make such order as it thinks fit." (Italics supplied.)

1.281. For our part we recognise the need, in giving each spouse a new statutory right to withhold consent to a disposition, to provide the other spouse (and any third party who may have acquired an interest) with the right to ask the court to dispense with the consent requirement. Such a right is needed not only in cases where consent is being withheld unreasonably, but also in those where the spouse in question is incapable of consent because of illness, or has disappeared and cannot be traced.

1.282. In recommending such a right, however, we would add a further recommendation. We think the court should have clear and express power, in considering whether to dispense with a spouse's consent, to take account not only of the needs and circumstances of the beneficiaries but also of the welfare of any children of the family[206].

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[205] See *Rawlings* v. *Rawlings* [1964] P. 398 (C.A.), per Salmon L.J. at p. 419; and *Burke* v. *Burke* [1974] 1 W.L.R. 1063 (C.A.). But see *Brown* v. *Brown* (1974) 119 Sol. J. 166 (C.A.); and *Williams* v. *Williams* [1976] 3 W.L.R. (C.A.). For cases in which this question was considered in the context of bankruptcy, see n. 117, above.

[206] The court's power to do this under the existing law is not altogether clear: see n. 205, above, and the text thereto. We use the expression "children of the family" in the sense defined in s. 52(1) of the Matrimonial Causes Act 1973. A child of the family is any child of both spouses or (with certain exceptions) any other child who has been treated by them both as a child of their family.

1.283. It is of course vital to the exercise of the court's discretion that the spouses should be able to attend the hearing and feel able to discuss freely their conflicting views about the property. In very many cases these objects will be best achieved if the case is dealt with by the local county court rather than by the High Court. We therefore recommend that the county court should have jurisdiction to deal with all such cases. This will involve the abolition, in relation to relevant land, of the present financial limits (based on the capital value or net annual value of the land concerned) to the county court's jurisdiction under section 30.

1.284. As section 30 recognises, however, opposition to a disposition may arise not only from someone whose consent is required to it and who refuses consent, but also from a trustee who is a necessary party and who declines to make it. If, for example, a trustee husband resisted a disposition, and the county court was satisfied that it should be made, the court should have power not only to dispense with his consent but also to order him to make it. It is true that an application for an order of this kind could be made under section 17 of the Married Women's Property Act 1882, under which the county court already has jurisdiction. But we think it simpler and more satisfactory to allow the matter to be dealt with on an application under one single statutory provision.

1.285. To implement all these recommendations there is in the draft Bill a clause[207] which, in relation to relevant land, replaces section 30 altogether and sets out its provisions afresh, giving full jurisdiction to the county court and making the other changes recommended. Where this new jurisdction would overlap with existing jurisdiction under section 30, or under section 17 of the Act of 1882, the existing jurisdiction should not be exercisable.

(v) *Court's power to declare whether consent is required*

1.286. Very occasionally it may be difficult to decide whether or not the consent requirement applies in favour of a particular spouse. The question whether sole co-ownership existed at some time when the property was a matrimonial home, for example, may not always be easy to answer. We consider, therefore, that the trustees and anyone else who is interested should have a simple means of seeking the court's guidance[208]. We recommend that the amended restatement of section 30, to which we have just referred, should include such a means and that the county court should have full jurisdiction to deal also with applications of this kind.

(vi) *Minority*

1.287. In accordance with the principles outlined in another context[209] earlier in this Book, we think that the consent requirement should apply in favour of a spouse even if that spouse happens to be a minor. We think also that a consent given by such a spouse should be fully binding despite the minority.

(vii) *General consents*

1.288. In a normal case a consent given by a spouse who has the benefit of the consent requirement will be confined to a particular disposition the

[207] Clause 20.

[208] We also recommend that this means should be available for determining whether or not a spouse has the right to withold consent to the appointment or discharge of a trustee (see paras. 1.293–1.303, below).

[209] Paras. 1.184–1.186, above.

details of which are known. There is no reason in principle, however, why such a spouse should not give a more general consent if she wishes to do so. For example, a wife could give a general consent to the mortgaging or charging of a particular property. She could indeed give a general consent to all dispositions, thus effectively giving up the benefit of the consent requirement altogether: in this sense "contracting out" is possible. But of course this should not be done lightly and very clear words would be necessary to achieve such an effect.

(viii) *The effect of a disposition without consent*

1.289. Failure to observe a consent requirement in favour of a wife who is not a trustee will normally be a breach of trust by the trustees, so that the wife may claim damages from them if she suffers loss. But we have already pointed out in another context[210] that a mere remedy in damages is inadequate and unsatisfactory and particularly so if (as is likely) the only trustee is the husband. To give the wife full protection we need to go beyond the personal liability of the trustees and impose a sanction in regard to the disposition itself.

1.290. In seeking to do this, we must first draw a most important distinction between two categories of case:

(1) Those where the trustees hold a legal estate, and the disposition is made to a purchaser[211] of that estate or of some interest in it.

(2) Cases which do not fall into category (1) above, either because the trustees do not hold a legal estate (a very rare situation) or, if they do, because the disponee is not a purchaser but someone who takes the property or interest as a gift.

1.291. The basic rule which we recommend is a simple one: that a disposition made without a requisite consent should be of no effect. Having regard to the fact that the consent requirement aims to preserve the right of control, this sanction, though it may seem draconian, is the only one appropriate for our purposes. But we also recommend that it should apply in its simple form only to category (2) cases. In the vast majority of cases (namely those which fall within category (1)), it should take effect subject to the provisions for registration which we put forward in paragraphs 1.310–1.333, below, and which are intended to modify its severity very considerably.

1.292. So far as category (2) cases are concerned, however, our recommendation means that the disposition will be ineffective whether the disponee knew of the consent requirement or not. This does no more than reflect the general and well-established principle that lack of notice does not protect a volunteer, or the purchaser of an interest which is merely equitable.

(2) *The trusteeship rights: rights of each spouse in respect of the trusteeship*

1.293. Where the circumstances are such that the new consent requirement applies—where, that is to say, spouses have had a matrimonial home in relevant land at a time (after the coming into force of the relevant provisions of the draft Bill) when they were sole co-owners of an ownership interest in it—we think that each spouse should also have a substantial measure of control over the trusteeship.

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[210] Para. 1.245, above. Note 170 to that paragraph points out that, although an injunction may be obtainable, this remedy is unlikely to be widely used in practice.

[211] For the meaning of "purchaser" in this context, see n. 224, below.

1.294. The primary right which we want to confer is that suggested in the working paper[212]: that a spouse who is not already a trustee should be entitled "to apply to the court for an order vesting the property in joint names"—that is to say, to become a joint trustee. Although we go to some lengths when we come to our next set of recommendations ("The registration right"[213]) to provide a spouse not on the title with a means of protection, the fact remains that the best protection of all lies in being one of the trustees, having direct control of dispositions and all their details, and receiving directly any capital money which they may involve. Where matrimonial co-ownership is expressly created it is the invariable practice, except in cases where special circumstances otherwise require, for both spouses to be on the legal title; and we think that each spouse should have a right to bring about this situation in cases where the co-ownership is not express.

1.295. The trusteeship rights which we recommend in the following paragraphs, though based on the working paper's suggestion, are more comprehensive, and fall into two groups. We discuss them under headings (*a*) and (*b*) below.

(*a*) *Negative: spouses' right to prevent other people becoming (or ceasing to be) trustees*

1.296. We recommend, first, that no new trustee should be *appointed* of the trusts under which the co-ownership exists *unless both spouses consent.* This requirement of consent corresponds broadly with the consent requirement recommended above in regard to dispositions.

1.297. In a typical case in which statutory co-ownership has applied to a house previously in the husband's sole name, so that he has become a trustee for himself and his wife, this will mean that he must not appoint anyone else to be a trustee with him unless his wife consents to the appointment.

1.298. Since a deliberate reduction in the number of trustees can reduce the beneficiaries' protection, we recommend also that both spouses' consent should be required to the discharge of a trustee from the trusteeship—unless it takes place on the appointment of a new trustee. As to this latter point, it should be borne in mind that the discharge will not be coupled with the appointment of a new trustee unless each spouse consents to the appointment.

1.299. As in the case of the consent requirement recommended in regard to dispositions, we think that a spouse's consent should still be required for this purpose, and should be valid and binding, despite his or her minority.

1.300. We recommend, however, that this consent requirement should not apply to any appointment made by the court. The court has power under section 41 of the Trustee Act 1925 to appoint new trustees and its power to do so without the consent of a spouse will amount in effect to a power to dispense with such consent. This will be analogous to the court's power to dispense with the consent requirement recommended above in regard to dispositions.

1.301. What is to be the effect of an appointment or discharge which takes place, wrongfully, without the consent of a spouse? It must be borne in mind,

[212] Para. 1.107.
[213] Paras. 1.310–1.333, below.

first, that it may, though wrongful, be innocent. For example, the appointor of a new trustee may conceivably not know that a beneficiary's spouse has acquired an interest through statutory co-ownership. We must also bear in mind the need to protect third parties who purchase the trust property from the trustees. In a case where the consent requirement will not even appear from an examination of the title it would be clearly wrong for a purchaser's ownership to be put in jeopardy simply because one of the trustees from whom he bought may prove to have been wrongly appointed.

1.302. We therefore recommend that an appointment or discharge of a trustee which does not comply with the consent requirement shall nonetheless be valid. We also recommend that no one who makes it (or concurs in it) shall be under any liability for doing so unless he knew, or ought reasonably to have known, of the consent requirement. But we recommend that where a trustee is appointed without a spouse's consent, the spouse should be entitled to ask the court[214] to remove that trustee from the trusteeship; and that the court should do so unless the appointment is one which the court itself would have made in the circumstances.

1.303. We have one final recommendation to make under this heading. Section 37(1)(*b*) of the Trustee Act 1925 provides a facility for the appointment of a separate set of trustees for any part of trust property which is held on trusts distinct from those relating to any other part or parts of it. We think this facility should be available where a spouse withholds consent to the appointment or discharge of a trustee of a home or former home: if the trust extends to other property, it should be possible to appoint a separate set of trustees for that property even if it is not held on distinct trusts. An example may be helpful. Suppose that trustees hold a trust fund upon trust for husband and wife and that the fund comprises not only their matrimonial home but other property as well. Suppose that a wife opposes the appointment of a new trustee. Her right to withhold consent arises only in virtue of her interest in the home, because that alone is "relevant land". It should therefore be possible in appropriate circumstances to make the appointment in regard to the other property, thus producing a separate set of trustees for that property.

(*b*) *Positive: spouses' right to become (and remain) trustees themselves*

1.304. We recommend that whenever the co-ownership exists under trusts of a legal estate, each spouse should be entitled to apply to the court to be appointed a trustee[215]. A minor cannot hold a legal estate in land, and we therefore except minor spouses from this recommendation. We recognise, too, that there may sometimes be a good reason why a particular spouse should not be appointed; but we think the application should normally be granted and we therefore recommend a provision requiring the court to grant it unless there is special reason for not doing so.

1.305. Of course we do not envisage that a spouse who wishes to avail herself of this right will always have to apply to the court in order to do so.

[214] For reasons similar to those given in another connection (para. 1.283, above) we recommend that the county court, as well as the High Court, should have jurisdiction to hear all such applications.

[215] We make the same recommendation in regard to jurisdiction of the High Court and the county court as that set out in n. 214, above.

Usually, we think, a request made to those (normally the existing trustees) with power to appoint new trustees will be enough to secure her appointment.

1.306. The right we are now recommending is in a sense the converse of the rights discussed under head (*a*) above. Not only should the dice be weighted (if we may use that metaphor) negatively against the appointment of anyone other than the spouses: they should also be weighted positively in favour of the appointment of the spouses.

1.307. Suppose a simple case in which a house formerly in the sole ownership of the husband has been affected by statutory co-ownership. The husband cannot appoint another person to act as trustee with him (in order to sell the house or for any other reason) unless the wife consents. This follows from the recommendations made under head (*a*). So if he says, "I want to appoint X", she is entitled to reply, "I do not want him." And if the husband then says, "All right, whom may I appoint?", this present recommendation enables her to reply, "Me", and to add, "and if you will not appoint me I will seek appointment from the court." The recommendations thus fit together in a logical sequence.

1.308. The number of persons permitted to hold land as trustees upon a private trust for sale is restricted to four[216] and appointments of new trustees must not increase the total number above four[217]. Should these restrictions be allowed to negative the right just recommended? Normally the question will not arise. In the case mentioned in the preceding paragraph the appointment of the wife would raise the number of trustees only to two. Very seldom would the appointment of a spouse raise it above four. But in these rare cases we think that the appointment should be possible nonetheless. We think it would be wrong that a spouse's right to be appointed a trustee should be defeated by a technicality such as this. We recognise that there are good reasons for the existing rule, but we think that the limited exception which we now propose will make no substantial inroads upon it. We are conscious, too, that a contrary recommendation on our part might result in unfairness as between spouses. If neither spouse were a trustee but there were three other trustees, the application of one spouse would be almost bound to succeed and that of the other to fail. And if a spouse was already one of four trustees, the application of the other would obviously be doomed.

1.309. Finally, we think that a spouse's right to be appointed a trustee should be supplemented by a right, once appointed, not to be removed from the trusteeship without good cause. The instrument creating the trust may contain an express power to remove trustees. We think that such a power should not enable a trustee-spouse to be removed without his or her consent, unless he or she remains out of the United Kingdom for more than 12 months or refuses or is unfit to act in the trust or is incapable of acting therein[218].

(*3*) *The registration right: right of a spouse to enforce the new consent requirement and the two trustee rule through registration*

1.310. If the new consent requirement[219] and the two trustee rule which exists

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[216] Trustee Act 1925, s. 34. See also Land Registration Act 1925, s. 95.
[217] Trustee Act 1925, s. 36.
[218] Cf. s. 36(1) of the Trustee Act 1925.
[219] Paras. 1.270–1.292, above.

under the present law[220], can be made fully *effective*, then we consider that a spouse may be said to enjoy both the right of control[221] and the money right[222]. But we must now turn to consider the implications of the word italicised.

1.311. The spouse in question can of course exercise her right to become a trustee, thus putting herself in a position to ensure the observance of the rules. But even if she is prepared to undertake the burden of trusteeship, and take the steps necessary to become a trustee, there is bound to be some delay. If there is obstruction by the existing trustee or trustees, who may be or include the husband, the delay may be considerable.

1.312. We must therefore find a means by which a wife who is not on the legal title may obtain immediate protection. So far as the consent requirement is concerned we have already recommended[223] that a disposition made in breach of it should be ineffective whether the disponee has notice of it or not; but we have also made it clear that this severe sanction cannot be allowed to apply in its simple form to cases where the trustees hold a legal estate and the disposition is to a purchaser[224]. In these cases it would be wrong to apply this sanction unless the existence of the consent requirement were brought to the purchaser's attention.

1.313. So far as the two trustee rule is concerned, the consequences of its breach are already well established and have been summarised before[225]. But the law has recognised (as we recognise in relation to the consent requirement) that if the trustee holds a legal estate, and the disposition is to a purchaser[226], these consequences cannot be allowed to apply unless the need to observe the rule has been brought to the purchaser's attention. In the case of registered land, the wife has a relatively satisfactory means of doing this; but in the case of unregistered land she often has no effective means of giving notice to a purchaser.

1.314. In the light of these considerations our general task becomes clearer. What we have to do is to devise a means whereby the consent requirement and the two trustee rule can be brought to the attention of purchasers.

1.315. The working paper[227] outlined several possible means by which this might be done, and we have given careful consideration to these in the light of consultation. In the end we have come to the clear conclusion that the most

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[220] Para. 1.247, above.
[221] Para. 1.231, above.
[222] Para. 1.231, above.
[223] Paras. 1.289–1.292, above.
[224] In what follows, we shall be using the term "purchaser" in the sense prescribed by the Land Charges Act 1972, s. 17(1) or, as the case may be, in that prescribed by the Land Registration Act 1925, s. 3, para. (xxi). The former definition is as follows:

> " 'purchaser' means any person (including a mortgagee or lessee) who, for valuable consideration, takes any interest in land or in a charge on land . . .".

The latter definition is:

> " 'Purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee, or other person who for valuable consideration acquires any interest in land or in any charge on land".

[225] Paras. 1.247–1.254, above.
[226] Despite the contents of the preceding footnote, "purchaser" in *this* context means a purchaser (as defined in the Law of Property Act 1925, s. 205(1) (xxi)) *who acquires a legal estate*: Law of Property Act 1925, s. 2(1). We return to this point in para. 1.322, below (see especially sub-para. (a) (ii)).
[227] Paras. 1.104–1.106 and 1.108–1.114.

satisfactory answer is provided by the existing facility of registration[228]. Many factors led to this conclusion, but we would make particular reference to three. First, the undesirability of introducing some new protective mechanism into the already complex field of conveyancing. Second, the fact that registration has already been adopted for analogous purposes by the Matrimonial Homes Act 1967[229]. And third, the fact that express consent requirements and the two trustee rule are already registrable in the case of registered land. To this last point we shall later return.

1.316. Before we deal with the details of the new registration rights which we recommend we must pause to answer a question which some may want to ask. Why are these new rights necessary? How is the position of our hypothetical wife different from that of any other beneficiary under a trust? Even the existence of the consent requirement surely does not make her unique, because express consent requirements are already known to the law? The answer is, of course, that it is not her position as a trust beneficiary, or the requirement of consent, which puts her in a special category, but the fact that neither of these things is likely to appear on the title to the property. In the ordinary way, a purchaser of trust property will see the existence of the trust when he investigates title, and if there is an express requirement of consent he will see that too. But this is not always true, even today, of matrimonial property. Spouses sometimes act informally in relation to their homes (by making contributions to the purchase price, for example, or paying for improvements which attract the operation of section 37 of the Matrimonial Proceedings and Property Act 1970) in such a way as to create co-ownerships not evidenced by any document. More important, statutory co-ownership will give rise to many more such cases. And of course the new consent requirement is also a creature of statute and will not appear from an investigation of title.

1.317. We now turn to the details of the new registration rights, dealing separately with the cases of unregistered and registered land.

(i) *Unregistered land*

1.318. We deal first with the case where the trustees for the spouses hold a legal estate which is not registered land. We recommend that a spouse who is not a trustee should have a right to register against the trustees a land charge, to be known as a land charge of Class G. This new land charge should accordingly be added to the list of land charges contained in section 2 of the Land Charges Act 1972.

1.319. Registration of a Class G land charge by or on behalf of a spouse should amount to registration of:

(1) that spouse's beneficial interest under the trust; and

(2) that spouse's consent requirement[230], *if she has one.*

1.320. We deal in the next paragraph with the significance of the words in

[228] I.e., under the Land Charges Act 1972 (in the case of unregistered land) or the Land Registration Act 1925 (in the case of registered land).

[229] Paras. 1.237–1.240, above.

[230] We should make it clear, to avoid any possible doubt, that we refer here to a spouse's right to withhold consent to *dispositions*. Spouses' rights to withhold consent to activities involving the *trusteeship* are not to be registrable.

italics. For the moment we assume that the registering spouse enjoys the benefit of the consent requirement. On that basis the effects of registration before the completion[231] of a disposition may be described as follows:

(*a*) The first effect will be that the purchaser is automatically treated as having actual notice, by virtue of section 198(1) of the Law of Property Act 1925, of the registering spouse's beneficial interest under the trust. The existing law will apply on that basis and will ensure that the beneficial interest in question is not overreached unless the *two trustee rule* is complied with. The registration facility thus remedies, for relevant land, the unsatisfactory feature of the present law about the two trustee rule in relation to land which is unregistered: that there is no satisfactory way to ensure that a purchaser has notice of the circumstances which bring the rule into play.

(*b*) The second effect will be that registration will provide notice of the *consent requirement* and so provide the background against which the sanction for breaking this requirement can fairly be allowed to operate. In other words, if a spouse's consent requirement is registered, and the consent is not given, the disposition will be of no effect.

1.321. The registration of a Class G land charge has thus a dual purpose: to enforce both the two trustee rule and the consent requirement. But there may be cases in which, although the former applies, the latter does not: for example, the co-ownership may never have been sole[232]. It is for this reason that the registration of a Class G amounts to registration of the consent requirement only if there is such a requirement in fact. In this respect, therefore, the new Class G land charge will introduce a new idea into the scheme of the Land Charges Act. But we think it will cause little difficulty in practice[233], and that it is in any case preferable to the only available alternative: of inventing *two* new land charges, of Class G for the two trustee rule and of Class H for the consent right.

1.322. We dealt, in the last paragraph but one, with the effects of registration. We now turn to the effects of non-registration:

(*a*) The first such effect should be that the disposition does overreach the beneficial interest of the spouse who could have registered but has not done so, even if the *two trustee rule* is broken. This effect should apply in favour of a purchaser of the legal estate or of any interest in it. Two points deserve to be emphasised:

(i) The overreaching is to occur in these circumstances no matter whether the purchaser has notice of the trust, or of the beneficial interest, in other ways or from other sources. This is consistent with the principles of the existing law about registration, and in particular with section 199(1) of the Law of Property Act 1925, which provides that a purchaser is not to be prejudicially affected by notice of any matter

[231] The usual protection will of course be available to a purchaser who obtains an official search certificate and completes within 15 days of its date: Land Charges Act 1972, s. 11(5) and (6).

[232] Paras. 1.272–1.274, above.

[233] See para. 1.340, below.

capable of registration under the Land Charges Act 1972 which is void or unenforceable as against him under that Act by reason of non-registration[234]. And any other solution would involve purchasers in making the enquiries which we are anxious to avoid[235].

(ii) The overreaching is to occur in favour not only of a purchaser of the legal estate but of a purchaser of any interest in it—for example, an equitable mortgagee. To this extent the class of purchaser who can claim the protection which results from non-registration is wider than the class which, under the existing law, can claim the protection which results from compliance with the two trustee rule itself[236]. But if the spouse's beneficial interest is made to amount to a land charge[237], there is no reason why it should not follow the pattern of several other land charges (including the Class F charge registrable under the Matrimonial Homes Act 1967) in being unenforceable against purchasers of any interest in a legal estate. This will serve, for example, to protect banks which take informal (and therefore equitable) charges on domestic property.

(*b*) The second effect of non-registration should be that the breach of a *consent requirement* in favour of a spouse who could have registered should *not* prejudice a purchaser of the legal estate or of any interest in it. This recommendation runs parallel to the recommendations made in sub-paragraph (*a*) above, and our reasons are broadly the same.

1.323. Before we leave the subject of unregistered land, we should like to make one or two general points.

1.324. First, it will be noticed that each spouse's beneficial interest, and each spouse's consent requirement, is treated separately. If a spouse can register, registration is of her own interest alone, and of her own requirement alone, and neither registration nor non-registration is to have any effect upon the other spouse's interest or requirement, or upon the interest of any third party under the trust. The following points may be emphasised in particular:

(i) Nothing which we have said has any application to a spouse on the legal title. He cannot register (because he has no need to). If the disposition is to take place at all, he must join in making it, and if he does join he will clearly be unable to claim that he did not consent or that his own beneficial interest was preserved.

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[234] One result of this principle is that a purchaser may be able to ignore unregistered land charges even if their existence appears from the title deeds. In theory, therefore, failure to register a Class G charge might allow a purchaser to ignore the existence of a trust disclosed in the title deeds and pay his money to a single trustee. But this would rarely happen in practice because such a trust would almost certainly be express and both spouses would almost certainly be trustees. In such a case as that, indeed, no Class G charge would be registrable.

[235] See para. 1.325, below.

[236] See n. 226, above.

[237] The fact that our recommendation will lead to this result obliges us to recommend a consequential amendment to the Law of Property Act 1925, s. 2(3) (v): to the two equitable interests listed in that paragraph there should be added an equitable interest registrable as a land charge of Class G. This will ensure that such an interest can be overreached under s. 2(2) even though protected as a land charge.

(ii) In the very rare case where neither spouse is on the legal title, both spouses will have to register a Class G charge if both are to obtain complete protection.

(iii) The interests of any third parties under the trust are in no way affected. They cannot register. They derive no direct[238] benefit from a spouse's registration. The preservation or overreaching of their interests will continue to depend upon the existing law and its existing doctrine of notice.

1.325. Secondly, we should like to emphasise that, although the changes which we have recommended here in relation to unregistered land (and those which we shall recommend in relation to registered land) are intended for the benefit of a spouse not on the legal title, this is not their only purpose or even their most important one. They are also intended to be of benefit to purchasers. If the existing law about notice, in all its forms, were left untouched despite the introduction of statutory co-ownership, we think that the position of purchasers might be difficult. Not only would the problems inherent in the present law—under which it may sometimes be hard to tell whether a purchaser has or has not received constructive notice—remain: they might be exacerbated by the introduction of statutory co-ownership itself. Co-ownership would then become in a sense the "norm" for married couples, and it could be argued that a purchaser would acquire constructive notice of a trust from the mere fact that the house he wanted to buy was a matrimonial home. As it is, we hope that the changes we propose will serve not only to forestall these added difficulties which might flow from statutory co-ownership but also to alleviate some of the problems which exist under the present law.

1.326. Finally, we have to consider in what circumstances the county court should have power under the Land Charges Act 1972, section 1(6), to vacate the registration of a Class G land charge. These circumstances should, in our view, be the same as those in which most similar land charges can be vacated by the county court: where the land concerned does not exceed £5000 in capital value or £300 in net annual value for rating[239].

(ii) *Registered land*

1.327. In turning to the subject of registered land, we must make one preliminary point. What matters, for this purpose, is whether the particular estate in relevant land which the trustees hold for the spouses is registered land. Suppose, for example, that the freehold is registered but that a leasehold estate in the land is not—perhaps because the lease was granted for a term of 21 years or less[240]: if the spouses are co-owners of the leasehold, protection is to be obtained in the way described in the preceding paragraphs; but if they are co-owners of the freehold, protection should be sought by the means applicable to registered land.

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[238] It is true, of course, that if a spouse's registration causes a purchaser to make his payment to two trustees, the third party will incidentally derive the same benefit from this compliance with the two trustee rule as does the spouse.

[239] The source of these powers is the County Courts Act 1959, Sched. 1, and we recommend that that schedule be amended accordingly. The figures quoted above were increased to their present levels by the Administration of Justice Act 1969, s. 5.

[240] Land Registration Act 1925, s. 8(1).

1.328. In the field of registered land, there is much less to do. As we have already mentioned, the existing system makes provision for registration to ensure compliance both with the two trustee rule and with the consent requirements known to the present law[241]. So far as the two trustee rule is concerned, we have already dealt fully with the way in which this may now be protected by an entry on the register[242]. The primary means of doing so is through the entry of a restriction[243]. The primary means of protecting a consent requirement is also a restriction[244]. And provision is made for the registration of these restrictions on the application of someone other than the registered proprietor[245], so that a wife not on the title would be able to have them registered.

1.329. In our earlier discussion of the two trustee rule[246] we mentioned that the appropriate restriction cannot be entered unless the Land Certificate is produced to the registrar[247], and added that this rule may not prove an obstacle in practice because if the property is mortgaged by registered charge the Land Certificate will be deposited at the registry in any case[248]. Exactly the same applies to the restriction which protects a consent requirement. In cases where the Land Certificate is not already in the registry, however, the entry of a restriction would depend, as the law now stands, upon the co-operation of the registered proprietor or proprietors. This is unsatisfactory in the present context. Restrictions are undoubtedly the best and most appropriate means of protecting the wife's interests as co-owner, and we think she should be entitled, as of right, to have them entered. We therefore recommend a statutory provision dispensing with the production of the Land Certificate in these circumstances.

1.330. It is necessary here to make explicit a point which has influenced us in reaching the conclusion expressed in the preceding paragraph: that an application for the registration of the new restrictions, or either of them, by the wife, is likely to be, or at least to seem, in some sense a hostile step. In the majority of cases the husband will be the registered proprietor and the wife's action will imply a fear on her part that, left to himself, he might ignore the consent requirement or dishonour his financial obligations as her trustee. Such fears may well be justified. But clearly she cannot count on his co-operation in making her registration. This is one reason why we recommend that the production of the Land Certificate, which is probably in his custody if it is not at the registry, should be dispensed with. And this is why we now make another recommendation—namely, that the registry should not give notice to the registered proprietor of the restriction having been entered[249].

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[241] Again we should make it clear, to avoid any possible doubt, that we refer here to requirements of consent to *dispositions*. The right of a spouse to withhold consent to activities involving the *trusteeship*, confined as it is to appointments and discharges of trustees, is not of such a kind as to be registrable: see Land Registration Act 1925, s. 58(1).

[242] Para. 1.253(*a*), above.

[243] Land Registration Act 1925, s. 58(1) (*b*). Other means of protection will be unnecessary in future if the recommendation in para. 1.329, below, is implemented.

[244] Land Registration Act 1925, s. 58(3), and Land Registration Rules 1925, r. 213. Other means of protecting this requirement also will become unnecessary with the implementation of the change recommended in para. 1.329, below.

[245] Land Registration Act 1925, s. 58(5), and Land Registration Rules 1925, r. 236.

[246] Para. 1.253(*a*), above.

[247] Land Registration Act 1925, s. 64(1) (*c*).

[248] Land Registration Act 1925, s. 65.

[249] We enlarge upon our reasons for taking this view, in another context, in para. 2.86, below.

1.331. We now turn to the effects of registration and non-registration. So far as *registration* is concerned[250], the existing law will apply and we propose no changes in it. The crucial consequence is that no one to whom a disposition is made in breach of the restriction will succeed in having the disposition registered.

1.332. The effects of *non-registration* are also governed by the existing law[251], but here we do propose one change. Broadly, if no restriction exists to prevent a disposition being registered, it will be registered, and this will confer upon the disponee a good title free from all interests not protected on the register *unless they are overriding interests*[252].

1.333. The change we recommend has to do with the words italicised. If the wife's rights are not protected on the register, we would wish the disponee to take free from them in all circumstances. This is consistent with the analogous recommendation made in the case of unregistered land[253]. But the fulfilment of this wish is jeopardised by the possibility, to which we have already referred[254], that the wife's beneficial interest might in some circumstances be an overriding interest[255]. In our view no beneficial interest which subsists under a trust for sale (or a settlement within the Settled Land Act 1925) should amount to an overriding interest, whether it belongs to a wife or to anyone else. We therefore recommend, for the removal of doubt, a general statutory provision to ensure that it does not. Such a provision is made particularly desirable by our recommendations for statutory co-ownership, because these will increase the number of cases in which a wife not on the legal title has nonetheless a beneficial interest in the property. Our recommendation will therefore avoid a potential source of conveyancing complication and delay, and dispose at the same time of a doubt about the existing law.

(iii) *Registration in practice*

1.334. Before we leave the topic of registration, we would make one or two comments of a practical nature.

(*a*) When to register?

1.335. When ought a wife not on the legal title to protect herself by registration? We hope that this question will need to be considered less and less frequently as time goes by. A main purpose of our proposals for statutory co-ownership, as we have said more than once, is to encourage married couples to create an express co-ownership when they buy their homes, putting them from the start into their joint names. If they do this, registration is not necessary to

[250] We refer, of course, to a registration which affects a purchaser: as in the case of unregistered land, he will enjoy the usual period of protection if he obtains an official search certificate.

[251] To put the matter beyond doubt, we recommend an express provision to confirm that a consent requirement which is not protected by an entry on the register does not affect a purchaser.

[252] Land Registration Act 1925, ss. 20 and 23.

[253] Para. 1.322, above.

[254] Para. 1.253(*b*), above.

[255] This possibility arises only in relation to the wife's beneficial interest. It is clear that her consent requirement cannot be an overriding interest, since it is not by its nature a right which can endure through different ownerships of the land: see *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175, H.L.

protect either of them. If all goes well, therefore, the question, "When to register?", will arise much more often during the period immediately following the introduction of statutory co-ownership (when many houses already acquired in one name will become co-owned for the first time) than it will later on.

1.336. But when it does arise, what is the answer to it? It must be emphasised that the rights and interests which registration protects are in no way dependent upon registration. They exist whether a registration is made or not. Registration serves only to protect them, and protection is not necessary unless there is some risk that they will be violated or ignored. It follows from this, in our view, that registration should be the exception, and not the rule. We should be unhappy to see any unthinking rush to register—not only because it would show a basic misconception about our recommendations and the thoughts behind them, but also because it would impose an unjustifiable burden on the Land Registry and the Land Charges Department and clutter up the registers quite unnecessarily. Almost the only situation in which registration is really necessary is that in which marital disharmony gives rise to the fear that one spouse's interests may not be accorded their due weight. In circumstances of this kind registration is necessary and desirable; but unless special circumstances do exist we do not think that a legal adviser would be under any duty to advise it.

1.337. The view which we have expressed in the preceding paragraph corresponds with the view expressed by the Solicitor-General[256] and the Lord Chancellor[257] when the Matrimonial Homes Act 1967 was going through Parliament, and subsequently endorsed by The Law Society[258], as to the registration of the Class F land charge (and its registered land equivalent) for which that Act provides; and we see no relevant difference between that case and the present one.

(*b*) How should a purchaser react?

1.338. It is worth considering briefly how a purchaser should react on discovering a registration of the kind we have been discussing. Unless the contrary appears, we use the term "purchaser" to include a mortgagee.

1.339. We take first the case of *registered land.* If he finds a restriction covering the two trustee rule, he will of course refuse to accept a disposition, on which capital money arises, from a single individual proprietor[259]. And if the purchaser finds a restriction covering the consent requirement he will similarly refuse to take a disposition unless the necessary consent is given—and given, moreover, in the disposing instrument itself, or at least in some written form which will satisfy the registrar that the requirement has been complied with. The restrictions will be cancelled automatically when any new proprietor of the land is registered.

1.340. Let us now suppose that the purchaser is buying *unregistered land* and finds a land charge of Class G on the register. If it is validly entered (as we will assume) then he will always insist upon compliance with the two trustee

[256] *Hansard* (H.C.), 21 July 1967, vol. 750, cols. 2736–7.
[257] *Hansard* (H.L.), 27 July 1967, vol. 285, cols. 1149–51.
[258] The Law Society's Gazette, January 1968, p.4.
[259] If there is a single individual proprietor he will probably be the husband; and the negative and positive rights which the wife possesses in relation to the trusteeship will normally ensure that he appoints her as an additional trustee to make the disposition.

rule. If there is currently a single individual trustee, he will require the appointment of another person to make the disposition[260]. But the Class G land charge also serves to protect the wife's consent requirement—if she has one. The purchaser will be wise to assume that she has, and to require her consent to be given. If it can be shown that no consent requirement exists in fact, then the purchaser would be safe in accepting a disposition made without consent. But the only really satisfactory way of showing this, in most cases, will be to obtain from the wife a statement that she does not claim the benefit of the requirement. In cases of outright purchase (as distinct from mortgages), this statement should normally be coupled with an application, to be handed over on completion, for the cancellation of the Class G entry. Such cancellation will be essential if awkward questions by subsequent purchasers are to be avoided: cancellation will not take place automatically (as it would in the case of registered land) and if the entry is allowed to stand each subsequent purchaser is likely to ask why no consent was obtained to the disposition. Even in the case where the wife consents to the sale, and the two trustee rule is complied with, there is a great deal to be said for having the Class G entry cancelled after completion since it then becomes obsolete.

(*c*) Class G and/or Class F?

1.341. In most cases a wife who is entitled to register a Class G land charge will be entitled also to register a land charge of Class F under the Matrimonial Homes Act 1967. (In these paragraphs our references to Class G and Class F land charges are to be treated as including references to their registered land equivalents.) Should she register both, or only one, and, in the latter case, which one?

1.342. If she is a co-owner, she should clearly seek protection (if she needs it at all) by registering a Class G land charge: it will not be enough merely to register a Class F[261]. But should she go on to register a Class F as well? In our view, the practical answer is as follows:

(i) If her position as co-owner entitles her to the protection of the two trustee rule but not to that of the consent requirement, then she has clearly something to gain by registering a Class F as well, so as to obtain the protection of the 1967 Act. It is true that her Class G registration in respect of the two trustee rule will ensure that a disposition is not made by a sole individual trustee, but if she is not herself a trustee she cannot control what dispositions are actually made.

(ii) If she has the benefit of the consent requirement as well as the two trustee rule, and her registration protects them both, then the registration of a Class F will not normally add to her protection in any way and so (but for the points about to be mentioned) she could confine herself to the registration of a Class G. But this statement needs to be qualified in two ways:

(*a*) Registration of a Class F will entitle her to notice of an action brought by a mortgagee to enforce his security and registration of a Class G will not[262]. The reasons for this apparent anomaly are technical and

[260] See the preceding footnote.
[261] See paras. 1.238 and 1.239, above.
[262] Paras. 2.27–2.33, below.

we did strive at one stage to do away with it; but we could do so only by introducing additional complications[263] and in the end we decided that the attempt was not worthwhile. The conclusion is that the wife should register a Class F as well as a Class G in any case in which there is a risk of action by a mortgagee.

(*b*) This conclusion must also follow in any case in which there is room for doubt about the applicability of the consent requirement. If there is doubt, both types of charge should be registered. This point goes far to reduce the impact of the anomaly mentioned in (*a*) above, because we think the registration of both will normally be made for safety's sake alone.

(*d*) The *Wroth* v. *Tyler* problem in the G area.

1.343. When we come to deal with the Matrimonial Homes Act 1967 later in this report, we spend some time in considering the case of *Wroth* v. *Tyler*[264]. In that case a purchaser, having contracted to buy a house, discovered before completion that the vendor's wife had registered the registered land equivalent of a Class F land charge; and the wife consistently refused to cancel her entry. The contract could not be completed, and the husband ended by having to pay large damages. After considering the matter very fully, however, we come to the conclusion that difficulties of this kind cannot be avoided by any appropriate change in the law.

1.344. Exactly the same difficulties occur, of course, where the purchaser finds a Class G entry protecting a consent requirement; and nearly all of what we say about the *Wroth* v. *Tyler* problem is equally applicable, *mutatis mutandis*, to this case—including the practical solution. The solution lies, we suggest, in recognising that whenever a husband (or other trustee) plans to dispose of a property, and the consent requirement applies in favour of the wife, he should consult her and obtain her consent before any binding obligation is incurred. Her oral agreement would normally be enough, but a written consent could be obtained if necessary. In cases where a preliminary contract is made she could, if the vendor or the purchaser wished, join in it and signify her consent to the transaction in that way.

Further advances

1.345. We want to consider here a problem which involves both the two trustee rule and the consent requirement and which demands separate treatment. It arises because a mortgage or charge of property may be made in such a way that it serves as security not only for an initial loan but also for subsequent loans, known as further advances. And the problem is: in what circumstances should the two trustee rule and the consent requirement apply in respect of the further advances and what should the result be?

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[263] Briefly, the problem is this. As we explain in more detail when we make our recommendations about occupation rights in mortgaged property (paras. 2.27–2.33, below) we wish to impose upon the mortgagee an obligation, before commencing an action, to make a special search in the Land Registry or at the Land Charges Department limited to Class F entries: on finding such an entry he must serve notice on the wife. It would be easy in theory to provide that the special search should extend also to Class G entries. The trouble is that in the case of registered land there may be nothing on the register to distinguish a restriction registered by a co-owning wife from one registered by someone else. Only by inventing a new form of restriction for this one case could the problem be overcome.

[264] [1974] Ch. 30. See paras. 2.74–2.90, below.

1.346. We emphasise that we are concerned here only with mortgages made for securing further advances. (In what follows, we shall use the term "mortgage" to include a charge.) If the mortgage is not made so as to secure further advances it will not do so; and if additional loans are to be made on the same property a fresh mortgage will have to be executed to secure them. This fresh mortgage will amount to a disposition and the two trustee rule and the consent requirement will apply as they apply to any other disposition. We are concerned here only with the case where the further advances, when made, become secured under the terms of the original mortgage—and it does not matter for this purpose whether or not the original mortgage imposed upon the lender an actual obligation to make them.

1.347. The problem may seem a small one, but it has caused us a great deal of difficulty. From the point of view of the wife (and we continue to assume that the spouse who needs protection is the wife, though it may sometimes be the husband, and occasionally both spouses may need it), it would be wrong if neither the consent requirement nor the two trustee rule were to apply at all. Though the taking of further advances does not amount to a disposition of the property, it may nonetheless rob the property of all its value just as effectively as a disposition might. So in our view the wife does need protection, especially since, for a variety of reasons, she may not have consented to the mortgage itself. On the other hand, the lender's interests must also be considered. Very many mortgages made to secure further advances are in fact mortgages made to a bank to secure a fluctuating overdraft. A situation in which the bank had to enquire about the consent requirement and the two trustee rule every time it met a cheque would obviously be intolerable. In solving this problem, therefore, we must be fair both to the wife and to the lender.

(i) *The consent requirement*

1.348. If the circumstances are such, at the time of the further advance, that the consent requirement would apply if a *disposition* of the mortgaged property were made at that time, we think that an analogous requirement of consent should apply to the taking of the further advance. It may be stated thus: the trustees of trusts under which a husband and wife are co-owners of relevant land must not borrow any money by way of further advance secured upon their estate or interest unless both spouses consent[265]. The requirement should apply whether the mortgage was made before or after the passing of the legislation which imposes it[266].

1.349. The same ancillary rules should apply as apply to the consent requirement described earlier: the new requirement should not arise unless the spouses have (at some time after the relevant statutory provisions are in force) been sole co-owners while the property was a matrimonial home of theirs; a spouse's

[265] To avoid any possible doubt, we recommend an express provision applicable to those (comparatively rare) cases in which the mortgage actually imposes an obligation upon the lender to make the further advances: no obligation of this kind should be enforceable against the lender if its discharge would involve a breach of the requirement.

[266] This recommendation is consistent with our recommendation that statutory co-ownership itself should apply to existing homes: para. 1.213, above. We recognise that mortgages made before the passing of the legislation could thus become subject, unexpectedly, to this requirement. But of course a consent can be dispensed with by the court: see the next paragraph of the text. And in so far as the co-ownership which activates the requirement is statutory co-ownership, an exercise of the unilateral power to exclude statutory co-ownership in transitional cases would serve also to exclude the requirement: paras. 1.218–1.221, above.

consent should be required, and should be valid and binding, despite his or her minority; and the court should have the same power to dispense with the consent or to declare whether or not a consent is required.

1.350. For the trustees to borrow money in breach of the requirement would amount to a breach of trust actionable by a spouse who has suffered damage. But it clearly ought not always to have a prejudicial effect upon the lender. Two questions need to be asked about the lender: when should he be affected by a breach of the requirement and, if he is affected, what should the result be?

When should the lender be affected?

1.351. The effect upon third parties of the requirement of consent to dispositions hinges simply upon registration. We are satisfied that the effect of this new requirement of consent to borrowing cannot do that. We may demonstrate this by reference to our example of the bank overdraft: the bank could not reasonably be required to make a search every time a cheque was presented.

1.352. It is necessary to remember that the requirement of consent to dispositions may have applied at the time of the original mortgage or (perhaps because the land was not relevant land at the time) it may not. If it did apply at that time, *and was registered*, we may assume for present purposes that the lender obtained the consent required (because if he did not his mortgage will be wholly void and will not be security for the original advance, let alone a further one). We think that if the registration resulted in the lender obtaining a spouse's consent at the time of the mortgage, he may fairly be treated as knowing of the need for that spouse's consent, and should be bound to obtain it, if necessary, at the time of the further advance. We think he should also be so treated if, although no registration was made at the time of the mortgage, the consent of the spouse in question was in fact, *and to the lender's knowledge*, obtained. We can state the recommendations made in this paragraph in the form of one simple rule—that a lender should be affected by failure to obtain a spouse's consent to a further advance if that spouse's consent was required to the mortgage itself and was, to the lender's knowledge, then obtained.

1.353. But if the matter ended there, a spouse who had no consent requirement at the time of the mortgage would have no means of preventing the taking of a further advance. We therefore recommend that the lender should be affected by failure to obtain a spouse's consent in one further case—namely, where notice in writing has been served on the lender or his agent by or on behalf of that spouse, stating that his or her consent is required. In practice, this recommendation will apply for the benefit, not only of a spouse who had no consent requirement at the time of the mortgage, but also of one who had a consent requirement and failed to protect it at that time.

1.354. We do not think that a lender, even if his mortgage is merely equitable, should be affected by failure to obtain a spouse's consent in any cases other than those described in the preceding two paragraphs. But an important point remains to be made. He will not be affected *at all* if a consent already given is sufficiently general to cover the further advances. We have already pointed out[267] that general consents can be given, and we think that they will frequently

[267] Para. 1.288, above.

be given in cases of this kind. In particular, we think that if a spouse is willing to consent at all to the giving of a mortgage to secure further advances, she will usually be willing to consent beforehand to the taking of the advances themselves. In the case of a mortgage to secure a bank overdraft this seems almost inevitable, because such a mortgage makes no sense if it is only to secure an initial loan, and it would hardly be practicable for the bank to obtain a spouse's consent each time a cheque was honoured. In such cases, therefore, it seems likely that the consent will be included in the mortgage and worded in such a way as to cover the further advances for which the mortgage will be security if and when they are made.

What should the result be?

1.355. When the lender is affected, in accordance with the rules just recommended, by failure to obtain a spouse's consent to a further advance, the result we recommend is that the mortgage should be ineffective *in so far as it secures the further advance*. This consequence is modelled closely upon the consequence for a disponee of failing to observe the requirement of consent to dispositions.

(ii) *The two trustee rule*

1.356. The two trustee rule, of course, is part of the existing law, and its application is clear enough: capital money must not be paid to, or applied by the direction of, a sole individual trustee. But its effect upon a lender making a further advance in the circumstances we have in mind is not entirely clear, and we therefore think it desirable to deal with this point afresh in relation to relevant land. The same two questions arise as arose in connection with the consent requirement.

When should the lender be affected?

1.357. It must be borne in mind that although the two trustee rule is a single rule it is necessary, in considering its application and effect, to look separately at the individual beneficial interests under the trust. In what follows, therefore, we shall be considering each spouse's interest individually. In passing, we would emphasise that, although a third party may on occasion have an interest under the trust in addition to the spouses, we shall not be concerned with that: no recommendation made here is intended to affect the interests of third party beneficiaries, and their position will continue to be governed by the existing law.

1.358 In our view, a lender should be affected, in relation to the making of a further advance, by the beneficial interest of a spouse, when he has what the draft Bill[268] calls "effective notice" of that interest. There are two ways in which we think he should be treated as having effective notice.

1.359. First, we think, broadly, that he should have effective notice of an interest at the time of the further advance if he was affected by it at the time of the original mortgage. We have to remember, however, that the question whether he was so affected will depend on the precise circumstances at the former time. If the land was then relevant land, the question will depend upon whether a Class G land charge (in the case of unregistered land) or an appropriate entry (in the case of registered land) was registered. But if it was not

[268] Schedule 2, paras. 4 and 5.

relevant land, this question will depend upon whether there was then a trust and, if so, whether the lender had notice under the existing rules relating to notice (in the case of unregistered land) or (in the case of registered land) whether there was an appropriate entry on the register.

1.360. But although the circumstances in which a lender may have been affected at the time of the mortgage thus vary widely, the consequence of his being so affected may be said, in each case, to be the same: namely, the failure of the mortgage to overreach the beneficial interest[269]—unless the two trustee rule was complied with. It therefore seems to us that the circumstances in which the lender should have effective notice at the time of the further advance, by reason of the situation which existed at the time of the mortgage, may be shortly and accurately summed up as follows:

> Where the mortgage failed to overreach the beneficial interest in question, *or* where the mortgage was in fact made by two or more persons or by a trust corporation known to the lender to be acting as such.

The latter half of this statement needs to be explained. It is inserted to cover the case where the lender, though affected by the beneficial interest, complied with the two trustee rule and so avoided the consequence of non-overreaching. But it goes a little further, because it covers also the case where the mortgagee was not actually affected by the interest (for example, because the land was unregistered relevant land and no Class G charge was registered in respect of it) but where he took the mortgage from two people (who could only have been trustees) or from a trust corporation knowing it to be acting as trustee: in these cases he must have known perfectly well of the existence of a trust, and this, we think, should amount to effective notice of both spouses' beneficial interests.

1.361. Second, the lender should have effective notice of an interest if, by the time of the further advance, notice in writing has been served on him or his agent, by or on behalf of the spouse who is entitled to the interest, stating that the mortgaged property is held upon trust. This alternative means of giving the lender effective notice is provided to meet the case where the circumstances at the time of the mortgage were not such that he had it then.

What should the result be?

1.362. If the lender has effective notice, in any of the ways mentioned in the two preceding paragraphs, of a spouse's interest, and he nonetheless pays the further advance to or by the direction of a single trustee, we recommend that the mortgage, in so far as it secures the advance, should not overreach that interest. If the lender does not have effective notice of a spouse's interest, then the interest should be overreached despite contravention of the two trustee rule.

1.363. The recommendation just made is subject to one necessary qualification. A beneficiary who is himself the trustee receiving or directing the application of the money advanced clearly cannot claim that his own interest under the trust is preserved for him, even if the lender does have effective notice of it.

1.364. There is one final point to note. Just as we have recommended earlier that the protection which a purchaser enjoys if no G land charge is registered

[269] In the case of registered land the consequence is usually more than a failure to overreach but we think it accurate to say nonetheless that such a failure takes place.

in respect of relevant land should extend to equitable mortgagees[270], so we now recommend that they should enjoy this present protection in respect of further advances. On this basis an equitable mortgagee's charge to secure a further advance will overreach a spouse's beneficial interest of which he has no effective notice, whether or not he observes the two trustee rule.

New rights in respect of the replacement home

1.365. We said earlier[271] that each spouse should, in addition to the right of control and the money right applicable to homes in general, have further rights applicable when one house is acquired to replace another:

> Rights to ensure that the other spouse's share of the proceeds of sale of a former home are used in the acquisition of a new one.

We now turn to the details of these further rights.

The need for the new rights

1.366. We think it only fair that these new rights should exist. A married couple need a matrimonial home. If they sell one home, they need another to replace it. If one spouse insists upon taking away his or her share of the proceeds of sale and putting them to some private use, instead of making them available for the purchase of a new home, this is clearly unfair to the other spouse. If the other spouse wants a new home similar to the old, he or she can acquire it in those circustmances only by assuming the whole financial burden of doing so—a burden which will be far greater than his or her own share of the proceeds of the old home. If he or she is unwilling or unable to shoulder this burden, then the new home will have to be substantially inferior to the old. Either way, the result is wrong.

1.367. Granted, however, that this result would indeed be wrong, why do we need to trouble about it now? The possibility of its occurrence has existed for very many years, but there is no reason to think that it has occurred very often in fact. Should we not, as it were, let sleeping dogs lie? The answer is that we cannot do so because statutory co-ownership has introduced a new factor into the situation. Hitherto, speaking broadly, homes have been co-owned only through the express and voluntary act of both spouses; and this augurs well for an amicable and sensible decision about the use of the proceeds. But statutory co-ownership does not involve any express act or presuppose the assent of both spouses, and it may apply to couples whose relationship is less than good. The chances of disagreement about the use of the proceeds are therefore greater. More important still, however, is the fact that statutory co-ownership is likely to apply to the *new* home. Up to now, a spouse who was unjustly forced, in the way described above, to shoulder the whole burden of acquiring a new home, could at least be sure that he or she would remain the sole owner of that home. After the advent of statutory co-ownership, such assurance can no longer be felt: on the contrary, unless the non-contributing spouse will co-operate in excluding it, statutory co-ownership will usually make that spouse a beneficial joint tenant of the new home. And this, unless the paying spouse had a remedy of the kind we propose, would make an unfair

[270] Para. 1.322(*a*) (ii), above.
[271] Para. 1.232, above.

situation doubly unfair. Not only that: it would, we think, be wrong in principle. In our first report we rejected the idea of introducing into our law any regime of general community of property between spouses. But a spouse who insisted on keeping his or her share of the proceeds of successive homes provided by the other spouse would in fact benefit from a kind of "creeping" community of property which could, in the end, give him or her even more than a genuine community regime would do.

The right to require a contribution

1.368. We therefore recommend that where relevant land[272] is sold during the marriage, and one spouse pays the whole or part of the cost of acquiring a new home[273], that spouse should (subject to any contrary agreement between them) have a right to require the other to make a contribution[274] towards the cost of its acquisition. The contribution required may be of any amount, but is limited in two ways:

> First, it should not exceed the other spouse's share of the proceeds of sale of the old home.
> Second, it should not exceed the amount required to ensure that the spouses' respective contributions to the new home are in proportion to their respective shares in the proceeds of the old.

Some illustrations may help to explain these two limits. Suppose the old home is sold and the husband alone buys a new one. If the new home costs more than the old, the first limit is the only one which is relevant. The husband can require the wife to contribute her whole share of the proceeds but no more. If the new home costs less than the old, the second limit comes into play. Thus, the old home may be sold for £21,000 and the new one bought for £18,000. If the spouses shared the old one equally the contribution required from the wife is limited, not to £10,500 (her share of the proceeds), but to £9,000 (half the cost of the new house); and if she was entitled to two thirds of the proceeds of the old house the contribution required from her is limited, not to £14,000, but to £12,000.

1.369 Some of the expressions and ideas embodied in the preceding paragraph need to be explained. By "new home" we mean a property in which the couple have or propose to have a matrimonial home in place of their home in the property sold. The new home may be acquired either before or (provided it is truly a replacement) after the old one is disposed of. In the former case, the acquisition may have taken place before the Bill is in force and before the couple have decided to use it as a home. In referring to the "proceeds of sale" we mean the net proceeds of sale after meeting the costs of or incidental to the sale and after satisfying any sum secured by way of mortgage. When we refer to the old home being "sold" we mean to include any disposal (by the trustees, or by the husband and wife) for a consideration in money. A spouse's right to require a "contribution" towards the cost of acquisition of the new home includes a right to require reimbursement of money already applied

[272] The term "relevant land" still has the meaning explained in paras. 1.258–1.268, above.
[273] It should, we think, be immaterial for this purpose that the new home is not in England and Wales.
[274] The recommendation covers not only cases where the other spouse has made no contribution, but also where he or she has made a contribution which is inadequate. In the latter cases a further contribution would be required.

by him or her towards that cost. The concept of the "cost of acquisition" of the new home includes:

(*a*) the costs of any improvements or alterations of the new home made to adapt it for the purposes of the husband and wife, and

(*b*) if the new home is provided by the erection of a house, the cost of erection as well as the cost of the site.

The right to go to court

1.370. The main object of these recommendations is merely to provide an impetus—to give the spouses a push in the direction of reaching a sensible settlement about the application of the proceeds of sale. We hope that the right to require a contribution, dealt with above, will be enough to do that. But the requirement may have no effect and, with this in mind, we make two further recommendations:

First, that the requiring spouse should have a right to take the matter to court.

But, second, that the court should then have a wide discretion in deciding what order to make, with power to refuse an order altogether.

1.371. To give one spouse the right to require a contribution from the other, but with no right to enforce the requirement, would obviously be pointless, so the right to go to court must exist. On the other hand there may be cases where, although the formal conditions for making the requirement are satisfied, the particular circumstances are such as to make the amount required an unreasonable one. Too long a lapse of time in making the requirement is only one example of the many factors which might lead to this conclusion. That is why we wish the court to have a wide discretion. And it should be noted that the spouse against whom the requirement has been made need do no more, in order to gain the benefit of this discretion, than simply refuse to comply with it.

1.372. We have already said that there should be no lower limit on the court's powers: the court should have power to refuse an order altogether if it sees fit. The upper limit should, we think, be the same as that recommended[275] in connection with the requirement itself. Between these two extremes, the court should be able to direct the respondent spouse to make any payments of specified amounts, and at specified times, to the applicant spouse or to any other person.

1.373. We think the court should have power also to direct that the payment to be made by the respondent spouse should be secured upon any substantive interest[276] which that spouse may have in the new home: if the respondent has acquired an interest through statutory co-ownership, this would include that interest.

1.374. But we do not think that the court's order should affect the size of the spouses' interests in the new home except in so far (if at all) as the size

[275] See para. 1.368, above.

[276] The phrase "substantive interest" is defined in clause 13(4) of the draft Bill to mean any beneficial interest (whether vested or contingent) other than an interest by way of security only, or by way of rent charge or annuity, or by way of charge under the Matrimonial Homes Act 1967.

of their interests may be affected by the proportion in which they bear the cost of its acquisition.

1.375. So far as jurisdiction is concerned, we recommend that spouses should be able to bring any application before either the High Court or a county court. We think it desirable in a case of this kind that the county court should have jurisdiction no matter what the size of the financial issues involved.

1.376. We would make one final point in connection with the recommendations made above: the spouses will always be at liberty, before or after the matter has been taken to court, to compromise their rights in any way they may see fit. If, for example, a wife were validly required by her husband, or ordered by the court, to make an immediate payment of a given sum, there would be nothing to prevent the couple agreeing that she should in fact pay a rather larger sum but do so in instalments spread over a period of years.

Transitional

1.377. Under this heading we shall make some recommendations about the new rights which relate only to the period immediately after our draft Bill reaches the statute book as an Act.

The one year's "breathing space"

1.378. We have already recommended that there should be a year's "breathing space" between the passing of the Act and the coming into force of the scheme for statutory co-ownership[277]. We now recommend that the new rights associated with co-ownership (whether statutory or not) should come into force at the same time as statutory co-ownership, so that there will be the same period of one year between the passing of the Act and the coming into force of those rights.

1.379. There are several reasons for this. If the new rights did come into force before the end of the year there would be comparatively few cases in which they actually applied. They would clearly be confined to cases in which the co-ownership was not statutory and, in as much as most of those cases would be ones in which both spouses were on the legal title, there would be little need for them. We also see some merit in having a period of one year in which the public and the legal profession can get to know these rights before they have actually to deal with them.

A contingency plan

1.380. Although we have tried strongly to discourage the automatic registration of Class G land charges (a term which we shall use to include the restrictions which are their registered land equivalents), and to suggest that their registration should be confined to those cases in which special circumstances give rise to anxiety about the security of the rights which they protect, we are aware that applications to register will in fact be made, at the earliest opportunity, by a number of spouses—a number the size of which it is difficult to forecast.

1.381. We have been given to understand that there may be administrative difficulties about the registration of the Class G land charge. Because of the

[277] Para. 1.215, above.

programme of work to which it is already committed, the Land Registry might find it impossible, in the immediate future, to cope satisfactorily with any substantial number of additional applications.

1.382. Whether this proves to be a real problem in practice will largely depend upon the speed with which our proposals make progress towards the statute book. There is some reason to think that pressure on the Land Registry will ease towards the end of 1978, and if our proposals did not reach the statute book until then there would probably be no problem at all. For this reason we have not made any provision for this difficulty in the draft Bill.

1.383. We recognise, however, that if events should move at a speed which seems likely to put the Registry in real difficulties, then changes will have to be made; and we think it is incumbent on us to consider what form they should take.

1.384. We have considered several alternatives, but we do not think it necessary to rehearse them all here. The only satisfactory solution, in our view, would be to take out the provision whereby the scheme for statutory co-ownership, and the new co-ownership rights, come into force one year after the passing of the Act, and to replace it by a provision enabling the Lord Chancellor to fix by order the date upon which they should come into force. This date could then be decided upon in the light of the circumstances which prevailed.

PART II PROVISIONS TO PRESERVE EQUALITY

Married couples

1.385. The recommendations made in this Part of Book One follow logically from our recommendations about statutory co-ownership, but they are dealt with separately because (for reasons we shall explain) their application is wider than that of statutory co-ownership itself.

Introductory

1.386. Our proposals for statutory co-ownership are founded on the belief that it is normally right for a married couple to own their home equally, no matter how or by whom it may have been paid for. It seems to us to follow from this that their equal holding, once established, should normally continue no matter who may subsequently put money into the home.

1.387. Unfortunately, there are certain existing rules of law which, if left to operate freely, would militate against this latter objective, and with these we must now deal. They have to do with payments made for the acquisition of property (including mortgage repayments)[278] or for its improvement, and they usually have the effect of giving the payer an added beneficial interest which is more or less commensurate with the payment. We turn first to the rule about improvements.

Improvements

1.388. Prior to the enactment of section 37 of the Matrimonial Proceedings and Property Act 1970,[279] there had been doubt as to whether a spouse could, by making improvements to a property, earn a beneficial interest, or a larger beneficial interest, in it. That section now provides as follows:

> "It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed or, in default of such agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or in any other proceedings)."

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[278] As appears more fully in paras. 1.397 and 1.398, below, we refer here to the rule by which a person who contributes (particularly through mortgage repayments) to the acquisition of property is sometimes presumed to acquire a beneficial interest (or an added beneficial interest) by doing so. This is to be distinguished from the presumption of *advancement*, by which a husband who buys property in his wife's name is presumed to intend a gift to her. We do not deal with this presumption at all because it does not militate against the principle of equal home ownership. Since statutory co-ownership does not apply until completion (para. 1.25, above), the operation of this presumption will be followed (immediately or after an interval) by a co-ownership occasion which (unless statutory co-ownership is effectively excluded) will make the presumption irrelevant for the future.

[279] The section was recommended by the Law Commission: (1969) Law Com. No. 25, para. 57.

Our recommendations about section 37 may conveniently be made under the following sub-headings.

(i) *The general rule*

1.389. For reasons which we have already indicated, we recommend that where spouses hold a house or other land equally (whether as beneficial joint tenants or tenants in common in equal shares, and whether or not through the operation of statutory co-ownership) section 37 should not be permitted to upset their equal holding. The simplest and most satisfactory way of achieving this result is through a provision declaring that in these circumstances the contribution in question shall be deemed to be made equally by the two of them.

(ii) *The exception*

1.390. We do however recommend one exception to this provision: we do not think it should apply when the equal holding has come about only through the prior operation of section 37 (or of the presumption about the cost of acquisition with which we shall deal later[280]). Although we think that equal ownership of the matrimonial home is normally desirable, we fully recognise that in some cases the ownership ought not to be equal. The most important of these cases is that in which the spouses both agree upon an unequal holding. Where the holding is unequal, section 37 (and the presumption just mentioned) will continue to operate. It may be that their operation will serve at some point, quite fortuitously, to create an equal holding. In our view it would not be sensible to say, merely because of this, that they should not operate in future. For one thing, it would be illogical to do so. In such a case, equality has been deliberately excluded, from the outset and probably for good reason, in favour of inequality and all that inequality implies—including the continued operation of section 37 (and the presumption); and the mere fact that equality happens to have come about through that operation gives no ground for inferring a change in the original intention. For another thing, a provision along these lines could create uncertainty. It is often difficult to know, in any given case, precisely what added beneficial interest, if any, section 37 has served to confer upon a spouse, so it would often be hard to say whether equality had been produced or not. Yet the future operation of the section would depend upon this, and so doubt would be piled upon doubt.

(iii) *The uncertain accrual*

1.391. In recommending that (with the exception just mentioned), section 37 should not apply in cases of equal co-ownership, we have to face the transitional problem of the uncertain accrual. We use this expression to describe the situation in which one spouse has made an improvement to a property but the question whether this has caused a beneficial interest to accrue, and if so the extent of that interest, has not been answered, either by agreement or by court order.

1.392. Suppose then, that at the time when the provisions implementing our main recommendation came into force the spouses' ownership is equal, subject only to an uncertain accrual. (We assume that the equality has not come about through the prior operation of section 37, or of the presumption

[280] Paras. 1.397–1.400, below.

about the cost of acquisition.) We could, of course, decide to do nothing at all about this situation. Then the uncertain accrual would remain, and remain uncertain, until its existence and extent were settled (unless something happened which caused it to disappear or to become quantified). But this seems to us unsatisfactory. For one thing it might eventually turn out that there had been no accrual at all—either because the improvement was not "substantial", or because the court decided in its discretion that, though substantial, it should give rise to no accrual. So it would be impossible to know, in the meantime, whether the co-ownership was equal or not and thus whether section 37 did or did not apply to further improvements.

1.393. We think that if the uncertain accrual occurred in circumstances in which our provisions to preserve equality would have prevented it if they had been in force, it should be deemed not to have occurred and thus be nullified altogether. But our policy elsewhere in this report is that people should not be deprived of property rights existing when our proposals come into effect unless they are given some means of retaining them. We therefore recommend that a spouse in this situation should have a right to direct, by writing signed by him or her (or by his or her agent), that the uncertain accrual should be preserved. We recommend further that this direction should have to be made before the date on which the provisions to preserve equality come into force, but that this date should be the same as that on which the provisions for statutory co-ownership come into force (i.e., at least one year after the passing of the Act[281]). Although we have, for reasons of principle, provided spouses with a means of preserving uncertain accruals, we do not envisage that it will be frequently used and (in as much as its use would militate against the principle of equality as well as giving rise to continued uncertainty) we hope that it will not. There is one other situation in which an uncertain accrual ought not to be retrospectively nullified on the date in question, and that is where the marriage has been terminated before that date: our proposals must not be allowed to upset, or to undermine the basis of, any property adjustment made on divorce or nullity.

(iv) *The effect of statutory co-ownership*

1.394. Before we leave this subject we think it may be helpful to mention briefly the effect of statutory co-ownership upon properties to which section 37 may have applied.

1.395. The first point to make is that some of these properties may never fall, even potentially, within the ambit of statutory co-ownership because they are not matrimonial homes. Section 37 is not confined to the matrimonial home and neither are our recommendations for its amendment: we return to this point later[282].

1.396. But suppose that property to which section 37 may have applied is of a kind on which statutory co-ownership may operate. The following points may be made:

(*a*) The question whether statutory co-ownership applies will of course depend upon whether the situation falls within one of the exceptions

[281] Para. 1.215, above.
[282] Paras. 1.401–1.403, below.

dealt with in Part 1A of this Book. The ones most likely to apply are those described under the heading, "Exclusion by agreement between the spouses". Two observations may be made here. First, that an agreement under section 37 may itself amount to an agreement sufficient to exclude statutory co-ownership under this exception[283]. Second, that if, before the improvement is made, there is an excluding agreement of some kind already in existence, an accrual (whether certain or uncertain) resulting from the improvement will not affect the efficacy of that agreement as an excluding agreement: statutory co-ownership is excluded even if the spouses' interests change between the date of the excluding agreement and the co-ownership occasion.

(*b*) The making, by one spouse, of a direction to preserve an uncertain accrual will not by itself affect the onset of statutory co-ownership one way or the other. It will certainly not amount of itself to an excluding instrument. But if the spouse in question wants to exclude statutory co-ownership as well as to preserve the uncertain accrual, and the situation is not within one of the exceptions already, that spouse may go on to declare that statutory co-ownership is not to to apply: during the first year, a declaration to this effect may be made unilaterally[284].

(*c*) If statutory co-ownership does apply on any occasion, then of course it will serve to override any uncertain accrual which may then exist. Whatever interest the spouse may have acquired by virtue of the improvement will be subject to the joint tenancy imposed by statutory co-ownership, as well as any other interest of that spouse and any interest of the other spouse—and the result will be a joint tenancy of the whole.

Acquisition payments (including mortgage repayments)

1.397. We recommend that where two spouses are equal owners of a house or other land (whether as beneficial joint tenants or tenants in common in equal shares) any contribution made by one of them to the cost of its acquisition should, for the purposes of any presumption which might otherwise operate to confer an interest or a larger interest on that one, be treated as made equally by the two of them. And a contribution to the cost of acquisition should include any repayment of money borrowed to meet that cost. This recommendation parallels the recommendation as to improvements made in paragraph 1.389, above.

1.398. Since spouses are not likely to be equal co-owners of a property prior to the making of acquisition payments strictly so called, this recommendation is unlikely to apply to such payments. It is more likely to affect mortgage repayments. Under the present law the repayment by one spouse of money borrowed to finance the purchase of property may sometimes give that spouse an interest, or a larger interest, in the property. This is comparatively rare: it seems clear, for example, that it will not happen if the spouses have already declared what their beneficial interests are to be, because the declaration will

[283] Paras. 1.135–1.141, above.
[284] Paras. 1.218–1.221, above.

prevail despite the making of the mortgage repayments[285]. But the position, when it does arise, is analogous to the position under section 37 and, for reasons already given, we think that the principle of equality should be preserved from any danger arising from this source.

1.399. We do not think it necessary, however, to recommend any further provisions analogous to those recommended to deal with the problem of the uncertain accrual under section 37. There are several reasons for this—for example:

(*a*) Though the existence of uncertain accruals by reason of mortgage repayments is possible, they will be rare and the area of uncertainty will normally be smaller (in that such accruals are not (as accruals under section 37 are) directly subject to the court's discretion).

(*b*) Since accruals by reason of mortgage repayments occur only if the property is owned solely by one spouse or if, it being co-owned, the spouses' interests are not expressly declared, uncertain accruals will tend to exist only in those cases in which statutory co-ownership will apply. And if it does apply, it will in effect nullify the accrual and thus solve the problem. A spouse who wishes, in such circumstances, to preserve an uncertain accrual can of course do so, in the transitional year, by a unilateral exclusion of statutory co-ownership[286].

1.400. We do however recommend the same exception to the new rule as we recommend in regard to the new rule we propose about section 37—namely that it should not apply when the equal co-ownership has come about fortuitously, by the operation of section 37 itself or of this presumption about acquisition payments.

The new provisions are not limited to matrimonial homes

1.401. We think that the new provisions to preserve equality should apply to all cases where spouses are equal co-owners of land, and should not be limited to cases where the land comprises their matrimonial home.

1.402. None of the other changes proposed in this report is applicable as widely as this, but the conclusion we have reached seems to us inevitable. Our primary objective, of course, is to catch the matrimonial home but (as we have explained elsewhere[287]) the only satisfactory way to define a matrimonial home is as property which has been *used* as a matrimonial home. If we applied that definition in this context our recommendation would entail (for example) one rule for improvements made before such use began and another for improvements made afterwards—and this would be quite anomalous, particularly since improvements to property bought as a home are very often made before it has been used as such.

1.403. In any case we think the width of these recommendations is more apparent than real. It is, we think, very seldom that the rule about improve-

[285] See, e.g., *Leake* v. *Bruzzi* [1974] 1 W.L.R. 1528 (C.A.). This case makes it clear that one spouse making mortgage repayments after the other has left home may, even in these circumstances, be entitled to *credit* for the actual amount of the payments (or part of it). As to this, see also *Suttill* v. *Graham* [1977] 1 W.L.R. 819 (C.A.). But that is not a point with which we are concerned here.

[286] See paras. 1.218–1.221, above.

[287] Para. 1.262, above.

ments and the presumption about acquisition payments apply to land at all unless the spouses use it, or intend to use it, as a matrimonial home. Other land is seldom held by husband and wife as equal co-owners and, if it is, their holding will usually be regulated with a degree of formality sufficient to leave little room for the rule and the presumption. But in so far as our recommendations do in practice affect other land we think it is, on balance, right that they should do so.

Engaged couples

1.404. The provisions to preserve equality will operate in effect to prevent the operation of the rule about improvements and the presumption about acquisition payments which we describe earlier. How far should the new provisions apply to engaged couples as well as to married ones? To answer that question we must first consider how far the rule and the presumption themselves apply to engaged couples.

1.405. *The rule about improvements.*—This is expressly applied, by section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1970, to property in which either party, or both parties, to an agreement to marry has or have a beneficial interest—but only "where [the] agreement to marry is terminated".

1.406. *The presumption about acquisition payments.*—This presumption is of general application and therefore applies as much to engaged couples as it does to husbands and wives.

1.407. Having stated the existing law about the rule and the presumption, we are struck by an anomaly. We refer to the rule about improvements, applied to engaged couples by section 2(1) of the 1970 Act. This provision was enacted as a result of a recommendation in our report on *Breach of Promise of Marriage*[288], and we were concerned in that report, as its title suggests, to deal with cases where an engagement had terminated. But we do not think that the application of the rule about improvements should be confined to those cases. The justification for applying it in cases where the agreement to marry is implemented is, if anything, even stronger. We therefore recommend that it be extended to cover such cases.

1.408. With that extension, the rule and the presumption will henceforth apply to all engaged couples. How far should they give way to our recommended provisions to preserve equality?

1.409. In answering this question we think that three different types of case must be distinguished:

(*a*) *Cases where the engagement leads to marriage.*— We have no doubt that the rules to preserve equality should apply during an engagement if the couple do subsequently marry.

(*b*) *Cases where the engagement is broken off.*—We think that the provisions to preserve equality ought not to apply if the engagement is terminated by the act of one or both of the parties. In this situation we think that the principle of equality has no place and that, as regards both the rule and the presumption, there should in all cases be a full "accounting" between the parties.

[288] (1969) Law Com. No. 26, para. 43.

(*c*) *Cases where the engagement ends through death.*—Cases where the couple remain engaged and are prevented from marrying only by the death of one (or both) of them seem to us to fall somewhere between the two foregoing types of case. But they fall, in our view, closer to the first than to the second. The death occurs while the couple are still engaged: the indications are that they would have married. We see no reason to distinguish a case in which death occurs just before marrying from one in which it occurs just afterwards. Accordingly, we recommend that the provisions to preserve equality should apply in this situation.

Transitional

1.410. Since the provisions to preserve equality are so closely associated with the introduction of statutory co-ownership, we recommend that they should come into force at the same time as the statutory co-ownership scheme. The draft Bill envisages this time as being one year after its passing. But if it proves necessary to implement the contingency plan which we put forward earlier[289], the time will be that determined by the Lord Chancellor.

[289] Paras. 1.380–1.384, above.

Co-ownership of "winkling money"

1.411. Statutory tenants of property within the Rent Act 1977 enjoy the right of continued occupation given them by that Act, but they lose this right as soon as they move out of the property. And statutory tenants within the Rent (Agriculture) Act 1976 enjoy an analogous right, but they, too, lose it when they move out. We have mentioned earlier in this Book[290] that since statutory tenancies amount to nothing more than rights of occupation, they are in effect co-owned by virtue of the Matrimonial Homes Act 1967, which gives spouses an equal right of occupation in respect of the matrimonial home. But there is another point to consider.

1.412. Landlords who are particularly anxious, for whatever reason, to get vacant possession of their properties, and who have no statutory grounds for doing so, frequently offer their statutory tenants a sum of money, or other consideration, for leaving. Of course the tenants have no obligation to take the money, still less to leave, but sometimes they do accept the offer and vacate the premises. Whether this is a happy state of affairs is not a question with which we are now concerned: the main danger lies, of course, in the fact that a tenant may accept what seems to him an adequate sum, and leave the property, only to find that he cannot obtain comparable accommodation elsewhere or that the sum he took is quite inadequate to cover the added cost he has to incur.

1.413. But the payment of money to a statutory tenant to move out—it is often called "winkling money"—is a fact of life; and it seems to us that we must consider it in the light of the philosophy which underlies this Book. That philosophy leads us to recommend that it should be subject to some form of co-ownership. In this connection it must be borne in mind that money paid to a tenant for the surrender of a contractual tenancy to which statutory co-ownership has applied will be co-owned by virtue of our earlier proposals.

1.414. We think, however, that any scheme for the co-ownership of winkling money should be a very simple one. We see no need, in this context, for elaborate exceptions. We think that whenever two spouses have a home in a property of which one is a statutory tenant (or both are statutory tenants) and pecuniary consideration is received by one of them for the giving up of possession, the other should be entitled to receive from that one a sum equal to half its net amount or value.

1.415. For this purpose we recommend that pecuniary consideration should include any consideration in money or money's worth—except land or an interest in land. We make this exception partly for practical reasons and partly because if the land is a home (as normally it will be) it will fall within our scheme for statutory co-ownership in any case [291]. And we recommend that the *net* amount or value of the consideration received by a spouse (of which

[290] Para. 1.15, above.

[291] It is true that if, instead of paying winkling money, the landlord provides the statutory tenant with alternative accommodation, unfairness to the other spouse may result if she is prevented from living in the new accommodation at all, so that it never becomes a matrimonial home. But the powers exercisable by the court on breakdown of marriage would enable it to deal with this situation; and it is not one for which we can suggest any further remedy within the framework of this report.

the other spouse is entitled to half) should be its amount or value reduced by any consideration which that spouse himself has to give (e.g., to a sub-tenant) to obtain possession of a part in order to give possession of the whole.

Rules under the Land Registration Act 1925 and the Land Charges Act 1972

1.416. Many of the recommendations made in this Book have repercussions on the system set up for the registration of title to land, and on the system of registration of land charges relating to unregistered land. We therefore recommend that the powers of making rules under section 144 of the Land Registration Act 1925, and section 16 of the Land Charges Act 1972, should include power to make any rules needed to implement the legislative provisions recommended in this Book.

PART IV SUMMARY OF RECOMMENDATIONS

1.417. The following is a summary of this Book. It contains all our positive recommendations, but it goes some way beyond a bare statement of these and includes background details necessary to an understanding of our scheme as a whole. References to paragraphs are to those paragraphs of the report in which the recommendations are made or the points in question discussed. References to clauses are to those clauses of the draft Matrimonial Homes (Co-ownership) Bill which deal with recommendations requiring statutory implementation.

PART IA STATUTORY CO-OWNERSHIP

Statutory co-ownership

(1) Subject to the qualifications dealt with later, a husband and wife should by statute become equal co-owners as

joint tenants
of any ownership interest
in the matrimonial home.

The three separate elements in this statement are discussed below.
(Paragraph 1.1.)

(2) Definitions:

"Statutory co-ownership" will mean co-ownership which arises by operation of the proposed new legislation. Married couples may impose co-ownership upon their homes expressly: most do so already, and we hope that still more will do so in future. Where express co-ownership has been imposed, our scheme for statutory co-ownership will not apply at all.

"The owner spouse" will mean the spouse who is, unless and until statutory co-ownership applies, the sole owner of the ownership interest.

"The acquiring spouse" will mean the spouse who becomes, through statutory co-ownership, a co-owner of that interest; and it will be assumed that the owner spouse is the husband and the acquiring spouse the wife, though our recommendations apply in exactly the same way if these roles are reversed.

(Paragraphs 1.2–1.6, and clause 1(1).)

"Joint tenants"

(3) Spouses holding under statutory co-ownership should do so as beneficial joint tenants, so that (unless the joint tenancy has previously been severed) the interest of the spouse who dies first will pass automatically to the survivor.
(Paragraphs 1.8–1.10, and clause 6(1).)

"Of any ownership interest"

(4) We use the term "an ownership interest" to describe the type of interest in property which should attract statutory co-ownership. Legally, a property may be either *freehold* or *leasehold*; and the law speaks not of "owning" it but of having a particular *interest* in it.
(Paragraphs 1.11 and 1.12.)

Freehold or leasehold

(5) Eligibility for statutory co-ownership should extend to all leasehold homes as well as to freehold ones.
(Paragraph 1.14, and clause 2(2).)

(6) This means that all homes held upon tenancies should be eligible, whether or not the tenancy is periodic and however short its duration. Local authority lettings are thus included. So are tenancies which are protected tenancies under the Rent Act. But "statutory tenancies" are not included because a "statutory tenant", having no proprietory interest in the property, is not technically a "tenant" at all, and the rights he does possess are effectively co-owned already by virtue of the Matrimonial Homes Act 1967.
(Paragraphs 1.14 and 1.15.)

Interest

(7) Though homes of any tenure should be eligible for statutory co-ownership, statutory co-ownership must actually apply to an *interest in* the home; and if that interest is to be eligible:

(*a*) It should be a beneficial interest, not one held as trustee.

(*b*) It should be an absolute interest in possession and not, for example, a life interest or a future interest. It might be legal or equitable and, in the latter case, it might be an interest which a spouse holds as one of two or more beneficial joint tenants or tenants in common. But an interest acquired under a contract for the purchase of land should not rank as an ownership interest so long as any purchase money remains to be paid to the vendor in that capacity.

(*c*) It should be owned by one of the spouses. If both spouses have an ownership interest in the same property, the situation will usually be such that statutory co-ownership is excluded by one of the exceptions mentioned later, but if it is not excluded it should apply to both interests.

(Paragraphs 1.17–1.29, and clauses 2(1), (2), (3) and (4) and 4.)

"In the matrimonial home"

Use as a matrimonial home

(8) Statutory co-ownership should apply to an ownership interest only if the owner spouse has it at a time when the property is used as a matrimonial home. If different ownership interests are acquired at different times, this test should be applied separately to each one.

(Paragraphs 1.31–1.33, and clause 5.)

Homes not amounting to "land": caravans, houseboats, etc.

(9) To be eligible for statutory co-ownership, the home must be attached to the land in such a way as to be part of it in law. This rules out most caravans, houseboats, etc.

(Paragraphs 1.34–1.36, and clause 3(1).)

The extent of the matrimonial home

(10) The primary subject of statutory co-ownership should be the accommodation in which the couple actually live, but it should extend to any garage, outhouse, garden, yard and appurtenances which go with it.

(Paragraph 1.38, and clause 3(1).)

(11) It should also extend to property which does not form part of the immediate home, either because it is used for some non-residential purpose or because it is not in the occupation of the spouses, but goes with the home as an adjunct to it.

(Paragraph 1.39, and clause 3(2) and (3).)

Homes forming part of a larger unit

(12) If a spouse is beneficially interested not only in the home but also in adjoining or neighbouring property which does not form part of the home (and is not a mere adjunct to it), the applicability of statutory co-ownership should depend upon whether the home part and the non-home part are readily severable from one another:

(*a*) If they are, statutory co-ownership should apply to the home part only.

(*b*) If they are not, it should apply to neither part.

But if the spouse in question subsequently ceases to have an interest in the non-home part (or in a material part of it), the situation should be considered afresh for the purposes of statutory co-ownership.
(Paragraphs 1.46–1.48 and 1.51, and clause 13.)

Effect

The operation of statutory co-ownership

(13) As mentioned above, the ownership interest to which statutory co-ownership applies may be legal or equitable. If it is equitable, the acquiring spouse should become a direct joint tenant of it with the owner spouse. This should be treated as having come about through an assignment by the owner spouse to himself and the acquiring spouse.
(Paragraphs 1.54 and 1.61, and clause 6(1).)

(14) If the ownership interest is a legal one, the owner spouse should become a trustee holding upon trust for himself and the acquiring spouse as beneficial joint tenants. This should be treated as having come about through a declaration of trust made by the owner spouse.
(Paragraphs 1.55 and 1.61, and clause 6(1).)

(15) Two consequences may be mentioned:

(*a*) If the interest of the owner spouse is an interest as a beneficial joint tenant, the effect of the assignment which he is deemed to make (see paragraph (13), above) will be to sever the joint tenancy as between himself and the other joint tenant or tenants.

(*b*) If the interest of the owner spouse is a legal estate, the declaration of trust which he is deemed to make (see paragraph (14), above) will give rise to a trust for sale.

(Paragraphs 1.62 and 1.63, and clause 6(1) (*c*).)

(16) If the owner spouse holds his interest subject to a limitation covenant or condition which takes away or limits his right to assign or declare a trust of it, this should not prevent the operation of statutory co-ownership.
(Paragraph 1.65, and clause 6(2).)

Should interests held under statutory co-ownership be inalienable?

(17) In regard to the beneficial interests of individual spouses held under statutory co-ownership, there should be no special curtailment of the normal powers of a beneficial joint tenant to sever the joint tenancy or to dispose of his severable interest.
(Paragraph 1.69.)

Commencement

(18) Statutory co-ownership should commence when three ingredients first co-exist: the married state of the spouses, the possession (by one or both of them) of an ownership interest, and their use of the property as a matrimonial home.
(Paragraph 1.70).

Co-ownership occasions

(19) Any occasion on which these three ingredients come to co-exist is one which we call a co-ownership "occasion". Four such occasions may be distinguished:

(i) When the couple, already married and already having an ownership interest, set up home in the property.

(ii) When the couple, already married and already having a home in the property, acquire an ownership interest in it (or a further ownership interest).

(iii) When the couple, already having an ownership interest and a home in the property, marry one another.

(iv) When the couple, already married and already having both a home in the property and an ownership interest, acquire an ownership interest in other property forming an addition to the home.

(Paragraph 1.71, and clause 5(2), (3)(*a*), (4) and (5).)

Marriage

(20) For the purposes of statutory co-ownership a couple should be treated as married if, and only if, their marriage is recognised by English law (including English private international law).
(Paragraph 1.73.)

(21) Further, the fact that a marriage is, on one side or both, *potentially* polygamous, should not prevent it from being treated as a marriage.
(Paragraph 1.76, and clause 1(2).)

(22) But if the marriage is, on either side, *actually* polygamous (so that the husband has in fact more than one wife, or the wife more than one husband) statutory co-ownership should not apply.
(Paragraph 1.81, and clause 1(2).)

(23) A marriage should not be treated as such if it is void from the beginning, as distinct from being merely voidable, or if it has been terminated.
(Paragraphs 1.82 and 1.88.)

Acquisition of the ownership interest

(24) A spouse should be treated as acquiring an ownership interest whenever he comes to have such an interest, whether he does so by acquiring an interest which is itself an ownership interest, or by some change occurring in an interest which he already has, or otherwise.
(Paragraph 1.91, and clause 5(3)(*b*).)

Use as a home

(25) The time at which a property is first used as a home must be a question of fact. For statutory co-ownership to apply, it must be used as a home of both spouses: use as a home for one alone should not be sufficient, but use as a home of both does not necessarily require the physical presence of both.
(Paragraph 1.99.)

(26) If the spouses have a home in two or more properties at the same time, statutory co-ownership should (assuming the presence of its other ingredients) apply to both or all of them.
(Paragraph 1.100.)

Duration

(27) The interests arising under statutory co-ownership should have all the characteristics, including permanence, which such interests would have it expressly created.
(Paragraph 1.101.)

(28) This means that the interests may outlast the use of the property as a matrimonial home.
(Paragraph 1.102.)

(29) It also means, in regard to any particular property, that interests acquired under statutory co-ownership will normally extend to all those parts of it which have at any time been used as the spouses' home, even though there may have been no time when they were all simultaneously so used.
(Paragraph 1.103.)

Major exceptions

Exclusion by owner spouse of an interest acquired before (or on) the marriage

(30) An owner spouse who acquires an interest in a property before, or on, marriage should be entitled to exclude that interest from statutory co-ownership if, but only if—

(i) his interest is a separate interest—in the sense that it is not held by him as a joint tenant or tenant in common *with the other spouse*, and

(ii) he makes a written excluding declaration, signed and attested, before the marriage.

(Paragraphs 1.108, 1.112 and 1.113, and clause 9(1)(*a*) and (2) (and see clause 8(3) and (4)).)

(31) Although the owner spouse must make the declaration before the marriage, he should not be required to make it specifically with reference to a named person whom he proposes to marry: a general declaration should be effective.
(Paragraph 1.110, and clause 9(1)(*a*).)

(32) If an owner spouse, having made an excluding declaration, later wishes to revoke it, he should have power to do so by further writing signed by him. If the original declaration was a general one, the revocation may be either total or for the benefit of a particular named spouse only.
(Paragraph 1.111, and clause 9(1)(*b*).)

(33) The owner spouse's power to exclude should affect only the property in question and should not apply to any property for which he may exchange it before the marriage, or to any subsequent home bought during the marriage, even if purchased with the proceeds of sale of the excluded property.
(Paragraph 1.113.)

(34) If the owner spouse holds his interest as a beneficial joint tenant with a third party, any excluding declaration he may make in regard to his interest as a joint tenant should apply equally to the interest he acquires as tenant in common if the joint tenancy should later be severed.
(Paragraph 1.115, and clause 9(3).)

Exclusion by a donor

(35) Statutory co-ownership should not apply to an interest in a property given by a donor (a term which includes a settlor or testator), whether before or after the marriage—

(i) to one spouse as a separate interest (in the sense explained in paragraph (30) of this summary), provided the donor directs, in the instrument making the gift, that the interest is to be enjoyed free of statutory co-ownership, or

(ii) to both the spouses as beneficial joint tenants or tenants in common.
(Paragraphs 1.118, 1.121 and 1.123, and clause 10(1) and (2).)

(36) Where the interest is acquired under a settlement incorporating a power of appointment which is capable of being exercised in favour of a donee spouse (or spouses), then—

(i) if the interest is acquired by the spouse (or spouses) through the *exercise* of the power, the gift should be treated as made by that exercise; and

(ii) If the interest is acquired by a single spouse through the *release* of the power, the releasor should be treated as the donor for this purpose, so that he may incorporate in it an effective excluding declaration;

but the exercise or release should not be treated as a gift at all unless both it and the settlement were made without consideration.
(Paragraph 1.124, and clause 10(3) and (4).)

(37) An exclusion made by a donor in regard to any interest as beneficial joint tenant should also exclude the interest as tenant in common which may arise from it through severance.
(Paragraph 1.125, and clause 10(5).)

Exclusion by agreement between the spouses

(38) In principle, a couple should be free to exclude statutory co-ownership by mutual agreement. But such an agreement should be effective for this purpose only if it leaves the spouses' actual interests clear. Therefore the agreement should be considered less as an agreement *against* statutory co-ownership than as an agreement *for* some other ownership.
(Paragraphs 1.127–1.133.)

(i) *Agreements for express co-ownership*

(39) A couple who agree to create an express *co*-ownership of their own before a co-ownership occasion occurs should be taken to have provided sufficient evidence of their desire to exclude statutory co-ownership.
(Paragraph 1.135.)

(40) More specifically, spouses should be able to achieve this result in any one of the following ways:

(*a*) By making a written agreement signed by them both, specifying an express co-ownership of their own and, if the co-ownership is a tenancy in common, the relative size of their shares.

(*b*) By simply taking an instrument which makes them co-owners, specifying their interests in the same way—provided that it implements a prior agreement (however informal) between them, or they both adopt it by some act of acceptance before the co-ownership occasion. (And the holding which appears from the instrument should be presumed to implement a prior agreement unless the contrary is shown.)

(*c*) By producing the express co-ownership through a disposition of part ownership by one to the other, provided that the instrument of disposition specifies their interests in the same way—and provided that it implements a prior agreement (however informal) between them, or

the disponee spouse adopts it by some act of acceptance before the co-ownership occasion. (And the holding which appears should again be presumed to implement a prior agreement unless the contrary is shown.)

(Paragraph 1.138, and clause 12(1)(*a*), (2), (3), (4) and (5).)

(41) There may be cases in which the instruments described in paragraph (40) above cannot specify what the spouses' interests *are* because the interests in question do not come into existence (or do not assume the size and nature specified) until some future time. In such cases it should be sufficient for the instrument to specify what they *are to be*.

(Paragraph 1.139, and clause 12(1)(*a*).)

(42) If the situation is such that statutory co-ownership would be excluded on some future occasion in one of the ways described above, the spouses should have power, by written agreement signed by them, to negative this result, with the consequence that statutory co-ownership does after all apply.

(Paragraph 1.137, and clause 12(1).)

(43) If an excluding instrument has been made, it should be effective to exclude statutory co-ownership even if the interests which it specifies have changed before the relevant co-ownership occasion.

(Paragraph 1.141, and clause 12(1) (*b*).)

(ii) *Agreements for sole ownership*

(44) In general we do not think it right to infer a mutual desire to exclude statutory co-ownership from a mere agreement between the spouses that a property *is* in the sole ownership of one of them: an express declaration against statutory co-ownership should be necessary.

(Paragraphs 1.142–1.145.)

(45) More specifically, statutory co-ownership should be excluded in favour of the sole ownership of one spouse in either of the following cases:

(*a*) If the spouses make a written agreement, signed by them both, that one of them is, or is to be, the sole owner and is to hold free of statutory co-ownership. (For the significance of the words "or is to be", see paragraph (41) of this summary.)

(*b*) If the sole ownership of one is produced by the other, through an express disposition in that one's favour giving the ownership or making it sole or enlarging or improving it. (This forms an exception to the general rule stated in paragraph (44), above: in these circumstances we think that an intention to exclude statutory co-ownership may be inferred.) But if it is to qualify under this head, the disposition should be written and should be a disposition by one spouse (or expressly at his or her direction) made expressly to the other spouse beneficially.

(Paragraph 1.146, and clause 11(1).)

(46) Once an excluding instrument has been made, it should again be effective to exclude statutory co-ownership even if the sole ownership specified or produced by it no longer subsists at the time of the relevant co-ownership occasion.

(Paragraph 1.147, and clauses 11(2) and 7(*c*).)

(47) But the spouses should again have the right, by written agreement signed by them, to negative the excluding effect of the instrument, thus allowing statutory co-ownership to apply in spite of it.
(Paragraph 1.148, and clause 11(1)(*a*) and (2).)

(48) An exclusion made in respect of an interest held as a joint tenant should serve to exclude the interest as tenant in common which may arise from it through severance.
(Paragraph 1.149, and clause 11(3).)

Minor exceptions

Exclusion to avoid severance from other property

(49) This is dealt with in paragraph (12) of this summary.

Exclusion when the acquiring spouse is bankrupt

(50) This is dealt with in paragraphs (56) and (57) of this summary.

Exclusion when the spouses are already beneficial joint tenants

(51) Since the purpose of statutory co-ownership is to bring about a beneficial joint tenancy between the spouses, it should not apply where one already exists.
(Paragraphs 1.53 and 1.154, and clause 7(*a*).)

Exclusion of an interest acquired by one spouse out of an interest of the other which is itself excluded

(52) If the interest of one spouse is excluded from statutory co-ownership, then statutory co-ownership should not apply to any interest which the other spouse may have acquired out of that interest. This should equally be so if the interest of the first spouse, though it would have been excluded if he still had it, has in fact been disposed of before the relevant co-ownership occasion.
(Paragraphs 1.155 and 1.158, and clause 7(*c*).)

Exclusion of an interest acquired by one spouse from the other while they have a home in the property

(53) The exclusion described in this heading is clearly necessary to implement the intentions of the spouses.
(Paragraphs 1.159, and clause 5(3)(*a*).)

Exclusion if a beneficial joint tenancy is severed while the spouses have a home in the property

(54) The exclusion described in this heading is also clearly in accord with the spouses' intentions.
(Paragraph 1.163, and clause 7(*b*).)

Exclusion of partnership property

(55) An interest held by a spouse as a member of a partnership should not be eligible for statutory co-ownership. And even if the partnership is dissolved or he ceases to be a member of it, his interest should not be eligible so long as any other person has a claim on it (or on the property in which it subsists) as a member of the partnership (or as a former member, or in right of a former member).
(Paragraphs 1.164 and 1.166, and clause 2(5).)

Bankruptcy

Bankruptcy of the acquiring spouse

(56) If, at the time of a co-ownership occasion, the acquiring spouse is bankrupt (or has, in bankruptcy proceedings, made a composition or arrangement under which her assets are to be administered by a trustee for the benefit of her creditors), statutory co-ownership should not operate.
(Paragraphs 1.168–1.170, and clause 14(1) and (3)(*a*).)

(57) If at the time of the co-ownership occasion no adjudication order (or composition or arrangement) has been made, but a subsequent adjudication (or composition or arrangement) relates back to that time, statutory co-ownership should be treated as not having operated—but this should not affect the interests of any third parties to whom the acquiring spouse may have made dispositions in the meantime.
(Paragraphs 1.171–1.174, and clause 14(2), (3)(*b*) and (4).)

Bankruptcy of the owner spouse

(58) Under recommendations summarised above, statutory co-ownership is deemed to come about through a declaration of trust or an assignment by the owner spouse. In regard to the bankruptcy of the owner spouse, the general law should be left to apply on that basis.
(Paragraph 1.177.)

(59) Thus:

(*a*) If a co-ownership occasion occurs after an adjudication order has been made in respect of the owner spouse (or after that spouse has made a composition or arrangement in bankruptcy proceedings—or indeed (in this case) a private composition or arrangement which involves the transfer of all his assets), no stautory co-ownership can occur because the owner spouse no longer has an ownership interest.

(*b*) If at the time of the occasion no adjudication order (or composition or arrangement in bankruptcy proceedings) has been made, but a subsequent order (or composition or arrangement) relates back to that time, the statutory co-ownership may be set aside in the circumstances in which a transaction of the kind in question might be set aside under the existing law if it occurred at that time.

(*c*) If the occasion occurs before any relevant act of bankruptcy, but the owner spouse later becomes bankrupt (or makes a composition or arrangement in bankruptcy proceedings), the interest which has passed to the acquiring spouse will be vulnerable in those cases in which an interest which had passed under a transaction of that kind would be vulnerable under the existing law.

(Paragraph 1.177.)

(60) If the situation is that described in paragraph (59)(*c*), above, and when statutory co-ownership applies the spouses are beneficial tenants in common (so that it applies to both their interests), the trustee in bankruptcy should not in any event recover more from the acquiring spouse than the overall "gain" (if any) made by that spouse.
(Paragraph 1.178, and clause 14(6).)

Divorce, etc.

(61) If a couple's marriage ends in divorce or a nullity decree, or a decree of judicial separation is made, the court should be able to make such orders in regard to their interests as statutory co-owners as it can make in respect of their other property.
(Paragraph 1.179.)

Minority

Minority does not of itself exclude statutory co-ownership

(62) Neither the minority of the acquiring spouse nor that of the owner spouse should prevent the operation of statutory co-ownership. And if statutory co-ownership applies to the ownership interest of a minor spouse, it should apply in the same way as if he were an adult (so that there is no question of the assignment which he is deemed to make being void or voidable because of his minority).
(Paragraphs 1.184–1.186, and clause 15(1).)

Unilateral exclusion by the owner spouse

(63) The power of an owner spouse to exclude statutory co-ownership in relation to an interest acquired before (or on) marriage (paragraphs (30)–(34), above) should be exercisable notwithstanding the spouse's minority. So should the owner spouse's right to exclude statutory co-ownership in a transitional situation (paragraph (75), below). And in either case the spouse's power to revoke the excluding declaration should similarly be unaffected by minority.
(Paragraphs 1.188–1.190, and clause 15(1)(*a*) and (2).)

Exclusion by agreement between the spouses

(64) The documents which serve to exclude statutory co-ownership under this heading (paragraphs (38)–(48), above) are of several kinds. Some ("the simplest category") amount simply to agreements to exclude statutory co-ownership. But the rest vary widely in the extent to which they amount to agreements in the legal sense, and in the extent to which they amount also (or amount exclusively) to dispositions.
(Paragraph 1.192.)

(i) *Avoidance*

(65) The existing law already has rules about the effect of minority on contracts. To the extent that an agreement has the effect of excluding statutory co-ownership it should be treated, for the purpose of these rules, as a contract for the *owner* spouse to acquire from the *other* spouse the interest which the latter would have received through statutory co-ownership. But this should be confined to cases where the agreement was made in contemplation of the use or possible use of the property as a matrimonial home.
(Paragraphs 1.193 and 1.194, and clause 16(1).)

(ii) *Effect of avoidance*

(66) If an excluding document is avoided *before* the relevant co-ownership occasion, it will not serve to exclude statutory co-ownership. If it is avoided *after* the occasion, so that it did serve to exclude statutory co-ownership on that occasion, then each spouse should be treated as acquiring (otherwise than from the other or out of the other's interest) the interest which that spouse has after the avoidance, so that a further co-ownership occasion automatically occurs.
(Paragraphs 1.195 and 1.196, and clause 16(2).)

Mental incapacity

(67) Neither the mental incapacity of the acquiring spouse, nor that of the owner spouse, should prevent the operation of statutory co-ownership. And we are satisfied that unilateral exclusion, or exclusion by agreement, could take place under the provisions of the Mental Health Act 1959, sections 102–104.
(Paragraphs 1.198–1.200, and clause 15(1)(*b*).)

Taxation

(68) Since statutory co-ownership may occasionally catch spouses unawares and apply only because they have failed to exclude it in time, they should be free to reverse its effect at any time within two years of its commencement without having to pay stamp duty on the instrument used for that purpose.
(Paragraph 1.202, and clause 17.)

Insurance

Insurance of the home

(69) In normal circumstances a spouse who has acquired an interest in property through statutory co-ownership will have a right to share in any insurance money paid in respect of damage to the property.
(Paragraph 1.205.)

Endowment life assurance

(70) Although the purchase of homes is often financed through endowment life assurance policies, we do not consider that any provision should be made for the co-ownership of these policies.
(Paragraphs 1.206–1.209.)

Disputes and doubts

(71) If doubts or disputes arise about the application of statutory co-ownership in individual cases, they can be summarily resolved under section 17 of the Married Women's Property Act 1882.
(Paragraph 1.211.)

Transitional

Existing homes to be subject in principle to statutory co-ownership

(72) Statutory co-ownership should in general apply to matrimonial homes existing at the time when it becomes operative.
(Paragraph 1.213, and clause 5(1).)

The one year's "breathing space"

(73) But statutory co-ownership should not become operative until a year has elapsed from the passing of the Act which introduces it.
(Paragraph 1.215, and clause 32.)

Homes owned (and not excluded) at the end of the year: a new co-ownership occasion

(74) If a couple, at the end of the transitional year, are married and have both an ownership interest and a home in a property, statutory co-ownership should apply.
(Paragraph 1.217, and clause 5(1).)

Exceptions from statutory co-ownership: a special unilateral power of exclusion

(75) During the transitional year, statutory co-ownership should be capable of exclusion in any of the ways already discussed. In addition there should be power for a spouse, at any time before the end of the year, unilaterally to exclude it in relation to any interest held by him at that time. The exclusion should be required to be in writing, and to be signed and attested. And if his interest is held as beneficial joint tenant or tenant in common with the other spouse, his power to exclude should be a power to exclude both interests or neither. There should be power to revoke the exclusion.
(Paragraph 1.218–1.220, and clause 8.)

(76) An excluding instrument made under the principles just stated should be effective to exclude statutory co-ownership in relation not only to the interest in respect of which it is made but also to any interest derived from that interest.
(Paragraph 1.221, and clause 8(1).)

Additional matters

(77) If a couple allows the transitional year to pass without excluding statutory co-ownership they are always free, by mutual agreement, to discard it later.
(Paragraph 1.224.)

(78) All the types of excluding instrument discussed in the report are effective to exclude statutory co-ownership even if made before the Act comes into force.
(Paragraph 1.225.)

PART IB INCIDENTS OF CO-OWNERSHIP

Introductory

(79) This section deals with the rights of husband and wife as co-owners of the matrimonial home. It applies whether the co-ownership is statutory or not.
(Paragraphs 1.226–1.229.)

The rights spouses need

(80) The rights which each spouse ought to have fall under two headings:

Homes in general (including former homes).—Each spouse should have:

(*a*) A right to ensure that the property is not sold, mortgaged or otherwise disposed of without his or her consent. (We call this a "right of control".)

(*b*) A right to ensure that he or she is not deprived of his or her due share of money realised by any dealing which does take place. (We call this a "money right".)

The replacement home.—In cases where one home is acquired to replace another, each spouse should also have:

Rights to ensure that the other spouse's share of the proceeds of sale of a former home are used in the acquisition of a new one.
(Paragraphs 1.230–1.232.)

Deficiencies of the present law

Homes in general (including former homes)

(81) Three features of the present law go some way towards providing a right of control and a money right:

(i) The Matrimonial Homes Act 1967, which is designed to protect spouses' rights of occupation in the matrimonial home.

(ii) The right of a trust beneficiary to be consulted under the Law of Property Act 1925, section 26(3).

(iii) The several interlocking provisions, based on the principle that capital money should not be paid to a sole individual trustee, which we refer to as the "two trustee rule".

We conclude that these are not sufficient, either singly or together, to confer the right of control or the money right. But we consider that the two trustee rule would be sufficient to confer the money right if its enforceability were improved, and recommendations to that end are made later.
(Paragraphs 1.234–1.254.)

The replacement home

(82) The present law does not go any way towards providing the rights which spouses need in relation to a replacement home.
(Paragraph 1.255.)

New rights in respect of homes in general (including former homes)

Preliminary: the meaning of "relevant land"

(i) *When land becomes relevant land*

(83) The concept of "relevant land" features prominently in this part of the report. Land becomes relevant land if, after the appropriate provisions of the draft Bill are in force—

> a husband and wife are co-owners of an ownership interest in the land at a time when it comprises a matrimonial home of theirs.

(Paragraphs 1.258–1.262, and clause 18(1)(*a*).)

(ii) *When land continues to be relevant land*

(84) *Property ceasing to be a home.*—Land should not cease to be relevant land merely because the property ceases to be a matrimonial home of the couple. (Paragraph 1.264, and clause 18(1) (i).)

(85) *Spouses ceasing to be married.*—Nor should land cease to be relevant merely because the couple's marriage ends through divorce or through a nullity decree given in respect of a voidable marriage.
(Paragraph 1.265, and clause 18(1) (ii).)

(86) *One spouse ceasing to be an owner.*—If one spouse loses his ownership interest altogether (through death, or through a voluntary or involuntary disposal), land should continue to be relevant land so long as—

(i) the other spouse retains all or some part of the interest which made that spouse a co-owner, and

(ii) the estate or interest which was formerly co-owned continues to be held by trustees.

(Paragraph 1.266, and clause 18(2).)

(87) References in the following paragraphs are framed for the usual case: where property continues to be owned by both spouses. Where one spouse has ceased to be an owner, but the land remains relevant land, the other spouse alone enjoys the new rights.
(Paragraph 1.267.)

(iii) *When land ceases to be relevant land*

(88) It follows from the above that once land has become relevant land it ceases to be such only when neither spouse retains any part of the interest which made him co-owner with the other spouse; or when one becomes solely entitled and the trust ceases.
(Paragraph 1.268.)

(1) The consent requirement: both spouses' consent required to dispositions

(89) There should be a new statutory requirement that if land is relevant land the trustees for the spouses must not make any disposition unless both spouses consent to it.
(Paragraph 1.270, and clause 21(1).)

(i) *The need for sole co-ownership*

(90) This consent requirement should not apply unless the spouses have, at some time when the property was a matrimonial home (and when the relevant

provisions of the draft Bill were in force), been *sole* co-owners of the ownership interest.
(Paragraphs 1.272–1.274, and clauses 19 and 21(4).)

(ii) *The dispositions for which consent is required*

(91) The requirement should apply to any disposition by the trustees of the trust property or of any estate or interest in it. But it should not apply to a disposition necessitated by a change in the trusteeship; and the taking of a further advance under an existing mortgage should not amount to a disposition at all.
(Paragraphs 1.275 and 1.276, and clauses 18(4) and 21(1).)

(iii) *Spouses who are trustees*

(92) The requirement should apply for the benefit of a spouse even if that spouse is himself a trustee.
(Paragraphs 1.277–1.279, and clause 21(1).)

(iv) *Court's power to dispense with consent*

(93) If a spouse will not give consent to a disposition, or if for any other reason the consent cannot be obtained, the court should have power, on the application of the other spouse or anyone else interested, to dispense with that consent and order that the disposition be made without it. But in deciding whether to make such an order the court should have power to take account of the welfare of any children of the family.
(Paragraphs 1.280–1.282, and clause 22(2), para. (*a*) and sub-para. (i), and (3).)

(94) The power just mentioned should be exercisable by the county court, as well as by the High Court, no matter what the value of the property.
(Paragraph 1.283, and clause 22(4).)

(95) Since the power mentioned in paragraph (93), above, is to be exercisable by the county court in all cases, the county court should also have power in all cases to overcome opposition to the proposed disposition from a trustee who is a necessary party and refuses to make it.
(Paragraph 1.284, and clause 22(2), para (*b*) and sub-para. (ii), and (4).)

(v) *Court's power to declare whether consent is required*

(96) The court should also have power, on the application of a spouse or anyone else interested, to declare whether or not a spouse's consent is in fact required to a disposition (or to the appointment or discharge of a trustee: see paragraphs (101) and (102), below), and this power, too, should be exercisable by the county court in all cases.
(Paragraph 1.286, and clause 22(1) and (4).)

(vi) *Minority*

(97) The consent requirement should apply in favour of a spouse despite his or her minority, and a consent given by a minor spouse should be valid and binding.
(Paragraph 1.287, and clause 21(2).)

(vii) *General consents*

(98) There is nothing to prevent a spouse from giving a "general" consent—for example, a consent to any mortgaging or charging of a particular property; or a still more general consent to all dispositions (which would amount to a total "contracting out" in respect of the consent requirement).
(Paragraph 1.288.)

(viii) *The effect of a disposition without consent*

(99) A trustee's failure to observe a spouse's consent requirement will normally amount to a breach of trust. In considering the extent to which the disponee should be affected, a distinction should be drawn between two categories of case:

(i) Those where the trustees hold a legal estate, and the disposition is to a purchaser of that estate or of some interest in it.

(ii) Those which do not fall into category (i).

In category (ii) cases, the disposition should be of no effect, whether or not the disponee had notice of the requirement. In category (i) cases, the position should be that summarised in paragraphs (110)–(115), below.
(Paragraphs 1.289–1.292, and clause 21(4) and (5).)

(2) The trusteeship rights: rights of each spouse in respect of the trusteeship

(100) The new trusteeship rights should exist in the same circumstances as the consent requirement: where spouses have had a matrimonial home in relevant land at a time (after the coming into force of the relevant statutory provisions) when they were *sole* co-owners of an ownership interest in it.
(Paragraphs 1.293, and clauses 19 and 20(5).)

(*a*) *Negative: spouses' right to prevent other people becoming (or ceasing to be) trustees*

(101) No new trustee should be appointed unless both spouses consent.
(Paragraph 1.296, and clause 20(1)(*a*).)

(102) No existing trustee should be discharged from the trusts unless both spouses consent—or the discharge takes place on the appointment of a new trustee.
(Paragraph 1.298, and clause 20(1)(*a*).)

(103) A spouse's consent should still be required, and should be valid and binding, despite minority.
(Paragraph 300, and clause 20(1)(*b*).)

(104) But the requirement of spouses' consent should not apply to any appointment made by the court.
(Paragraph 1.299, and clause (20(1)(*a*).)

(105) If an appointment or discharge is made in breach of this consent requirement it should be valid, and no one who made it (or concurred in it) should be liable unless he knew, or ought reasonably to have known, of the requirement. But if a trustee is appointed without a spouse's consent, that spouse should be entitled to apply to the court (including, in all cases, the county court) for his removal.
(Paragraph 1.302, and clause 20(1)(*c*) and (*d*) and (3).)

(106) If a spouse withholds consent to an appointment or discharge it should be possible to appoint a separate set of trustees for any property comprised in the trust but not subject to this consent requirement.
(Paragraph 1.303, and clause 20(4).)

(b) Positive: spouses' right to become (and remain) trustees themselves

(107) Whenever the trustees for the couple hold a legal estate, each spouse should be entitled, if of full age, to apply to the court (including, in all cases, the county court) to be appointed a trustee. The court should make the appointment unless it sees special reason against it.
(Paragraph 1.304, and clause 20(2)(*c*) and (3).)

(108) It should be possible for a spouse to be appointed a trustee (whether by the court or privately) even though the appointment increases the total number of trustees to more than four.
(Paragraph 1.308, and clause 20(2)(*b*).)

(109) Despite any power of removal contained in the instrument creating the trust, a spouse, once appointed, should not be removed from the trusteeship without good cause.
(Paragraph 1.309, and clause 20(2)(*a*).)

(3) The registration right: right of a spouse to enforce the new consent requirement and the two trustee rule through registration

(i) *Unregistered land*

(110) Whenever an unregistered legal estate in relevant land is held upon trust for a couple, a spouse who is not a trustee should have a right to register against the trustees a land charge, to be known as a land charge of Class G.
(Paragraph 1.318, and clause 23(1) and (2).)

(111) Registration of such a land charge by or on behalf of a spouse should amount to registration of:

(i) that spouse's beneficial interest under the trust; and
(ii) that spouse's consent requirement, *if she has one.*

(Paragraph 1.319, and clause 23(3).)

(112) If such a land charge is duly registered:

(*a*) A purchaser will automatically be treated as having notice (under section 198(1) of the Law of Property Act 1925) of the registering spouse's beneficial interest; and that interest will not be overreached unless the *two trustee rule* is complied with.

(*b*) If the registering spouse has the benefit of the *consent requirement*, a disposition to a purchaser should be of no effect unless that spouse's consent is obtained.

(Paragraphs 1.320 and 1.321, and clause 21(5).)

(113) If such a land charge is *not* duly registered:

(*a*) A disposition to a purchaser of the legal estate or any interest in it should, despite non-compliance with the *two trustee rule*, overreach the interest of the spouse who could have registered but failed to do so, no matter whether the purchaser has notice of the interest, or of the trust, from any other source. (There should be a consequential amendment of section 2(3) (v) of the Law of Property Act 1925.)

(*b*) A breach of the *consent requirement* enjoyed by the spouse who could have registered but did not should not prejudice a purchaser of the legal estate or any interest in it.

(Paragraph 1.322, and clause 23(4) and Schedule 1, paras. 1(2) and 2.)

(114) The county court should have power, under section 1(6) of the Land Charges Act 1972, to vacate the registration of a Class G land charge in cases where the land concerned does not exceed £5000 in capital value or £300 in net annual value for rating.

(Paragraph 1.326, and clause 23(4) and Schedule 1, para. 3.)

(ii) *Registered land*

(115) If a registered legal estate in relevant land is held upon trust for a couple, the existing law already makes provision for entries on the register in respect both of the two trustee rule and of the consent requirement. But:

(*a*) Restrictions in respect of the rule and the requirement should in future be entered without production of the Land Certificate (and the registry should not give notice to the registered proprietor of such an entry).

(*b*) If no entry has been made, there should be no question of a disponee being affected by beneficial interests under the trust. Accordingly, there should be a general statutory provision declaring, for the removal of doubt, that beneficial interests under trusts for sale, or under Settled Land Act settlements, are not overriding interests within the Land Registration Act 1925. There should also be an express provision confirming that a consent requirement which is not protected by an entry on the register does not affect a purchaser.

(Paragraphs 1.329–1.333, and clause 24.)

(iii) *Registration in practice*

(116) Paragraphs 1.334–1.344 contain further comments about the new registration rights which relate purely to their practical implications and so are not summarised here.

Further advances

(117) The problem arises when a mortgage (including a charge) is made for securing further advances.

(Paragraphs 1.345–1.347.)

(i) *The consent requirement*

(118) The trustees of trusts under which husband and wife are co-owners of relevant land should not borrow money by way of further advance secured upon their estate or interest unless both spouses consent.

(Paragraph 1.348, and clause 25 and Schedule 2, paras. 1 and 2(1).)

(119) The rule just stated should apply only if the spouses have (at some time after the relevant statutory provisions are in force) been sole co-owners while the property was a matrimonial home of theirs; and a spouse's consent should be required, and should be valid and binding, despite minority. No obligation to make a further advance undertaken by a lender should be enforceable against him so as to require him to make it in breach of this consent requirement.

(Paragraphs 1.348 and 1.349, and clauses 19 and 25 and Schedule 2, paras. 2(2)–(4).)

(120) The lender should be affected by failure to obtain a spouse's consent if—

(*a*) that spouse's consent was required to the mortgage itself and was, to the lender's knowledge, then obtained, or

(*b*) notice in writing has been served on the lender or his agent by or on behalf of that spouse stating that his or her consent is required.

(Paragraphs 1.351–1.353, and clause 25 and Schedule 2, para. 3.)

(121) In practice, however, this consent requirement will often be excluded by the giving of a general consent.
(Paragraph 1.354.)

(122) When the lender is affected, the result should be that the mortgage is of no effect in so far as it secures the further advance.
(Paragraph 1.355, and clause 25 and Schedule 2, para. 3.)

(ii) *The two trustee rule*

(123) The lender should, in making a further advance in breach of the two trustee rule, be affected by the beneficial interest of a spouse if he has "effective notice" of that spouse's interest. This should be capable of arising in either of two ways.
(Paragraphs 1.357 and 1.358.)

(124) First, because of the situation at the time of the mortgage. He should have effective notice where the mortgage itself failed to overreach the beneficial interest in question *or* where the mortgage was made by two or more persons or by a trust corporation known to the lender to be acting as such.
(Paragraphs 1.359 and 1.360, and clause 25 and Schedule 2, para. 5(3).)

(125) Second, the lender should have effective notice of a spouse's interest if written notice has been served on him or his agent, by or on behalf of that spouse, stating that the mortgaged property is held upon trust.
(Paragraph 1.361, and clause 25 and Schedule 1, para. 5(2).)

(126) When the lender has effective notice of a spouse's interest, and nonetheless pays the advance in breach of the two trustee rule, the mortgage, in so far as it secures the advance, should not overreach the interest in question. If the lender has no effective notice, then (even if he is only an equitable mortgagee) the interest should be overreached despite contravention of the rule. But a beneficiary who is himself the trustee to whom, or by whose direction, the advance is paid, should not in any event be able to claim that his beneficial interest is preserved.
(Paragraphs 1.362–1.364, and clause 25 and Schedule 1, para. 4.)

New rights in respect of the replacement home

The need for the new rights

(127) The rights in question are those outlined in paragraph (80), above, under the heading "The replacement home". They promote fairness between husband and wife and will become especially desirable with the advent of statutory co-ownership.
(Paragraphs 1.365–1.367.)

The right to require a contribution

(128) Where relevant land is sold during the marriage, and one spouse pays the whole or part of the cost of acquiring a new home, that spouse should

(subject to contrary agreement) have a right to require the other to make a contribution towards that cost. The contribution could be of any amount but should exceed neither—

the other spouse's share of the proceeds of the old home, nor

the amount required to ensure that the spouses' contributions to the new home are in proportion to their shares in the proceeds of the old.

It should not matter whether the acquisition takes place before or after the relevant provisions of the draft Bill are in force, nor whether the couple intend to use the property as a home at the time of acquisition.
(Paragraph 1.368, and clause 26(1), (2)(*b*), (5) and (9).)

(129) In the preceding paragraph, "new home" means a property in which the couple have or propose to have a home in place of their home in the property sold. "Proceeds of sale" means the net proceeds of sale after paying expenses and discharging any mortgage debt. "Sale" of relevant land includes any disposal (by the trustees, or by the husband and wife) for a consideration in money. The right to require a contribution towards the cost of acquisition includes a right to require reimbursement of money already paid towards that cost. And "cost of acquisition" includes—

the cost of improvements or alterations made to adapt the new home for the couple's purposes, and

if the new home is provided by the erection of a house, the cost of erection as well as the cost of the site.

(Paragraph 1.369, and clause 26(1), (2)(*a*), (5) and (6).)

The right to go to court

(130) If the contribution required is not paid the requiring spouse should have a right to go to court (including, in all cases, the county court). The court should then have a discretion to make such order as it thinks just (but not exceeding the limit mentioned in paragraph (128), above), or to refuse an order altogether. The court should have power to order that any payments to be made by the respondent spouse should be secured on any substantive interest which that spouse may have in the home (including an interest acquired through statutory co-ownership). But the order should not affect the extent of the spouses' interests in the new home except in so far as their extent is affected by the proportion in which they bear the cost of acquisition.
(Paragraphs 1.370–1.375, and clause 26(3)–(5).)

Transitional

The one year's "breathing space"

(131) The new rights recommended in Part IB should come into force at the same time as statutory co-ownership, so that there will be the same "breathing space" of one year (see paragraph (73), above).
(Paragraph 1.378, and clause 35(1)(*a*).)

A contingency plan

(132) If the Land Registry's commitments are such that the time scale envisaged in the preceding paragraph would create an undue burden of work, we recommend that the provision whereby statutory co-ownership, and the new co-ownership rights, come into force one year after the passing of the Act should be replaced by a provision enabling the Lord Chancellor to fix by order the date on which they should come into force.
(Paragraph 1.384.)

PART II PROVISIONS TO PRESERVE EQUALITY

Married couples

Introductory

(133) Certain existing rules of law must be modified because they militate against the principle of equal ownership of the matrimonial home on which our proposals for statutory co-ownership are founded.
(Paragraphs 1.386 and 1.387.)

Improvements

(134) By virtue of the rule declared in section 37 of the Matrimonial Proceedings and Property Act 1970 a spouse who makes improvements to a property may acquire an added beneficial interest in it. This rule should no longer operate if the spouses are equal co-owners of the property—unless the equality has come about through the prior operation of the rule (or of the presumption about acquisition payments dealt with below).
(Paragraphs 1.388–1.390, and clause 27(1).)

(135) Where, at the time when the provision just recommended comes into force, a couple's ownership is equal subject only to a possible, but unquantified, accrual of interest to one of them under section 37, the "uncertain accrual" should be retrospectively nullified unless—

(*a*) the equality has come about through the prior operation of section 37 (or the presumption about acquisition payments), or

(*b*) the marriage has terminated before that time, or

(*c*) either spouse has by writing signed by him or her (or by his or her agent) before that time made a declaration preserving the uncertain accrual.

(Paragraphs 1.391–1.393, and clause 27(3).)

Acquisition payments (including mortgage repayments)

(136) In comparatively rare cases the existing law may operate by presumption to confer an added beneficial interest on a spouse who makes a contribution towards the acquisition of a property or towards the repayment of a mortgage secured upon it. In cases where the spouses are equal co-owners, such a contribution should be treated as made equally by them both, so that their equality will be undisturbed unless the equality has come about through the prior operation of the presumption (or of the rule about improvements dealt with earlier).
(Paragraphs 1.397, 1.398 and 1.400, and clause 27(1) and (2).)

(137) But "uncertain accruals" under this presumption are unlikely to be numerous, and are likely in any case to be overtaken by statutory co-ownership, so we make no recommendation analogous to that summarised in paragraph (135) above.
(Paragraph 1.399.)

The new provisions are not limited to matrimonial homes

(138) The new provisions to preserve equality recommended above should apply to all cases where the spouses are equal co-owners of the land, and should not be limited to cases where the land comprises a matrimonial home of theirs.
(Paragraphs 1.401–1.403, and clause 27(1).)

Engaged couples

(139) With the exception mentioned in the next paragraph, the rule about improvements and the presumption about acquisition payments apply under the present law to engaged couples. We must therefore consider how far they should give way to our recommended provisions to preserve equality.
(Paragraphs 1.404–1.406.)

(140) The exception is that the rule about improvements does not apply to engaged couples unless their engagement is *terminated* (Law Reform (Miscellaneous Provisions) Act 1970, section 2(1)). We think it should apply in future to all engaged couples.
(Paragraph 1.407, and clause 28(1).)

(141) With that extension, the rule and the presumption will apply to all engaged couples. They should be modified by the provisions to preserve equality, summarised in paragraphs (133)–(138), above, if:—

(*a*) the engagement leads to marriage, or
(Paragraph 1.409 (*a*), and clause 28(1).)

(*b*) the engagement ends through death.
(Paragraph 1.409 (*c*), and clause 28(1).)

But they should *not* be so modified if the engagement is broken off.
(Paragraph 1.409 (*b*), and clauses 27(4) (as to the rule about improvements) and 28(2) (as to the presumption about acquisition payments).)

Transitional

(142) The provisions to preserve equality should start to operate at the same time as statutory co-ownership begins to apply.
(Paragraph 1.410, and clause 32.)

PART III MISCELLANEOUS

Co-ownership of "winkling money"

(143) If two spouses have a home in a property of which one of them has, or they both have, a statutory tenancy (within the Rent Act 1977 or the Rent (Agriculture) Act 1976), and one of them receives pecuniary consideration to give up possession, the other should be entitled to receive half its net amount or value. But "pecuniary consideration" should not include any land or interest in land; and its net amount or value should be reduced by any consideration which the receiving spouse gives to obtain possession of part of the property from someone else (e.g., a sub-tenant).
(Paragraphs 1.414 and 1.415, and clause 30.)

Rules under the Land Registration Act 1925 and the Land Charges Act 1972

(144) The powers to make rules under section 144 of the Land Registration Act 1925 and section 16 of the Land Charges Act 1972 should include powers to make any rules needed to implement the legislative provisions recommended in Book One.
(Paragraph 1.416, and clause 31.)

Matrimonial Homes (Co-ownership) Bill

ARRANGEMENT OF CLAUSES

PART I

RIGHTS IN RESPECT OF OWNERSHIP OF MATRIMONIAL HOME

CHAPTER I

INTRODUCTORY

CHAPTER II

STATUTORY CO-OWNERSHIP OF MATRIMONIAL HOME

SCHEDULES:

EXPLANATORY NOTES

GENERAL NOTE. In the case of nearly every clause of the Bill, the explanatory notes begin with an introductory passage which incorporates a paragraph reference in brackets. This reference is to those paragraphs of the report in which the subject matter of the clause is discussed.

In the examples, "H" and "W" refer to husband and wife respectively.

DRAFT

OF A

BILL

TO

A.D. 1978. Make, in relation to land in England and Wales, provision for statutory co-ownership of matrimonial homes and other provision as to the rights of husbands and wives (whether during the marriage or after its termination), and to extend to engaged couples certain rules applying to married couples; and as to related matters.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

RIGHTS IN RESPECT OF OWNERSHIP OF MATRIMONIAL HOME

CHAPTER I

INTRODUCTORY

Scope of Part I.

1.—(1) In this Part of this Act—

(*a*) Chapter II provides, subject to certain exceptions, for husband and wife to become joint owners of land if it is owned by either of them while comprised in a property in which they have a matrimonial home after this Part comes into force; and

(*b*) Chapter III makes provision as to the rights of a husband or wife in relation to land of which, while so comprised, they are or have been co-owners (whether statutory co-owners or not), and as to related matters.

In this Part "statutory co-ownership" means co-ownership by virtue of the operation of Chapter II, and "statutory co-owner" shall be construed accordingly.

(2) In this Part references to husband and wife and to marriage apply whether or not the marriage was entered into under a law which permits polygamy; but there shall be no statutory co-ownership on any occasion if at the time the husband has more than one wife or the wife more than one husband.

(3) In this Part references to marriage apply to a voidable marriage, notwithstanding that it is retroactively annulled, and references to husband and wife shall be construed accordingly.

EXPLANATORY NOTES

Clause 1

This clause sets the scene for the rest of the Bill. (As to subsections (2) and (3): paragraphs 1.73–1.87.)

Subsection (1) indicates the general purposes and scope of the Bill. Chapter II of Part I sets out the circumstances in which a spouse will become a co-owner: co-ownership so arising is called "statutory co-ownership". Chapter III is wider in its application: it is concerned with the basic rights of spouses who co-own their matrimonial home, no matter how the co-ownership has arisen.

The concept of marriage figures prominently in the Bill, and subsections (2) and (3) clarify the way in which it, and related references to "husbands" and "wives", are to be understood. *Subsection* (2) makes it clear that, for the purposes of the Bill, marriage includes potentially polygamous, but not actually polygamous, marriages.

Subsection (3) shows that a voidable marriage, unless and until it is actually annulled, also counts as a marriage for the purposes of the Bill. The annulment of a voidable marriage under English law no longer renders the marriage void from the beginning (Matrimonial Causes Act 1973, s.16); and even if a foreign decree has this effect the subsection makes it clear that the marriage counts as a marriage for present purposes until the time of the annulment. But the subsection does not displace the normal rule that a "marriage" which is not merely voidable, but is actually void from the start, does not rank as a marriage at all.

Meaning of "own" and related terms.

2.—(1) In this Part of this Act the expression "own" and related terms refer to beneficial ownership and do not include ownership in a fiduciary capacity.

Clause 2

This clause defines the interest in land which a person must have in order to qualify as an "owner" of the land within the meaning of later provisions. This is the interest which the report calls an "ownership interest", and is the interest which attracts the operation of statutory co-ownership and the protection afforded by the "incidents of co-ownership" dealt with in Chapter III of this Part of the Bill.
(Paragraphs 1.11–1.29; and, as to subsection (5), paragraphs 1.164–1.166.)

Subsection (1) shows that an interest, if it is to qualify its holder as an owner of land, must be held by him beneficially (that is, for his own benefit) and not as a trustee.

(2) Subject to subsection (1) above land is for purposes of this Part "owned" by a person if, but only if—

1925 c. 20.

(*a*) he is (within the meaning of the Law of Property Act 1925) the estate owner in respect of the fee simple absolute in possession or in respect of a term of years absolute in possession; or

(*b*) he has a corresponding equitable interest.

Clause 2 (*continued*)

Subsection (2) provides that even if the interest is held beneficially it will not qualify unless it amounts to one or other of the following:

(*a*) an estate in fee simple absolute in possession or a term of years absolute *in possession*; or

(*b*) a corresponding equitable interest.

(For an explanation of the difference between legal estates and equitable interests, see paragraph 1.54 of the report, and for an explanation of the term "in possession", see footnote 21.)

The terms used in head (*a*) above are used with the meanings given them by the Law of Property Act 1925 and—with one notable difference—the interests described are the estates which are capable of subsisting at law under section 1(1) of that Act. The difference appears from the words italicised. Although a leasehold (unlike a freehold) may be legal under section 1(1) even though it is not in possession (subject to any necessary compliance with section 149(3) of the 1925 Act) (see section 205(1) (xxvii) of the 1925 Act), such a leasehold will *not* qualify as an ownership interest while it remains reversionary. Subject to that, the definition of a "term of years absolute" which appears in section 205(1) (xxvii) of the 1925 Act is relevant here; and it may be noted in particular that it includes a fixed term for a year or less, and a periodic tenancy (however short the periods).

The purpose of head (*b*) is to include equitable interests which, in being both absolute and in possession, correspond with the legal estates described in head (*a*).

EXAMPLE 1. A is the legal owner of a freehold house for his own sole benefit. His interest makes him an owner under head (*a*).

EXAMPLE 2. B is the legal leaseholder of a house under a lease for 7 years, for his own sole benefit. That interest makes him an owner under head (*a*). So, too, if he has a quarterly tenancy.

EXAMPLE 3. C has a life interest in a house under his father's will. His interest is equitable but it does not qualify under head (*b*) because it is a limited interest, not an absolute one.

EXAMPLE 4. D bought a freehold house for his own sole benefit but, instead of becoming the legal owner himself, he had the legal estate transferred to a nominee, to hold on trust for him. D's interest makes him an owner under head (*b*) because, though equitable, it is absolute.

(3) Where an equitable interest arises under a contract to convey or grant, for valuable consideration, an estate or interest within paragraph (*a*) or (*b*) of sub-section (2) above, the said paragraph (*b*) shall not apply to the equitable interest so arising if and so long as the consideration has not been paid or transferred.

(4) Subject to subsection (5) below, where land or an interest in land is held on trust for sale, persons having an interest in the proceeds to arise from the sale and in the rents and profits till sale are for purposes of this Part to be treated as having the equivalent interest in the land; and sub-section (2)(*b*) above shall include the case where a person is joint tenant or tenant in common of such an interest as is there mentioned.

Clause 2 (*continued*)

Subsection (3) refers to cases in which, under the general law, a mere contract to purchase land serves of itself to give the purchaser an equitable interest in the land. It makes it clear that an equitable interest arising under a contract to grant an ownership interest for valuable consideration does not itself amount to an ownership interest so long as the consideration remains to be paid.

EXAMPLE 1. A contracts to buy a freehold house from B for £20,000 Although A would normally acquire an equitable interest in the house by virtue of the contract, he does not become an owner until he pays over £20,000 (or the balance of it) to B—that is to say, in a normal case until completion. On completion he becomes an owner, even if B allows the purchase price, or part of it, to remain outstanding as a mortgage loan: in law the money is lent by B in his capacity as mortgagee, so that it can be paid to him in his capacity as vendor.

EXAMPLE 2. A contracts with B to take a lease or a house at a rack rent and with no premium. If this contract gives A an equitable interest in the house (as normally it would: *Walsh* v. *Lonsdale* (1882) 21 CH.D.9), this interest will make him an immediate owner because (although rent will be payable *under* the lease) the terms of the contract do not provide for any payment to be made for the *grant* of the lease itself, and so the case is not within subsection (3) at all. (This example is significant because the parties to a contract of this kind often have no intention of formally completing it by the grant of an actual lease.)

Subsection (4) deals with cases where land is held upon trust for sale. Trusts for sale arise whenever land is co-owned by two or more people with absolute interests.

EXAMPLE. A and B buy a freehold house for their own benefit, and take the conveyance or transfer in their own names. Under the general law, by reason of their joint ownership, A and B hold the *legal* estate in the house as trustees for sale; and their *beneficial* interests are generally regarded as interests, not in the house itself, but only in the net proceeds of sale (and in any rents and profits which may arise pending sale). But for this subsection, A and B might not have ownership interests for the purposes of the Bill: they would not be owners by virtue of the legal title (because of subsection (1)), and they might not be owners by virtue of their beneficial interests because they do not subsist in *land.*

The subsection therefore makes it clear that references in the Bill to interests in land include references to the interests of beneficiaries under trusts for sale of land. It also provides that the beneficial interest of each of two or more joint owners (like A and B in the example) will qualify him to be an owner for the purposes of the Bill.

(5) A person is not to be treated for purposes of this Part as owning land by virtue of an interest he has in it as a member of a partnership; and for this purpose any interest a person has in land as a member of a partnership shall be deemed, notwithstanding that the partnership is dissolved or he ceases to be a member of it, to continue to be one he has as a member of it so long as any other person has any claim on the interest (or the property in which the interest subsists) as a member or former member of the partnership or in right of a former member.

Clause 2 (*continued*)

Subsection (5) introduces an exception: even if an interest is such that its holder would normally qualify as an owner of land, he will not do so if he holds it as a member of a partnership. If he ceases to hold it as a partner and comes to hold it as an ordinary beneficial owner, he will then qualify as an owner. But this will not happen the moment the partnership is dissolved or he ceases to be a member of it. Each member of a partnership may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm and to have the surplus properly distributed, and this lien comes into its own on the dissolution of the partnership: Partnership Act 1890, s. 39. The Bill therefore provides that only when the purpose of the lien has been fulfilled can a former partner's interest qualify him as an owner.

What constitutes a property.

3.—(1) Subject to the following subsections, references in this Part of this Act to a "property" are to be read as references to a house or flat and any garage, outhouse, garden, yard and appurtenances going with it which from time to time constitutes or together constitute a dwelling.

For this purpose "house or flat" includes a maisonette and any other separately occupied part of a building, but does not include a caravan or other structure designed or adapted for human habitation unless it forms part of the land on which it is sited.

(2) Where husband and wife set up or have a home in a property as described in subsection (1) above, or a man and woman having a home in a property as so described marry, the property shall be taken to extend to any other land which—

(*a*) is owned by them or either of them and goes with the property as an adjunct to it; but

(*b*) does not form part of their dwelling either because it is used for business or other non-residential purposes or because it is not in their occupation.

(3) Land not for the time being forming part of a property as described in subsection (1) above is, in particular, to be regarded under subsection (2) as going with the property if, given its situation and relation to the property, its primary use is likely to be for, or subservient to, the domestic purposes of an occupier of the property, including in those purposes the provision of accommodation for a parent or other dependant and such professional or business activities as those engaged in them commonly carry on at their homes.

1889 c. 63.

(4) Without prejudice to section 3 of the Interpretation Act 1889, references in this Part to land are to be read as including parts of houses or buildings.

Clause 3

This defines a "property" for the purposes of the Bill. The definition is important because it is a "property" to which statutory co-ownership applies and to which the incidents of co-ownership attach. (Paragraphs 1.34–1.43.)

Subsection (1) contains the basic definition: a house or flat (or a maisonette or any separately occupied part of a building) and any garage, outhouse, garden, yard and appurtenances going with it: the whole amounting to a dwelling.

A "house or flat" does not, however, include a caravan, or anything similar unless it forms part of the land on which it is sited. Two cases must be distinguished:

(1) The ordinary case where a married couple make their home in a *mobile* caravan. Even if one of them owns the caravan, statutory co-ownership will not apply to it because it is not a house or flat and so forms no part of a "property". And even if one of them owns the land on which it is sited, statutory co-ownership will not apply to that either, because the land by itself, with no house or flat, does not constitute a "property".

(2) The more rare case where the caravan in which the home is made has ceased to be mobile and has become a part, in law, of the land itself just like a house built upon land. (This test should not be confused with others which may apply for different purposes. In *Makins* v. *Elston* [1977] 1 W.L.R. 221, a caravan on land was held on the facts to be a "dwelling house" for the purposes of capital gains tax, but this does not necessarily mean that it was legally a part of the land.) Whether a caravan has become part of the land will depend partly upon the degree to which it has become attached to it and partly upon the owner's intention. If it has done so, then the ownership of the caravan and the ownership of the land must necessarily be the same; and if a spouse is the owner then the land (including the caravan) will be eligible for statutory co-ownership.

Subsection (2) says that the "property" includes any land which goes with it as an adjunct to it, even though it does not form part of the dwelling. As a matter of general law, "land", throughout the Bill, includes houses or other buildings; and *subsection* (4) makes it clear that it includes parts of houses or buildings.

EXAMPLES appear in paragraph 1.41 of the report.

Subsection (3) gives particular instances of land which is to be considered "adjunct" land within subsection (2). These include cases where it constitutes a "granny flat", or premises in which someone may carry on a business or profession from his home. But the test is objective: the land is "adjunct" land if (and only if) it is *likely* to be used for these purposes (whether it is in fact so used or not).

CHAPTER II

STATUTORY CO-OWNERSHIP OF MATRIMONIAL HOME

Construction of Chapter II.

4. The following sections of this Chapter are framed for the case where, apart from their operation, the husband is the owner, but are to be read as applying equally, with the necessary adaptations of references to the husband or the wife, to produce the converse result in the case where the wife is the owner; and where each is part owner apart from the operation of those sections that alone does not exclude their operation.

Clause 4

This introduces the Chapter of the Bill which deals with statutory co-ownership, and makes it clear that, although this Chapter assumes that the husband is the owner spouse, its provisions are to operate in exactly the same way if the wife is the owner.

Occasions for statutory vesting in co-ownership.

5.—(1) Where at the time when this Part of this Act comes into force husband and wife have a home in a property and the husband is owner of the property or part of it, then the two shall thereupon become co-owners in respect of the interest the husband then has as owner of the property or part.

(2) Where husband and wife set up a home in a property, and the husband is owner of the property or part of it, then the two shall thereupon become co-owners in respect of the interest the husband then has as owner of the property or part.

Clause 5

This sets out the co-ownership "occasions": that is, the occasions on which statutory co-ownership may apply to an ownership interest which the husband has in a property (or in part of a property).
(Paragraphs 1.31–1.33; 1.70–1.100; 1.159; and 1.216 and 1.217.)

Subsection (1) says that where, at the time when the statutory co-ownership provisions come into force, the couple are already married and already have a home in the property, and the husband already has an ownership interest, an occasion occurs when *the statutory provisions come into force*. Subsections (2)–(5) deal with cases where the occasion occurs after the provisions are in force.

Subsection (2) says that where the couple are already married and the husband already has an ownership interest, an occasion occurs when *they set up a home* in the property.

(3)(*a*) Where husband and wife have a home in a property, and the husband acquires the ownership or a new ownership of the property or part of it otherwise than from the wife or out of her interest, then the two shall thereupon become co-owners in respect of that interest of the husband in the property or part.

(*b*) A husband is to be treated for purposes of this subsection as acquiring the ownership of a property or part of a property in any case where he becomes the owner whether by acquiring an interest (or further interest) amounting to ownership or by a change in an interest he already has or otherwise.

Clause 5 (*continued*)

Subsection (3) says that where the couple are already married and already have a home in the property, an occasion occurs when *the husband acquires an ownership interest.* In regard to this occasion, several special provisions are made:

(i) The ownership interest acquired may not be the first one which the husband has had.

EXAMPLE. H and W are already statutory co-owners of a leasehold house. If H later acquires the freehold while they still have a home in the house, there is a new co-ownership occasion in regard to the freehold.

(ii) But statutory co-ownership does not apply if the husband's interest is acquired from the wife or out of her interest.

EXAMPLE 1. W is the sole owner of the house (statutory co-ownership having been excluded by agreement). If she then gives part of her interest to H, statutory co-ownership does not operate to make them co-owners of that part.

EXAMPLE 2. H and W are beneficial tenants in common sharing in the proportions 2:1 and in such a way that statutory co-ownership has been excluded. If H then makes a substantial improvement to the house which increases his, and correspondingly reduces W's, interest in the whole property (in accordance with section 37 of the Matrimonial Proceedings and Property Act 1970), the acquisition by H of that additional interest will not be an occasion bringing about statutory co-ownership of the additional interest.

(iii) For the purposes of subsection (2) the husband acquires an ownership interest whenever he comes to have such an interest: it does not matter how he comes to have it.

EXAMPLE. H is absolutely entitled under his father's will to a house contingently upon his attaining the age of 25. He has been allowed to live there with W. When he attains the age of 25, his contingent interest becomes absolute, a co-ownership occasion occurs, and the absolute interest will become co-owned unless co-ownership is for some reason excluded.

(4) Where husband and wife have a home in a property, and there is made to the property any addition owned by the husband (whether so owned before it is added to the property or not), then the two shall thereupon become co-owners in respect of the interest the husband then has as owner of the addition.

(5) Where a man and a woman having a home in a property marry one another, and the husband is at the time of the marriage (or becomes on the marriage) owner of the property or part of it, then the two shall thereupon become co-owners in respect of the interest the husband then has as owner of the property or part.

(6) This section has effect subject to the exceptions in sections 7 to 14 below.

Clause 5 (*continued*)

Subsection (4) says that where the couple are already married and already have a home in a property, an occasion occurs (in relation to the addition) when *any addition, in which the husband has an ownership interest, is made to it.*

EXAMPLE. H and W have a home in a house which has no garage. If H buys an adjoining piece of land as a site for a garage, there is a co-ownership occasion in regard to the garage site.

Subsection (5) says that if an unmarried couple already have a home in a property, and the future husband already has an ownership interest (or acquires one on the marriage), an occasion occurs *when they marry.*

Subsection (6) then makes it clear that the happening of any of these occasions will *not* give rise to statutory co-ownership if the case falls within one of the exceptions for which clauses 7–14 provide.

Effect of statutory vesting in co-ownership.

6.—(1) Where a husband and wife become statutory co-owners in respect of an interest of the husband in a property or part of a property, then—

(*a*) if the interest is a legal estate, it shall become subject to a trust for them as beneficial joint tenants; and

(*b*) if the interest is not a legal estate, it shall vest in the two of them as beneficial joint tenants; and

(*c*) the same consequences (including the creation of a trust for sale and the severance of any joint interest) shall ensue, as if the like result had been achieved by a written declaration of trust or assignment made by the husband.

Clause 6

This deals with the effect of the application of statutory co-ownership to the husband's ownership interest.
(Paragraphs 1.8–1.10; and 1.52–1.65.)

Subsection (1) distinguishes two different cases:

(i) That where the ownership interest is a legal estate. In this case the effect is that the legal estate is held upon trust by the husband for himself and his wife as beneficial joint tenants. The same consequences follow as if this had happened through a written declaration of trust by the husband. One such consequence is the creation of a trust for sale (Law of Property Act 1925, s. 36; and see s. 35).

EXAMPLE. H is the legal owner of a freehold house for his own sole benefit. If statutory co-ownership applies, he will hold the house as trustee upon trust for sale for himself and W as beneficial joint tenants.

(ii) That where the ownership interest is an equitable interest. In this case the effect is that the interest vests directly in the husband and wife as beneficial joint tenants. The same consequences follow as if this had happened through an assignment by the husband to himself and his wife. One such consequence is that if the husband held his interest as a joint tenant with someone else, that joint tenancy is severed and becomes a tenancy in common. Another consequence, as before, may be the creation of a trust for sale (as in Example 1, below.)

EXAMPLE 1. H has bought a house for his own sole benefit but has had it conveyed to N, a nominee. If statutory co-ownership applies, N will hold the house as trustee upon trust for sale for H and W as beneficial joint tenants.

EXAMPLE 2. A house is already held by trustees upon trust for H and B (his brother) as beneficial joint tenants. If statutory co-ownership applies to H's interest, the joint tenancy between H and B will be severed, and the trustees will hold the house in two undivided half shares upon a tenancy in common:

— one share will belong to B as tenant in common, and

— the other share (though the spouses will together hold it as tenant in common with B) will belong to H and W as beneficial joint tenants as between themselves.

EXAMPLE 3. A house, although it is in the sole name of H as legal owner, is already held by him upon trust for sale for himself and W as beneficial tenants in common (perhaps because W made a contribution to the cost of its acquisition). If statutory co-ownership applies, it will normally apply to both of their beneficial interests. H's beneficial interest will be regarded as having been assigned by him to himself and W as joint tenants; and W's beneficial interest will be regarded as having been assigned to herself and H as joint tenants. The effect is that H

Clause 6 (*continued*)

will continue to hold as trustee upon trust for sale, but now for himself and W as beneficial joint tenants of the whole, instead of as tenants in common. (Joint tenancies are always equal, though tenancies in common need not be.)

(For an explanation of the terms "joint tenants" and "tenants in common", which appear in these notes, see paragraph 1.9 of the report. As to legal estates and equitable interests, see paragraph 1.54.)

(2) Notwithstanding subsection (1)(*c*) above, no limitation, covenant or condition restrictive of the husband's right to deal with the property shall be taken to extend or have reference to any transfer of ownership under this section.

Clause 6 (*continued*)

Subsection (2) ensures that the disposition with which statutory co-ownership is deemed to commence does not infringe any bar upon dispositions to which the ownership interest may be subject.

Exception from statutory co-ownership of joint interests and certain derivative interests.

7. There shall be no statutory co-ownership on any occasion in respect of an interest of a husband where the interest either—

(*a*) is one he has as joint tenant with the wife; or

(*b*) derives from one he had as joint tenant with her, the joint tenancy having been severed at a time when they had a matrimonial home in the property; or

(*c*) is one he acquired prior to that occasion out of an interest of hers in respect of which he is on that occasion excluded under sections 8 to 14 below from becoming statutory co-owner (or would be if she retained the interest).

Clause 7

The general principle is that statutory co-ownership applies to an ownership interest on the happening of a co-ownership occasion. But clauses 7–14 contain exceptions to that principle, and clause 7 deals with the three most simple ones.
(Paragraphs 1.153 and 1.154; 1.160–1.163; and 1.155–1.158 respectively.)

(*a*) Where the husband's ownership interest is one held as beneficial joint tenant with the wife. Since the effect of statutory co-ownership is to produce a beneficial joint tenancy, there is no need for it to apply when there is one already.

(*b*) Where the husband's ownership interest *derives* from one held as beneficial joint tenant with the wife, the joint tenancy having been severed while they had a matrimonial home in the property. (As to the severance of a joint tenancy, see paragraph 1.9.)

EXAMPLE. H and W own their home as beneficial joint tenants. The joint tenancy is severed and H and W thereupon acquire interests as tenants in common. These acquisitions (occurring at a time when H and W have a home in the property) amount to co-ownership occasions (clause 5(3)) and, but for this exception, statutory co-ownership would apply to re-create a joint tenancy. The exception ensures that this does not happen.

(*c*) Where the husband's ownership interest was acquired out of an interest of the wife and *that* interest is already excluded from co-ownership (or would be if the wife still had it).

EXAMPLE. W's father gives her a house, declaring that it is to be free of statutory co-ownership. (This declaration is effective to exclude statutory co-ownership under clause 10: see below.) Subsequently, W decides that she would like H to share, and gives him a one-third interest in it. If H and W already have a matrimonial home in the house, H's acquisition of this interest from W would not be a co-ownership occasion (clause 5(3)); but if they had not, and moved in subsequently, or if another co-ownership occasion occurred, statutory co-ownership would apply to his interest (but not to hers, because of her father's declaration), so that W would get half her gift back from H. Since this result would clearly be unintended, the exception prevents it. The result would still be prevented if:

(i) H had acquired his interest by operation of law (e.g., by making improvements to the property within the Matrimonial Proceedings and Property Act 1970, section 37); or

(ii) W had disposed of her remaining interest before the co-ownership occasion.

Right of husband or wife to exclude statutory co-ownership in transitional cases.

8.—(1) There shall be no statutory co-ownership on any occasion in respect of an interest which a husband has at the date when this Part of this Act comes into force (or which derives from such an interest) if before that date—

(*a*) the husband has by any writing signed by him declared that the interest he has at that date, being a separate interest, is to be free of statutory co-ownership; or

(*b*) where the interest is not a separate interest, either the husband or the wife has by a writing signed by him or her declared that both the interest the husband has at that date and the wife's corresponding interest are to be free of statutory co-ownership;

and the person making the declaration under paragraph (*a*) or (*b*) above has not, before the occasion in question, by a further writing signed by him or her revoked the declaration.

(2) A declaration under paragraph (*a*) or (*b*) of subsection (1) above must be attested by a person present as a witness when the declaration is signed.

(3) In this Chapter references to a separate interest of a husband or of a wife are references to an interest of his or hers not being an interest as joint tenant or tenant in common with the other of them (with no implication that they are married at the time referred to).

(4) In this Chapter references to a document being signed by a person include its being signed for him by his agent.

Clause 8

This clause contains a power, exercisable *unilaterally* by either spouse *at any time up to one year after Royal Assent*, to exclude statutory co-ownership in relation to any ownership interest then held. It also contains the definition of "separate interest"—a phrase used elsewhere in the Bill—and provides for signature of documents by agents.
(Paragraphs 1.218–1.222; as to subsection (3), 1.113; and, as to subsection (4), n. 76.)

Subsection (1) provides that the power is exercisable at any time before the date on which the Act comes into force (i.e., one year after its passing: see clause 32), and in respect of any ownership interest held on that date. There are two possibilities:

(*a*) If the husband's ownership interest is "separate" (i.e., not held as co-owner with the wife), then he may sign a unilateral declaration that it is to be free of statutory co-ownership.

(*b*) If the husband holds his ownership interest as co-owner with the wife, then either of them may sign a unilateral declaration but in this case the declaration must exclude *both* interests from statutory co-ownership. (Such exclusion will of course be unnecessary if the existing co-ownership is established in such a way as to fall within the excluding provisions of clause 12 of the Bill.)

A declaration of either kind will exclude statutory co-ownership on any future co-ownership occasion *unless* the person who made it has revoked it (by signed writing) in the meantime.

Subsection (2) provides that a unilateral declaration under this clause must be formally witnessed. This requirement does not apply to revocations.

Subsection (3) defines "separate interest" as an interest of the kind described in sub-para. (*a*) of the note on subsection (1) above. The words in brackets show that if a property is co-owned by a man and woman who are not married to one another, their respective interests will be treated as *not* having been "separate" if they later become husband and wife.

EXAMPLE 1. H is the legal owner of a house but he holds it upon trust for H and W because W contributed part of the purchase money. The ownership interest of H is not a separate interest. Nor is that of W.

EXAMPLE 2. H's father, by his Will, left a house to H and his brother and sister as beneficial joint tenants. H's ownership interest is a separate interest because, although he holds it as a joint tenant, he does not hold it as a joint tenant with W.

Subsection (4) provides that references in this clause—or elsewhere in Chapter II of the Bill—to a document being signed by a person include its being signed for him by his agent.

Right of husband or wife to exclude statutory co-ownership of interests held before marriage.

9.—(1) There shall be no statutory co-ownership on any occasion in respect of any separate interest which a husband has in any land at the time of the marriage (including an interest acquired on the marriage) if—

(*a*) he has before the marriage by any writing signed by him declared, either specifically with reference to the wife or generally, that the interest is to be free of statutory co-ownership; and

(*b*) he has not, before the occasion in question, by a further writing signed by him revoked the declaration or (it being a general declaration) directed that it shall not have effect in the case of the wife.

Clause 9

This contains a power for an unmarried person to prevent statutory co-ownership arising later in relation to an interest owned before marriage. (Paragraphs 1.106–1.115.)

Subsection (1) sets out the conditions under which an unmarried man may unilaterally exclude statutory co-ownership:

(*a*) The relevant interest must be held by him before his marriage, or be acquired on the marriage;

(*b*) the interest must be a separate interest of his (see clause 8(3), above, and the note thereon); and

(*c*) a declaration against statutory co-ownership must be signed *before the marriage*. (This declaration may be a general one, or may be so worded as to prevent co-ownership with the particular wife whom he intends to marry.)

The subsection goes on to provide that the spouse who made the declaration can revoke it by further signed writing. If the original declaration was a general one it may be revoked either generally or in relation to a particular woman only. The effect of a revocation is that the original declaration is ineffective to exclude statutory co-ownership on any subsequent occasion (unless the revocation is partial, in which case the original declaration will continue to operate against any woman other than the one in whose favour it was revoked).

EXAMPLE 1. An unmarried man is sole owner of a house and makes a general declaration excluding statutory co-ownership. He later marries, and he and his wife set up home in the house. W does not become a statutory co-owner.

EXAMPLE 2. Facts as in Example 1, but before the marriage (or before setting up home), the man has revoked the declaration, either generally or in favour of W. W becomes statutory co-owner (unless co-ownership is excluded for some other reason) on the first co-ownership occasion.

EXAMPLE 3. Facts as in Example 1. *After* the home has been set up, the man (now, H) revokes the declaration generally. This does not alter W's position because the revocation does not operate retrospectively. But the revocation would be relevant on a subsequent co-ownership occasion (e.g., if the couple ceased to have a home in the house, but later set up home in it again; or if H set up home in it with a new wife).

EXAMPLE 4. An unmarried man shares the ownership of a house with a woman, X. He makes a general declaration excluding statutory co-ownership in respect of his interest. If he later marries a different woman, she will be excluded from the statutory co-ownership of his interest. But if he marries X his unilateral declaration will not be effective to exclude her from statutory co-ownership because his interest will not have been "separate": in this case statutory co-ownership would normally apply to the interests of both the man and X, unless excluded for some other reason (e.g., because the co-ownership fell within the provisions of clause 12).

(2) A declaration under subsection (1)(*a*) above must be attested by a person present as a witness when the declaration is signed.

(3) For purposes of this section an interest as joint tenant and the interest derived from it by the severance of the joint tenancy are to be treated as one interest.

Clause 9 (*continued*)

By *subsection* (2) an excluding declaration (but not a revocation) must be formally witnessed.

Subsection (3) ensures that if the husband's ownership interest before marriage is one which he holds as a joint tenant (otherwise than with the woman who becomes his wife: if his interest was not separate the clause would not apply at all), a declaration made in regard to it serves equally to exclude the interest as tenant in common which he will acquire if it is severed.

Right of donor to exclude statutory co-ownership in case of gifts.

10.—(1) There shall be no statutory co-ownership in respect of an interest of a husband acquired by gift if the interest given him either—

(*a*) is a separate interest which is directed by the instrument making the gift to be free of statutory co-ownership; or

(*b*) is not a separate interest.

(2) Subject to subsection (3) below, any disposition of an interest in land is a gift—

(*a*) for purposes of subsection (1)(*a*) above, if it is made without consideration in money or money's worth moving from the husband (and is not a disposition by him alone);

(*b*) for purposes of subsection (1)(*b*) above, if it is made without consideration in money or money's worth moving from the husband or the wife (and is not a disposition made by them or either of them alone).

Clause 10

This provides for the exclusion from statutory co-ownership of ownership interests acquired by spouses through gifts from third parties. (Paragraphs 1.116–1.126.)

Subsection (1) contemplates two types of gift:

(*a*) A gift which confers a separate interest (defined in clause 8(3) upon one spouse. An interest of this kind will be excluded from statutory co-ownership if, and only if, the donor directs, in the instrument of gift, that it shall be so excluded.

(*b*) A gift which makes the spouses beneficial joint tenants or tenants in common. The interests thus given will be excluded from statutory co-ownership automatically, without the need for any direction.

Subsection (2) defines "gift" for the purposes of subsection (1). The words in brackets at the end of each of the two paragraphs show that, for example, a trust established by the husband in favour of himself and his brother would not be a gift within subsection (1)(*a*), and a similar trust in favour of himself and his wife would not be a gift within subsection (1)(*b*), even if (in either case) the trust was established gratuitously.

(3) Where a disposition of an interest in land is made by the exercise of a power of appointment, the interest is to be treated for purposes of this section as acquired by that exercise and not under the instrument conferring the power; but the disposition is not for those purposes a gift unless that instrument was made (as well as the power being exercised) without consideration as mentioned in subsection (2) above.

(4) Where the husband's interest in any land is or was conferred on him as a separate interest by an instrument conferring a power of appointment capable of being exercised in his favour, but he acquires ownership of the land by a release of the power, then if the instrument releasing it directs that the husband's interest is to be free of statutory co-ownership, the direction shall have the same effect under this section as if the husband had acquired his interest by the exercise by that instrument of the power.

(5) For purposes of this section an interest as joint tenant and the interest derived from it by the severance of the joint tenancy are to be treated as one interest.

Clause 10 (*continued*)

Subsections (3) *and* (4) are concerned with the case where the ownership interest is acquired under a settlement containing a power of appointment (i.e., a power vested in someone, usually the settlement trustees, to select who is to benefit).

Since the testator or settlor will not know the identity of the person in whose favour the power will be exercised (if it is exercised at all), it is appropriate that the appointor should have the power to make an excluding direction under subsection (1)(*a*), and subsection (3) therefore ensures that the instrument exercising the power of appointment is "the instrument making the gift". In consequence one will look to the appointment alone (and not to the settlement) to see whether statutory co-ownership has been excluded. But the subsection goes on to say that the interest acquired by the appointee (or, in a case within subsection (1)(*b*), by the appointees) is not treated as acquired by gift if consideration was given by him (or them) for the making *either* of the appointment *or* of the settlement.

People having powers of appointment are normally under no duty to exercise them and a settlor will therefore provide, in the settlement, for the destination of the property in default of appointment. If the power is simply not exercised the person entitled in default will acquire the property by virtue of the settlement and so it is the settlement which must contain any excluding direction which the settlor may wish to give. The same principle applies if the person having the power of appointment chooses to *release* it, thus making it certain that the beneficiary entitled in default will take, because that beneficiary still takes by virtue of the settlement—but in this case the Bill makes an important exception.

Where (as often happens) the beneficiary named to take in default of appointment is also one of the objects of the power of appointment, the person having the power of appointment can ensure that that beneficiary takes the property *either* by exercising the power *or* by releasing it. If he chose to exercise it, an excluding direction could be made in the Deed of Appointment (subsection (3)). If he chooses instead to release it, it would be anomalous if a similar direction could not be made in the Deed of Release. Accordingly, subsection (4) provides that in this particular case it can be so made. The concluding words of the subsection import the requirement as to consideration which is contained in subsection (3).

Subsection (5) contains a provision, analogous to that in clause 9(3), to ensure that an excluding declaration made in relation to the interest of a joint tenant serves also to exclude the interest as tenant in common which derives from it on severance.

Exclusion of statutory co-ownership by husband and wife's agreement for or creation of sole ownership.

11.—(1)(*a*) Subject to any written agreement to the contrary signed by the husband and wife, there shall be no statutory co-ownership on any occasion in respect of a separate interest of the husband—

(i) if at any time before that occasion the husband and the wife have entered into a written agreement signed by them that the interest is or is to be a separate interest and is to be free of statutory co-ownership; or

(ii) if he has acquired the interest by her express disposition in his favour, or the interest became a separate interest or, being a separate interest, was enlarged or improved by such a disposition.

(*b*) In paragraph (*a*)(ii) above any reference to the wife's express disposition in the husband's favour is a reference to a written disposition made and expressed to be made to him beneficially and made by her or made and expressed to be made by her direction.

(2) Subject to any written agreement to the contrary signed by the husband and wife, there shall be no statutory co-ownership on any occasion in respect of an interest of the husband if the interest is or derives from one in relation to which subsection (1)(*a*)(i) or (ii) above was satisfied at some previous time.

(3) For purposes of this section an interest as joint tenant and the interest derived from it by the severance of the joint tenancy are to be treated as one interest.

Clause 11

Clauses 11 and 12 deal with the cases in which a husband and wife may exclude statutory co-ownership, by agreement between themselves before a co-ownership occasion occurs, in favour of some other kind of ownership. Clause 11 deals with the case where the agreed ownership is *sole ownership* by one spouse. (Paragraphs 1.127–1.134; and 1.142–1.149.)

Subsection (1) (*a*) provides that statutory co-ownership is not to apply to a separate interest of the husband if:

(i) the spouses have signed an agreement that the interest is, or is to be, separate and free of statutory co-ownership; or

(ii) the husband acquired his interest from the wife, or she made it separate or enlarged or improved it (so that it can be inferred that she would not wish to recover part of it through statutory co-ownership).

In either case, however, the spouses can sign an agreement allowing statutory co-ownership to operate nonetheless.

EXAMPLES (of the exclusions of statutory co-ownership under the second case):

1. H and W have just married but have not yet set up home. The house into which they intend to move belongs to them as beneficial tenants in common. W expressly assigns her share to H.

2. The facts are the same but the house is settled property and W is the life tenant and H the remainderman. W expressly assigns her life interest to H, and it merges with H's remainder to make an ownership interest.

Subsection (1)(*b*) ensures, in the interests of certainty, that a disposition does not exclude statutory co-ownership unless it appears *from the disposition itself* to be made by the wife and in favour of the husband.

EXAMPLE. W buys a house and pays for it, but she directs the vendor to convey it to H, intending it to become his beneficially. The vendor does this by a simple conveyance which does not disclose any of these facts. Statutory co-ownership is not excluded.

Subsection (2) preserves the excluding effect of an agreement or disposition under subsection (1) notwithstanding a change in the husband's interest occurring before the co-ownership occasion.

EXAMPLE. Just after the marriage and before they set up home, H and W make an agreement effectively excluding H's house from statutory co-ownership. W then pays for substantial improvements to the property, so earning herself a beneficial interest under section 37 of the Matrimonial Proceedings and Property Act 1970. By the time they subsequently move in, therefore, H's interest is less than it was (and is, moreover, no longer a separate interest). Even so, statutory co-ownership will not apply to it (nor to W's newly acquired interest: see clause 7(*c*)).

Subsection (3) provides that the effective exclusion of an interest held by the husband as a beneficial joint tenant (with someone other than the wife: an interest held with the wife would not be separate) will operate to exclude also an interest as tenant in common derived from it through severance.

Exception from statutory co-ownership where entitlement of husband and wife to shared interest settled by agreement.

12.—(1) Subject to any written agreement to the contrary signed by the husband and wife, there shall be no statutory co-ownership on any occasion in respect of an interest of the husband, if—

(*a*) the interest is not a separate interest, and the fact that they are or are to be joint tenants or tenants in common and, if tenants in common, the relative size of their shares has been specified by a written agreement signed by them or by an instrument such as is mentioned in subsection (2) below; or

(*b*) the interest is or derives from one in relation to which paragraph (*a*) above was satisfied at some previous time.

(2) The instruments referred to in subsection (1)(*a*) above are instruments whereby either—

(*a*) the husband and wife are made beneficial joint tenants or tenants in common of the land or of an interest in it; or

(*b*) one of them disposes of any right or interest in favour of the other,

being instruments which satisfy one of the conditions in subsection (3) below.

(3) The said conditions are—

(*a*) that the entitlement of the husband and wife specified in the instrument as required by subsection (1) above is in accordance with a prior agreement between the husband and wife; or

(*b*) that before the occasion in question both the husband and wife adopted the instrument by any act showing an intention to accept the instrument; or

(*c*) whereby the instrument one of them disposes of any right or interest in favour of the other, that before the occasion in question the other adopts the instrument by any act showing an intention to accept the instrument.

(4) For purposes of subsection (3)(*a*) above the instrument (if it specifies the entitlement of the husband and wife as required by subsection (1)) shall be presumed, unless the contrary is shown, to do so in accordance with a prior agreement between them.

(5) For purposes of this section the entitlement of a husband and wife is not specified by an agreement or instrument as required by subsection (1), if the nature or extent of their interests is left in any relevant respect, other than a respect in which it is affected by the rights of some other person, to be ascertained from outside the agreement or instrument.

Clause 12

This clause deals with cases where statutory co-ownership may be excluded, by the spouses' agreement, in favour of some other kind of *co-ownership*. (Paragraphs 1.127–1.141.) This may be done in any one of three ways:

(i) By both spouses signing an agreement stating the nature of their agreed form of co-ownership (beneficial joint tenancy or tenancy in common) and (if tenancy in common) the sizes of their respective shares (*subsection* (1)(*a*), ignoring the words relating to "an instrument").

(ii) Alternatively, by an instrument (typically a conveyance or transfer) which makes the spouses co-owners and states the nature and (where relevant) the sizes of their shares. Such an instrument suffices (even though not signed by them) provided that the spouses had (however informally) agreed the co-ownership terms beforehand (and this is presumed unless the contrary is shown) or, failing that, had subsequently (but before any co-ownership occasion) shown that the terms were accepted. (This is the joint effect of *subsection* (1)(*a*), ignoring the words relating to "a written agreement", *subsection* (2) (*a*), *subsection* (3)(*a*) and (*b*), and *subsection* (4).)

(iii) Alternatively, by an instrument under which one spouse makes a disposition in favour of the other, the instrument setting out the same information as in (i) and (ii), above. Such an instrument suffices provided that the spouse had (however informally) agreed the co-ownership terms beforehand (this being again presumed unless the contrary is shown) or, failing that, the disponee spouse had subsequently (but before any co-ownership occasion) shown that the terms were accepted. (This is the joint effect of *subsection* (1)(*a*), ignoring the words relating to "a written agreement", *subsection* (2)(*b*), *subsection* 3(*a*) and (*c*), and *subsection* (4).)

In regard to all these three cases:

(*a*) *Subsection* (5) amplifies the requirement that the agreement or instrument in question should specify the spouses' interests.

(*b*) *The opening words of subsection* (1) enable the spouses, despite the existence of an excluding agreement or instrument, to agree that statutory co-ownership shall apply.

(*c*) *Subsection* (1)(*b*) preserves the excluding effect of an agreement or instrument despite changes in the spouses' interests occurring afterwards but before the co-ownership occasion.

EXAMPLE 1. A house is in the sole name of H but he holds on an implied trust for himself and W as tenants in common because W contributed part of the purchase price. They have not yet moved in. To exclude statutory co-ownership, they may make an agreement within the terms of case (i), specifying the sizes of their shares.

Clause 12 (*continued*)

EXAMPLE 2. H and W are thinking of buying the freehold of the house in which they live. Before they do so they sign an agreement that they will hold it as tenants in common in the proportion 2:1. Statutory co-ownership will be excluded in relation to the freehold interest under case (i).

EXAMPLE 3. H and W buy a house, taking a transfer which declares them to be beneficially entitled as tenants in common in the proportions 9:1, but they do not execute the transfer. Statutory co-ownership will be excluded under case (ii) *unless* W (or H) rebuts the presumption as to prior agreement *and* it appears that W (or H) did not subsequently accept the terms of the transfer.

EXAMPLE 4. H is sole owner of a house, not yet his matrimonial home. He executes an instrument declaring that he holds the house upon trust for himself and W in the proportions 4:1. *Prima facie*, this would exclude statutory co-ownership under case (iii) if the house later became the matrimonial home. But it would not do so if W rebutted the presumption as to prior agreement, and it appeared that she had not subsequently accepted the terms of the instrument.

Exception from statutory co-ownership to avoid severance from other land.

13.—(1) There shall be no statutory co-ownership on any occasion in respect of an interest the husband has in a property or part of a property if at the time—

(*a*) the husband has a substantive interest in any adjoining or neighbouring land which is not comprised in the property nor would be treated under section 3(2) above as so comprised if owned by the husband; and

(*b*) the difficulties or disadvantages involved in a severance would be such that, on a sale of the whole in the open market for the relevant estates or interests, subject to any subsisting tenancies but otherwise with vacant possession, it would not be practicable for the property or that part of it to be sold as a distinct lot without the adjoining or neighbouring land or, if it had to be so sold, the price to be expected for the whole would be substantially reduced.

Clause 13

This deals with the case where a husband, besides having an ownership interest in a "property" (as described in clause 3) which is potentially within the scope of statutory co-ownership, has also a substantive interest in adjoining or neighbouring land which is outside its scope. (Paragraphs 1.44–1.51.) The general effect is that if the "property" and the other land could not readily be disposed of separately, the "property" is excluded from statutory co-ownership.

Subsection (1) sets out the detailed conditions for exclusion from statutory co-ownership. Paragraph (*a*) provides that the husband must have a substantive interest in the adjoining or neighbouring land. "Substantive interest" is defined in subsection (4): it is wider than the interest of an owner (clause 2), and would include, for example, an interest as life tenant or partner.

This gives rise to the need for the words, "nor would be treated . . . if owned by the husband". They ensure that land which would be "adjunct" land within clause 3(2) if owned by one of the spouses is not brought within the category of "adjoining or neighbouring land". Otherwise, if the husband had a substantive, but not an ownership, interest in "adjunct" land, the "adjunct" land would fall into this category and might serve to exclude the home itself from statutory co-ownership.

Paragraph (*b*) requires that the difficulties or disadvantages inherent in severing the property from the adjoining or neighbouring land must be such that it would be impracticable to sell them as separate lots or that, if they were sold in that way, there would be a substantial reduction in the price to be expected for the whole.

Paragraph (*b*) also sets out the terms of the hypothetical sale. One of these is that the sale is for "the relevant estates or interests"—a phrase defined in subsection (3).

EXAMPLES are given in paragraph 1.49 of the report.

(2) Where but for this section a wife would on any occasion have become statutory co-owner in respect of an interest of the husband in a property or part of a property, and afterwards while the husband is owner of the property or that part of it he ceases to be entitled to a substantive interest in the adjoining or neighbouring land or any material part of it (without the wife having in the meantime become statutory co-owner in respect of the interest in the property or the part of it in question), then this Part of this Act shall thereupon have effect as if he had acquired his ownership of the property or that part of it on ceasing to be so entitled.

(3) For purposes of this section "the relevant estates or interests" are—

(*a*) in the case of the property or part of a property in question, the legal estate in respect of which, or in respect of the husband's interest in which, there is an occasion for the husband and wife to become statutory co-owners; and

(*b*) in the case of the adjoining or neighbouring land, any legal estate in which the husband then has a substantive interest.

(4) In this Part of this Act "substantive interest" means a beneficial interest (whether vested or contingent) other than an interest by way of security only, or by way of rent charge or annuity, or by way of charge under the Matrimonial Homes Act 1967.

1967 c. 75.

Clause 13 (*continued*)

Subsection (2): the exclusion of statutory co-ownership under subsection (1) is justified only so long as the husband has a substantive interest in the "other land". Accordingly, this subsection provides that if statutory co-ownership is excluded, and subsequently the husband loses his substantive interest in the "other land", or a material part of it, he is treated as acquiring his ownership interest in the "property" anew: there is a new co-ownership occasion. If he still retains his interest in some of the "other land", the retained part may be such that it still serves to exclude the "property" from co-ownership on this new occasion. But if he retains an interest in none of the "other land", or if the land retained is not such as to attract the operation of the clause, statutory co-ownership will apply to the "property" on this new occasion (unless it is excluded for any other reason). The words in brackets in the subsection make it clear that if, on a part disposal of the "other land", the retained part is insufficient to exclude statutory co-ownership on that occasion, and it applies to the "property", there is no new occasion when the retained part is sold (because there is no need for one).

Subsection (3) defines the subject matter of the hypothetical sale mentioned in subsection (1) (*b*).

Subsection (4) defines "substantive interest".

Effect of bankruptcy or insolvency.

14.—(1) There shall be no statutory co-ownership on any occasion in respect of an interest of the husband, if at the time the wife is an undischarged bankrupt.

(2) Where a wife, after becoming on any occasion statutory co-owner in respect of an interest of the husband, becomes bankrupt as from that time or an earlier time, then subject to subsection (4) below the wife shall be deemed not to have become on that occasion co-owner in respect of that interest.

(3) Where a wife becomes insolvent, then—

(*a*) there shall be no statutory co-ownership on any later occasion in respect of an interest of the husband, if the interest she thereby acquired would be included in the assets to be administered; and

(*b*) subject to subsection (4) below, she shall be deemed not to have become on any earlier occasion statutory co-owner in respect of such an interest, if the assets to be administered extend (by relation back) to her then assets.

(4) Subsections (2) and (3)(*b*) above shall not affect any dealing by the wife with her interest before the time when she is adjudged bankrupt or becomes insolvent.

(5) For the avoidance of doubt it is hereby declared that, subject to subsection (6) below, the circumstances in which the disposition ("the statutory disposition") supposed, by section 6(1)(*c*) above, to be made by the husband is voidable by reason of his bankruptcy or insolvency are the same as the circumstances in which an actual disposition of that kind would be voidable.

Clause 14

This deals with the relationship between statutory co-ownership and a spouse's bankruptcy. (Paragraphs 1.167–1.178.)

Subsection (1) ensures that statutory co-ownership does not operate at a time when the *acquiring* spouse is bankrupt. (For an explanation of the terms "acquiring spouse" and "owner spouse", see paragraph 1.4.)

Subsection (2) extends the principle of subsection (1) in the light of the fact that a bankruptcy, once the adjudication order is made, may take effect (by relation back) from an earlier date. If a co-ownership occasion occurs between this earlier date and the date of the order, statutory co-ownership is deemed not to have applied. But this is subject to subsection (4), which protects third parties with whom the spouse may have dealt in the meantime.

Subsection (3) applies the principles in subsections (1) and (2) to cases where the acquiring spouse, though not adjudged bankrupt, makes a composition or arrangement *in bankruptcy proceedings* (under section 16 of the Bankruptcy Act 1914—see subsection (8), below.)

Subsection (4): if a co-ownership occasion occurs during a period between the date to which a bankruptcy (or composition or arrangement) is back-dated and the date of the adjudication order (or composition or arrangement), and third parties deal with the acquiring spouse during this period in relation to the interest which that spouse has apparently acquired, they are protected despite the provisions of subsections (2) and (3)(*b*).

EXAMPLE. On 1 May there is a co-ownership occasion which appears to result in W becoming a joint tenant with H of a house formerly owned solely by H. On 15 May, W charges her interest in favour of her Bank. (This automatically severs the joint tenancy.) On 1 June W is adjudicated bankrupt with effect from 15 April. Results: (i) W's trustee in bankruptcy acquires no interest in the house because the bankruptcy began before the co-ownership occasion: H is still the sole owner; but (ii) the Bank keeps its charge on a half share in the house because the charge came before the bankruptcy adjudication.

Subsection (5) deals with the case where the *owner* spouse becomes bankrupt (or makes a composition or arrangement under the Bankruptcy Act) after statutory co-ownership has operated. It confirms that the "statutory disposition" (by which statutory co-ownership is deemed to commence: clause 6(1)(*c*)) is in the same position as an express disposition would have been; and the general law will determine whether, on the facts of the case, it can be avoided by the trustee for the benefit of creditors.

(6) Where the wife and the husband each become statutory co-owners in respect of an interest which the other has as part owner of the land (the two interests being ones which they have as tenants in common) and—

(*a*) subsequently the husband becomes bankrupt or insolvent; and

(*b*) the bankruptcy or insolvency is not one within subsection (2) or (3)(*b*) above (so that the statutory disposition by the wife is unaffected by the bankruptcy or insolvency),

the statutory disposition by the husband shall not be voidable by reason of the bankruptcy or insolvency except to the extent (if any) by which the husband's interest as part owner of the land exceeded the wife's (so that avoidance of the statutory disposition will do no more than prevent the wife from having obtained, as co-owner of both interests, more than she had previously as entire owner of the one interest).

Clause 14 (*continued*)

Subsection (6) qualifies the operation of subsection (5) in the rare case where the spouses were tenants in common before the co-ownership occasion; where they became statutory co-owners on that occasion; where one of them subsequently becomes bankrupt (or makes a composition or arrangement under the Act); and where the trustee would, in the absence of special provision, be able to avoid the statutory disposition which the bankrupt spouse was deemed to make when statutory co-ownership began. In these circumstances it is necessary, because *each* spouse will have made a statutory disposition (on the co-ownership occasion) in favour of *both* spouses, to limit the extent to which the trustee may avoid the disposition of the bankrupt spouse. Otherwise the trustee would be able both to avoid this disposition in full and to keep the benefit of the disposition made by the other spouse to the bankrupt spouse. The object is to ensure that the trustee does not take more than the bankrupt spouse's equal interest as statutory co-owner or his original share (whichever is the greater).

EXAMPLE. H and W own a house on an implied trust in the proportions 6:4. Statutory co-ownership is not excluded, and when they set up home there it applies. H makes a statutory disposition of 6/10 and W thus acquires 3/10. W, for her part, makes a statutory disposition of 4/10 and H acquires 2/10. Each ends with 5/10, or $\frac{1}{2}$.

H now becomes bankrupt. The trustee in bankruptcy will certainly take the $\frac{1}{2}$ which H has as statutory co-owner. But if the trustee could avoid H's statutory disposition he would obtain more—namely, the 3/10 which W acquired under it. As a result he would take a total of 8/10, leaving W with only 2/10 (less than her original share).

By virtue of subsection (6), however, H's statutory disposition is to be treated, not as a disposition of 6/10 under which W took 3/10, but as a disposition of 2/10 (the difference between the original shares) under which W acquired only 1/10. This being so, the trustee can acquire only 1/10 by avoiding it and will take a total of only 6/10 (which was H's original share). Avoidance of H's disposition has deprived W of the additional interest she acquired through statutory co-ownership, but of no more.

If, on the same basic facts, the bankrupt spouse was W, not H, the position would be this. The trustee would again take W's $\frac{1}{2}$ as statutory co-owner; but he could not avoid W's statutory disposition at all because W's original share did not exceed that of H. In the result, H is left with $\frac{1}{2}$. This is less than his original share, but the diminution was caused by statutory co-ownership and not by W's bankruptcy.

The example just given assumes that both spouses have retained intact their interests as statutory co-owners (as will normally be the case) but the subsection is so worded as to cater also for the case where they have not.

(7) This section shall have effect in relation to bankruptcies and to insolvencies under the law of any part of the United Kingdom or elsewhere.

(8) In this section references to insolvency are references to the making, in bankruptcy proceedings, of a composition or arrangement under which assets are to be administered by a trustee for the benefit of the insolvent's creditors, and references to the assets to be administered shall be construed accordingly.

Clause 14 (*continued*)

Subsection (7) makes it clear that (although the co-owned home can only be in England and Wales) the provisions of this clause apply no matter where the spouse in question has become bankrupt or insolvent.

Subsection (8) defines the term "insolvency" used earlier in the clause.

Effect of minority or incapacity.

15.—(1) Notwithstanding anything in section 6(1)(*c*) above, that section shall have effect—

(*a*) in relation to any interest of a husband who is a minor as if he were of full age;

(*b*) in relation to any interest of a husband who is an incapacitated person as if he were not incapacitated.

(2) A declaration or revocation made for purposes of section 8 or 9 above shall not be affected by the minority of the person making it.

Clause 15

This deals with incapacity and (in conjucntion with clause 16) with minority. (Paragraphs 1.197–1.200; and 1.184–1.190.)

Subsection (1) makes it clear that if the owner spouse is a minor, or mentally incapable, clause 6(1)(*c*) is to operate as if he were of full legal capacity. This negatives the possible argument that, since an *express* disposition by such a spouse would be ineffective, or voidable, the statutory disposition must suffer from the same defects.

Subsection (2) relates to *unilateral* declarations to exclude statutory co-ownership made by a minor spouse: it provides that such declarations may be made and will not be voidable. (As to similar declarations made by a spouse under mental disability, see paragraph 1.200.)

Minority: agreement or instrument excluding statutory co-ownership.

16.—(1)(*a*) This subsection applies to an agreement which, under section 11 or 12 above, has the effect of excluding a wife from statutory co-ownership in respect of an interest of the husband in any land, and in this subsection "the relevant law about minors" means the law relating to the effect on a contract of the minority of a party to the contract.

(*b*) If the agreement was made in contemplation of the use or possible use by the parties of the land (or a property comprising it) as a matrimonial home, the agreement shall be treated for purposes of the relevant law about minors as a contract for the husband to acquire from the wife her interest as stautory co-owner.

(2)(*a*) This subsection applies to an agreement, disposition or instrument which under section 11 or 12 above has the effect of excluding a wife from statutory co-ownership in respect of an interest of the husband in any land.

(*b*) Where the agreement, disposition or instrument is avoided by the wife or husband by reason of her or his minority section 5(3) above shall apply as if on the avoidance the wife and the husband each acquired (otherwise than from the other or out of the other's interest) the interest she or he then has in the land in question.

Clause 16

This clause deals with the effect of minority upon the exclusion of statutory co-ownership under clause 11 or 12. (Paragraphs 1.191–1.196.) Although such exclusion has been treated under the general heading of "exclusion by agreement", the actual documents which serve to exclude statutory co-ownership under clauses 11 and 12 need not amount to agreements in law (i.e., contracts). The general effect of the excluding document (and the extent to which it binds a minor spouse) will be governed by the existing law; and the clause serves only to supplement that law in two respects.

Subsection (1): if spouses make an *agreement* which is apt to exclude statutory co-ownership under clause 11 or 12, and do so at a time when they contemplate the use of the property as a matrimonial home, they should be taken to appreciate and intend the excluding effect of their agreement; and the existing law about the effect of minority on a contract is then to apply on the basis laid down in the subsection.

Subsection (2): if an excluding document (of any kind) within clause 11 or 12 is avoided by a spouse when he or she comes of age, there should be a new co-ownership occasion, so that statutory co-ownership applies immediately to the property if the spouses are still living there and it is not excluded for any other reason. The subsection produces this result.

EXAMPLE. H (a minor) was the sole beneficial owner of a house. He married W and assigned his whole interest to her and then they set up home in the house. H's assignment was effective to exclude statutory co-ownership under clause 11 (1)(*a*) (ii). H then comes of age and avoids the assignment, thus recovering his interest. But (assuming the spouses are still living in the house, and that there is no other reason for exclusion) statutory co-ownership immediately applies to it and he becomes a beneficial joint tenant with W.

Exemption from stamp duty on reversal of statutory co-ownership.

17. Stamp duty shall not be chargeable on an instrument executed within two years after a husband and wife have become statutory co-owners of a property or of land comprised in a property, in so far as the instrument operates to vest in each of them the same interest (if any) in any land as he or she would have had if on the occasion in question there had been no statutory co-ownership in respect of any interest of either of them in the property or land comprised in it.

Clause 17

Statutory co-ownership may sometimes arise without the spouses appreciating that their acts would have that effect; and the effect may be contrary to their wishes. This clause provides that stamp duty shall not be payable on any instrument executed simply in order to restore their positions to what they had been before the co-ownership occasion, provided that they carry this out within two years after that occasion. (Paragraph 1.202.)

CHAPTER III

INCIDENTS OF CO-OWNERSHIP OF MATRIMONIAL HOME

Construction and operation of Chapter III.

18.—(1) For purposes of this Chapter "relevant land" means land of which a husband and wife are co-owners at a time (after the coming into force of this Part of this Act) when it is comprised in a property in which they have a matrimonial home, and includes any such land—

(i) notwithstanding that the land ceases to be comprised in a property in which they have a matrimonial home; and

(ii) notwithstanding that they cease to be husband and wife.

(2) For purposes of this Chapter land continues to be relevant land notwithstanding that on death, or on any other occasion, either the husband or the wife ceases to own the land, so long as—

(*a*) the other remains an owner of the land in respect of the estate or interest in respect of which the husband and wife were co-owners immediately before that occasion; and

(*b*) that estate or interest is held by trustees.

(3) In this Chapter, where the context permits, in relation to relevant land—

(*a*) in accordance with subsection (1)(ii) above, references to "husband" and "wife" include former husband and former wife,

(*b*) in the circumstances specified in subsection (2), references to the husband and wife being co-owners are references to one of them being an owner, and references to the husband or wife are references to that one of them.

(4) In this Chapter—

(*a*) "the trusts" means the trusts under which a husband and wife are co-owners of relevant land,

(*b*) "the trustees" means the trustees of the trusts,

(*c*) references to a disposition of trust property made by the trustees are references to a disposition by them of, or of any estate or interest in, the estate or interest held by them, not being a disposition incident to or consequent on the appointment, resignation or removal of a trustee,

(*d*) references to a disposition do not include references to taking a further advance under an existing mortgage or charge.

Clause 18

This defines "relevant land" and certain other terms widely used in Chapter III. (Paragraphs 1.258–1.268.)

Subsection (1): the co-ownership of land which may make it relevant land for the purposes of this Chapter is *any* co-ownership (and not only statutory co-ownership under Chapter II). "Co-owners" (being a term related to "own") is defined in clause 2; and "property" in clause 3. As to "husband" and "wife", see clause 1(2) and (3), and subsection (3) of this clause.

Subsection (2): the provisions of the Chapter continue in general to apply (subject only to the exception made by clause 26(9)) for the protection of one co-owning spouse, after the other has ceased (for any reason) to be a co-owner, until that protection ceases to be necessary.

EXAMPLE. H and W are tenants in common of a freehold house in the sole name of H, who therefore holds the legal estate as trustee. H sells his beneficial interest to X. The land remains relevant land. X then transfers his beneficial interest to W. Although W now has the whole beneficial interest, H is still trustee of the legal estate and the land remains relevant land. W then calls upon H to convey the legal estate to her, and he does so. The land ceases to be relevant land.

Subsection (3) is consequential upon subsection (1), paragraph (ii), and subsection (2).

Subsection (4) contains further definitions.

Qualification of provisions requiring consent of husband or wife.

19.—(1) This section applies to the following provisions of this Act ("the consent provisions") namely—

(*a*) in section 20 subsections (1)(*a*) and (2)(*a*);

(*b*) in section 21 subsection (1);

(*c*) in Schedule 2, paragraph 2(1).

(2) The consent provisions shall have effect in relation to any relevant land only if the husband and wife are or have been sole co-owners of the land at a time (after the coming into force of this Part of this Act) when it is comprised in a property in which they have a matrimonial home.

(3) For purposes of this section a husband and wife are sole co-owners of land if, regard being had only to substantive interests, they are sole co-owners in respect either of the fee simple or of a leasehold interest.

Clause 19

This clause refers to later provisions of Chapter III (listed in *subsection* (1)) which require the spouses' consent to be obtained before certain things are done in relation to relevant land.

Subsection (2) provides that these requirements are not to apply unless the spouses have (at some time when the Act was in force and the property was their home) been *sole* co-owners. (Paragraphs 1.272–1.274; 1.293; and 1.349.)

Subsection (3) defines "sole co-owners". For "substantive interests", see clause 13(4).

Rights in respect of trusteeship.

20.—(1)(*a*) The consent of the husband and of the wife shall be required to any appointment otherwise than by order of a court of a new trustee of the trusts or to the discharge of a trustee from the trusts otherwise than on an appointment of new trustees.

(*b*) A person's consent is required by this subsection, and shall for purposes of this subsection be valid and binding, notwithstanding that person's minority.

(*c*) An appointment or discharge of a trustee shall not be invalid for want of a consent required by this subsection, nor shall any person be under any liability for making or concurring in an appointment or discharge without that consent unless he knows or ought reasonably to have known that the consent was so required.

(*d*) Where a trustee is appointed without a person's consent required by this subsection, the court may on the application of that person remove the trustee from the trusteeship, unless in the opinion of the court the appointment is one that would have been made by the court in the circumstances.

(2) Where a husband and wife are co-owners of relevant land under the trusts of a legal estate in the land, then—

(*a*) if either of them is a trustee, he or she shall not without his or her consent be removed from the trusteeship of that estate under any power contained in the instrument creating the trust unless he or she remains out of the United Kingdom for more than twelve months or refuses or is unfit to act in the trust or is incapable of acting therein; and

(*b*) either of them may be appointed trustee of that estate notwithstanding the statutory restrictions affecting the number of persons entitled to hold land on trust for sale, or those on the appointment of additional trustees, and if appointed by virtue of this provision shall be disregarded in the application of those restrictions; and

(*c*) if either of them (being of full age) is not a trustee and applies to the court to be appointed trustee of that estate, the court shall make an order appointing him or her trustee of it (and of the proceeds of sale), unless the court sees special reason for not making the appointment.

(3) In this section "the court" means the High Court or a county court, and a county court shall have jurisdiction notwithstanding that, by reason of the amounts involved or otherwise, the jurisdiction would not but for this subsection be exercisable by a county court.

(4) Where a person witholds consent under subsection (1) above to the appointment or discharge of a trustee of an estate or interest in land, a separate set of trustees may be appointed in accordance with section 37(1)(*b*) of the Trustee Act 1925 for the remainder of the trust property (if any), notwithstanding that it is not held on distinct trusts.

1925 c. 19.

(5) This section has effect subject to section 19 above.

Clause 20

This gives to spouses co-owning relevant land certain new rights in regard to the trusteeship. (Paragraphs 1.293–1.309.)

Subsection (1), paragraph (*a*), imposes a requirement of the consent of both spouses to any appointment of a new trustee (unless made by court order) or to any discharge of a trustee (unless made on the appointment of a new one) of the trusts under which they co-own relevant land.

By paragraph (*b*) the consent of a spouse who is a minor is required, and is validated.

Paragraph (*c*) deals with the consequences of a breach of the requirement.

Paragraph (*d*) provides a remedy for an appointment made in breach of the requirement.

Subsection (2) applies only where the trustees hold a legal estate (the usual case).

Paragraph (*a*) protects a spouse who is a trustee from being removed from the trusteeship.

Paragraph (*b*) facilitates the appointment of a spouse who is not a trustee. The statutory restrictions referred to are contained in the Trustee Act 1925, sections 34 (and see Land Registration Act 1925, section 95), and 36: the limit is four.

Paragraph (*c*), in the typical case where, although husband and wife are beneficial co-owners, the legal estate is in the name of the husband alone, will normally enable the wife to insist upon becoming a joint holder of the legal estate.

Subsection (3): any application to the court under this clause may be made to the county court.

Subsection (4) deals with a case where relevant land and other property are held upon the same trusts. If a consent under subsection (1) is refused, a separate set of trustees of the other property may be appointed.

Subsection (5) is a reminder that the condition of sole co-ownership (see clause 19) applies to the consent requirements in this clause.

Sales etc. to require consent of both co-owners.

21.—(1) The trustees shall not without the consent of the husband and of the wife make any disposition of trust property.

(2) A person's consent is required by this section, and shall for purposes of this section be valid and binding, notwithstanding that person's minority.

(3) The requirements of subsection (1) above, for any case within that subsection, shall take the place of any requirement of consent that might arise from the land having been acquired for a matrimonial home or other common purpose.

(4) This section has effect subject to section 19 above.

(5) A disposition made without a consent required by this section shall be of no effect.

(6) Where the trustees hold a legal estate subsection (5) above has effect—

(*a*) where the legal estate is registered land, subject to section 24(2) and (3) below;

(*b*) where the legal estate is not registered land, subject to section 4(9) of the Land Charges Act 1972 (inserted by paragraph 1(2) of Schedule 1 to this Act).

Clause 21

This implements our recommendations about the new consent requirement: the right of husband and wife to withhold consent to a disposition (defined in clause 18(4)(*c*) and (*d*)) by the trustees (defined in clause 18(4)(*b*)). (Paragraphs 1.270–1.279; and 1.287–1.292.)

Subsection (1) imposes the basic requirement of consent.

Subsection (2) provides that the consent of a minor spouse is required, and is valid.

Subsection (3) arises out of a line of cases, discussed in paragraph 1.278 of the report, which go far to establish an existing "requirement of consent" in certain circumstances. To avoid uncertainty and possible duplication, the subsection provides that the new consent requirement, when it applies, shall take the place of this existing "requirement" (although a spouse who wishes to justify a refusal of statutory consent may still rely upon the facts which would have given rise to the existing requirement).

Subsection (4) is a reminder that the condition of sole co-ownership (see clause 19) applies to this consent requirement.

Subsection (5) lays down the general principle that a disposition made in breach of the consent requirement is to be of no effect at all. But *subsection* (6) provides that this principle is subject to the registration provisions in clauses 23 (and Schedule 1) and 24 in all cases where the trustees hold a legal estate and the disposition is to a purchaser. The result is that the general principle applies only when the rights of the non-consenting spouse have been protected by registration, or where the *trustees* hold a mere equitable interest (a very rare case), or where the disposition is a gift.

Court jurisdiction as regards consents and powers of trustees.

22.—(1) The court shall have power on the application of any person interested to declare whether a person's consent is required by section 20 or 21 above or by paragraph 2 of Schedule 2 to this Act, in the case specified in the application.

(2) If—

(*a*) any consent to a disposition by the trustees, or to their taking a further advance under an existing mortgage or charge, whether required by this Act or not, cannot be obtained, or

(*b*) the trustees refuse to sell, or to exercise any of the powers conferred by sections 28 and 29 of the Law of Property Act 1925 (powers of management, and delegation of powers),

1925 c. 20.

any person interested may apply to the court—

(i) for a vesting or other order for giving effect to the proposed transaction, or

(ii) for an order directing the trustees to give effect to the proposed transaction,

and the court may make such order as it thinks fit.

(3) In considering under subsection (2) above a consent required from a person as being or having been one of the parties to a marriage the court may have regard to the welfare (if affected) of any children of the family within the meaning of the Matrimonial Causes Act 1973.

1973 c. 18.

(4) In this section "the court" means the High Court or a county court, and a county court shall have jurisdiction notwithstanding that, by reason of the amounts involved or otherwise, the jurisdiction would not but for this subsection be exercisable by a county court.

(5) The jurisdiction exercisable under section 30 of the Law of Property Act 1925 or section 17 of the Married Women's Property Act 1882 shall not be exercisable where the jurisdiction under this section is exercisable.

1882 c. 75.

Clause 22

This gives the court certain powers, principally to rule upon the existence of, and to dispense with, the consent requirements. (Paragraphs 1.280–1.286.)

Subsection (1) allows any person interested to seek a ruling as to whether a consent requirement has arisen.

Subsection (2) allows any such person to seek an order dispensing with a consent to a disposition or to a further advance (but not to a change in the trusteeship, because of the existing jurisdiction in this area: see also clause 20(3), above) which is being refused or is otherwise unobtainable; or an order requiring the trustees to carry out a particular transaction.

Subsection (3) ensures that (where the court is considering whether to dispense with a spouse's consent) the welfare of children can always be considered.

Subsection (4) gives the county court jurisdiction to hear all such applications.

Subsection (5): the clause applies only to relevant land, but this subsection ensures that when it does apply it replaces the existing jurisdiction under the Law of Property Act 1925 and the Married Women's Property Act 1882.

Trustees holding a legal estate in unregistered land.

1972 c. 61.

23.—(1) This section applies where the trustees hold a legal estate which is not registered land.

(2) So long as the husband or the wife is not one of the trustees there may be registered in the register of land charges under section 2 of the Land Charges Act 1972 a land charge for his or her benefit to be known as a land charge of Class G.

(3) Registration of a Class G land charge for the benefit of the husband or wife shall constitute registration—

(*a*) of that person's beneficial interest under the trusts; and

(*b*) if applicable, of the requirement of consent by that person imposed by section 21 above,

and notwithstanding that registration of that person's beneficial interest under the trusts shows that the legal estate is subject to trusts, registration of the land charge, or failure to register it, shall not affect any other person's interest under the trusts.

(4) The Land Charges Act 1972 and the other enactments mentioned in Schedule 1 to this Act shall be amended as provided in that Schedule.

Clause 23

This applies when relevant land is not registered under the Land Registration Act 1925, and gives spouses a right to register under the Land Charges Act 1972 a new land charge of Class G, in respect of their beneficial interests and the requirement of consent to dispositions. (Paragraphs 1.318–1.326.)

Subsection (1): the limitation to legal estates is unavoidable because the existing register is confined to entries affecting such estates (Land Charges Act 1972, s. 3(1); and see s. 17(1) and Law of Property Act 1925, s. 205(1) (v)).

Subsections (2) *and* (3) allow registration of the new land charge by a spouse who is not a trustee and provide that registration amounts to registration of

> that spouse's beneficial interest under the trusts, and
> the requirement of that spouse's consent to dispositions, *if it applies.* (It would not apply, for example, if the spouses had never been sole co-owners: clauses 19 and 21(4), above.)

Registration of the new land charge gives notice (through section 198(1) of the Law of Property Act 1925) of the beneficial interest of the registering spouse. The fact that a purchaser has notice of this interest will mean that he must pay the purchase money to or by the direction of two trustees (or a trust corporation) on pain of taking subject to the interest in question. And *if* the consent of the registering spouse is required to dispositions (and has not been dispensed with), registration of the land charge will ensure that a purchaser who takes a disposition made without consent will obtain nothing (see clause 21(5) and (6) (*b*), above, and Schedule 1, para. 1(2) (*c*), below).

The concluding words of subsection (3) remove any doubt as to whether registration or non-registration of a Class G land charge by a particular spouse affects the rights of other beneficiaries under the trust. It does not; and the question whether the interests of any such beneficiaries are overreached will continue to depend upon the existing law.

Subsection (4) introduces the further provisions to be found in Schedule 1. They deal in particular with the consequences of failure by a spouse to register.

Registered land.
1925 c. 21.

24.—(1)(*a*) Where the registered land is relevant land production of the land certificate shall not be required by section 64(1)(*c*) of the Land Registration Act 1925—

(i) for an application for the entry on the register of a restriction with reference to the requirement that there shall be at least two trustees; or

(ii) for an application for the entry on the register of a restriction with reference to the requirement of consent imposed by section 21(1) above.

1925 c. 21.

(*b*) Accordingly in section 64(1)(*c*) of the Land Registration Act 1925 after the words "except as hereinafter mentioned" there shall be inserted the words "or as provided by section 24(1) of the Matrimonial Homes (Co-ownership) Act 1978".

(2) A purchase under a registered disposition, as defined in section 3 of the Land Registration Act 1925, shall not, as against the purchaser, require the consent of any person under section 21 of this Act if that consent requirement is not protected by a restriction or other entry on the register.

(3) Subsection (2) above is without prejudice to section 59(6) of the Land Registration Act 1925 (failure to register matters capable, in the case of unregistered land, of registration under the Land Charges Act 1925) or any other provision of the Land Registration Act 1925 concerning matters which have not been protected by entry on the register.

(4) For the removal of doubt it is hereby declared that the rights capable of being overriding interests under section 70(1)(*g*) of the Land Registration Act 1925 (which protects the rights of persons in actual occupation or in receipt of the rents and profits of registered land) do not include—

1925 c. 20.

(*a*) in the case of land held on trust for sale, interests or powers which are under the Law of Property Act 1925 capable of being overridden by the trustees for sale; or

1925 c. 18.

(*b*) in the case of settled land, interests or powers which are under the Settled Land Act 1925 and the Law of Property Act 1925 or either of them capable of being overridden by the tenant for life or statutory owner.

Clause 24

Where the title to relevant land is registered, machinery already exists which is capable of protecting those things which (in the case of unregistered land) will be protected by the new Class G land charge. Ancillary provisions only are, therefore, required.
(Paragraphs 1.327–1.333.)

Subsection (1) allows restrictions to be entered, in respect of the two trustee rule and the requirement of consent to dispositions, without production of the Land Certificate. Such entries can thus be made by a spouse who is not on the title without the co-operation of the registered proprietor (who is likely to be the other spouse).

Subsection (2) provides that a consent requirement which is not protected on the register does not adversely affect a purchaser under a registered disposition; and *subsection* (3) preserves the protection already given by section 59(6) of the Land Registration Act 1925.

Subsection (4) applies to all registered land, not merely to relevant land, and serves to resolve a doubt which exists about the present law and which, if allowed to continue, would create special difficulties in relation to relevant land: as to whether a beneficial interest under a trust can (if the beneficiary is in actual occupation or in receipt of rents and profits) become an overriding interest under section 70(1)(*g*) of the Land Registration Act 1925, thus binding a purchaser even if unprotected by entry on the register. The subsection provides that interests of this kind are not overriding interests, and it makes this provision in regard both to interests under trusts for sale (which are the type of interest held by co-owning spouses) and to interests under strict settlements of land.

Further advances on mortgages.

25.—Schedule 2 to this Act, which relates to mortgages made for securing further advances, shall have effect.

Clause 25

This introduces Schedule 2 to the draft Bill, dealing with further advances upon the security of relevant land.

Application of proceeds of sale.

26.—(1) Where the interest of a husband and wife in any relevant land is sold during the marriage, then either of them who pays or has paid the whole or part of the cost of acquisition of a new home (that is to say, of another property in which they have or propose to have a matrimonial home in place of the home in the property comprising that land) may require the other to apply in meeting the cost of acquisition of the new home a sum amounting to the other's share of the proceeds of the sale or any less sum and, if the other does not, may apply to the court for an order requiring it.

(2) In subsection (1) above—

(*a*) the reference to an interest in land being sold shall extend to any disposal, by the trustees, or by the husband and wife, for a consideration in money (and references in this section to proceeds of sale shall be construed accordingly); and

(*b*) the reference to acquisition includes acquisition before the coming into force of this Part of this Act, and before the making of any decision to have a matrimonial home in the property.

(3) (*a*) On an application for an order under this section, the court may make such order (if any) as the court thinks just; but the court may refuse to make an order if the court thinks it just to do so having regard to lapse of time or other matters.

(*b*) The court may in particular by an order under this subsection—

(i) direct the respondent to make to the applicant or any other person such payments at such times as may be so directed; and

(ii) direct that any payment to be made by the respondent under this subsection shall be secured for the benefit of the applicant on any substantive interest of the respondent in the new home.

(*c*) An order of the court under this subsection shall not affect the substantive interests of the applicant and the respondent in the new home except in so far (if at all) as the extent of their respective interests is affected by the proportion in which they bear the cost of acquisition.

(4) The jurisdiction conferred on the court by this section shall be exercisable by the High Court or by a county court, and shall be exercisable by a county court notwithstanding that by reason of the amounts involved or otherwise the jurisdiction would not but for this subsection be exercisable by a county court.

Clause 26

This clause gives a new right for one spouse in certain circumstances to require the other to contribute from the latter's share of the proceeds of relevant land towards the cost of a replacement home. (Paragraphs 1.365–1.376.)

Subsection (1) gives the primary right, which is exercisable only by a spouse who pays or has paid at least part of the cost of acquisition of a new home. The maximum contribution which such a spouse can require is the other spouse's share of the proceeds of the old home (but a further limitation is imposed by subsection (5); and see subsection (6)).

Subsection (2): under paragraph (*a*), the right to require a contribution may arise not only where the trustees have sold the home itself (or their interest in it) but also where the husband and wife have sold their beneficial interests under the trust—probably to a third party co-owner. Under paragraph (*b*), the new home may be a property acquired by a spouse at some time in the past, and perhaps without any intention that it should become the matrimonial home.

Subsection (3) deals with the powers of the court. Although the requiring spouse has a right under subsection (1) to require from the other spouse a contribution the size of which can be calculated under the terms of the clause, this requirement can be enforced only by an application to the court. And when the application is made, the court has a wide discretion as to the contribution (if any) which it orders and as to the manner of payment, and it has power to provide for security.

Paragraph (*c*), however, prevents the court from interfering directly with the size of the spouses' interests in the new home. (And if statutory co-ownership has created a joint tenancy, that will continue.) But the concluding words make it clear that if the payment of the contribution ordered would of itself change the beneficial holding, such change is not prevented.

EXAMPLE. The new home is bought by H. Before the couple move in, H requires a contribution from W, and the court makes an order for a contribution with which she complies. On these facts, W's contribution might well earn her a share in the beneficial interest. (The holding thus produced would be overtaken by statutory co-ownership when they moved in, unless it was for some reason excluded.)

Subsection (4) ensures that the county court has power to make the order in all cases.

(5) A husband or wife's right under subsection (1) above, and the court's power under subsection (3), to require money to be applied in meeting the cost of acquisition of a new home shall be limited to the amount (or further amount) from time to time needed in order that the cost may be borne by the husband and the wife in proportion to their respective shares of those proceeds of sale, but includes the right to require any such amount to be applied in reimbursing to him or her money applied in meeting that cost.

(6) Any reference in this section to the proceeds of sale of land is a reference to the net proceeds after meeting the costs of or incidental to the sale and after satisfying any sum secured on the interest sold.

(7) For purposes of this section the cost of acquisition of the new home shall be taken to include—

(*a*) the cost of any improvements or alterations to the property undertaken in order to adapt it for the purposes of the husband and wife; or

(*b*) where the new home is provided by the erection of a house, the cost of erection, in addition to the cost of acquisition of the site.

(8) It is immaterial for purposes of this section that the new home is not in England or Wales.

(9) Subsection (1) above shall have effect subject to any agreement made between the husband and wife, and shall not apply where either the husband or the wife is not an owner, but the land is relevant land by virtue of section 18(2) above.

Clause 26 (*continued*)

Subsection (5) limits the amount which the requiring spouse can require the other spouse to contribute (and the contribution which the court can order) in cases where the new home has cost less than the net proceeds of sale of the old one. In other cases the effective limit will be that laid down by subsection (1).

EXAMPLE. H and W owned the old home as beneficial tenants in common in the proportions 2:1. They sold it for £30,000 net. H now buys a new, but smaller, house for £21,000. Although W received £10,000 of the proceeds of the old home, H cannot require her to contribute more than £7,000 to the new. (If the old home had been sold for £18,000 net and the new one bought for £21,000, the maximum which H could require from W would have been £6,000: see subsection (1).)

Subsection (6) defines "proceeds of sale" for the purposes of the clause. As to this phrase, see also subsection (2) (*a*).

Subsection (7) gives a wide meaning to "the cost of acquisition".

Subsection (8) makes it clear that the new home need not be in England and Wales.

Subsection (9) provides that the contribution right may be negatived by agreement between the spouses. It also shows that the right exists only in the (normal) case where the old home was actually co-owned by the spouses at the time of the sale.

PART II

PROVISIONS APPLYING TO MATRIMONIAL HOME OR OTHER LAND

Equal co-ownership of husband and wife not disturbed by payments for acquisition or improvements.

27.—(1) So long as two spouses are equal co-owners of any land in England or Wales either as joint tenants or as tenants in common having equal shares with one another, any contribution made by one of them in money or money's worth to meeting the cost of acquisition or to the improvement of the land shall be deemed, for the purposes of any rule of law or presumption as to the effect of such a contribution in conferring an interest or larger interest on the person making it, to be made equally by the two or them, except where they became tenants in common having equal shares with one another by the operation as between themselves of any such rule of law or presumption.

(2) Any reference in subsection (1) above to a contribution to meeting the cost of acquisition or to the improvement of the land includes expenditure on or with a view to the repayment of money borrowed to defray the cost of acquisition or of an improvement.

(3) In relation to the rule as to improvements this section shall be deemed always to have had effect, except where the marriage has been terminated before the time when this Part of this Act comes into force, or before that time either—

(*a*) one of the spouses has by any contribution acquired under the rule a share or additional share out of the beneficial interest of the other, and the extent of that share has been ascertained by agreement between them or by order of a court; or

(*b*) one of the spouses by writing signed by him or her or for him or her by his or her agent has directed that this subsection shall not apply.

(4) This section shall not affect the operation of the rule as to improvements as that rule is applied by section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1970 (property of engaged couples if engagement terminated), except where an agreement to marry is terminated by death after this Part of this Act comes into force.

1970 c. 33.

PART II: the need for the provisions of this Part to apply generally to land in England and Wales, and not merely to matrimonial homes, is explained in paragraphs 1.401–1.403 of the report.

Clause 27 applies where husband and wife are equal co-owners of land and is designed to preserve their equal holding in circumstances in which the equality might otherwise be lost by:

(i) one spouse making a substantial improvement and gaining an added beneficial interest (under "the rule as to improvements" defined in clause 29(*b*)).

(ii) one spouse making a contribution to the acquisition—usually by making a mortgage repayment (see subsection (2))—in circumstances where such payment earns an enlarged interest (under "the presumption about acquisition payments"—as to which, see paragraph 1.387 of the report).

(Paragraphs 1.385–1.400.)

Subsection (1) prevents such improvements or payments from unsettling equality in all cases except those where the equality came about "fortuitously" through previous improvements or payments.

Subsection (2) is a clarifying definition.

Subsection (3) applies when there is, at the time when these provisions come into force, an "uncertain" accrual under the rule as to improvements —i.e., one spouse has made an improvement but the spouses have not agreed, and the court has not decided, whether this has earned an increased beneficial interest and, if so, the size of it. The subsection applies the provisions of subsections (1) and (2) retrospectively, so that if the spouses' holding was equal at the time of the improvement (and not "fortuitously" so, in the way mentioned above), the uncertain accrual is nullified—unless (i) the marriage has been terminated before the provisions come into force, or (ii) one of the spouses has taken steps to preserve the uncertain accrual in the way described in paragraph (*b*).

Subsection (4) relates to engaged couples. This is also true of clause 28, and both are explained in the notes on the latter clause.

Application of certain rules to engaged couples.

28.—(1) Subject to subsection (2) below, where after the coming into force of this Part of this Act a man and a woman enter into an agreement to marry one another, then as regards land in England and Wales the rule as to improvements and section 27(1) and (2) above shall apply as if their agreement to marry had been implemented.

(2) Where an agreement to marry is terminated otherwise than by death, the beneficial interest of the parties to the agreement in any land shall be the same as if this section has not been enacted.

Clause 28

This clause, together with subsection (4) of clause 27, makes certain changes in the application of both the rule as to improvements, and the presumption about acquisition payments, to engaged couples in cases where the engagement leads to marriage or ends through the death of one of the parties. (Paragraphs 1.404–1.409.) The effect of the new provisions is difficult to appreciate without some explanation of the existing law, which is complicated.

Cases where the engagement leads to marriage

The rule as to improvements does not apply under the present law. It will do so in future by virtue of subsection (1) of this clause, but it will (also by virtue of that subsection) be subject to the same modification as applies to spouses under clause 27(1).

The presumption about acquisition payments, being of general application, applies already to all engaged couples. It will continue to apply, but subject to the modification contained in clause 27(1) (which will apply by virtue of subsection (1) of this clause).

Cases where the engagement is broken off

The rule as to improvements applies under the existing law (Law Reform (Miscellaneous Provisions) Act 1970, section 2(1)), and will continue to do so. But in those circumstances the parties should not be treated in the same way as spouses, so the rule should not be modified so as to preserve equality between them. Accordingly, clause 27(1) does not apply in this case (clause 27(4)).

The presumption about acquisition payments applies generally, and so applies to all engaged couples under the existing law. It will continue to do so but, again, without the modification made in regard to spouses by clause 27(1) (subsection (2) of this clause).

Cases where the engagement ends through death

The rule as to improvements seems not to apply under the present law (this case being outside the terms of section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1970). It will apply in future by virtue of subsection (1) of this clause and (by virtue of the same subsection) the modification made by clause 27(1) will also apply.

The presumption about acquisition payments applies generally under the present law and so applies to all engaged couples. It will continue to do so, but subject to the clause 27(1) modification (subsection (1) of this clause).

Interpretation of Part II.

29. In this Part of this Act—

(*a*) "co-owner" has the same meaning as in Part I;

(*b*) "the rule as to improvements" means the rule of law explained by section 37 of the Matrimonial Proceedings and Property Act 1970. 1970 c. 45.

Clause 29

This imports the meaning of "own" which is laid down in clause 2 into the expression "co-owner" as used in Part II and defines "the rule as to improvements".

PART III

MISCELLANEOUS

Sharing of "winkling money".
1976 c. 80.
1977 c. 42.

30.—(1) Where two spouses have a home in a dwelling-house (whether a house or part of a house) of which they have or one of them has a statutory tenancy under the Rent (Agriculture) Act 1976, or the Rent Act 1977, and either of them receives any pecuniary consideration in respect of the giving up of possession of the dwelling-house, the other shall be entitled to receive from that one a sum equal to half the net amount or value of that consideration.

(2) For purposes of this section "pecuniary consideration" includes any consideration in money or money's worth other than land and interests in land; and the net amount or value of the pecuniary consideration received by a spouse is the amount or value of it reduced by the amount or value of any consideration which that spouse gives in order to enable possession of part of the dwelling-house to be obtained from another and given up.

Clause 30

Statutory co-ownership, under Chapter II of the Bill, does not apply to statutory tenancies (which are not interests in land). But if a married couple have a home in a dwelling-house held on a statutory tenancy, and money (or other "pecuniary consideration") is given to one of them to persuade them to leave, this clause entitles the other to a half share in it (or in what is left after deduction of any payment made by the recipient to get possession of part of the property from a sub-tenant). The money need not come from the landlord (it may come, for example, from an intending purchaser). There is no obligation on the payer to see that the money is shared. The clause has no application to the value of alternative accommodation.
(Paragraphs 1.411–1.415.)

Rules as respects registered and unregistered land.

31. The powers of making rules under section 144 of the Land Registration Act 1925 and section 16 of the Land Charges Act 1972 shall include power to make provision for the purpose of implementing this Act.

1925 c. 21.

1972 c. 61.

Clause 31

This ensures that the Land Registry has power to make rules for the purpose of implementing the provisions of the Bill.
(Paragaraph 1.416.)

PART IV

SUPPLEMENTARY

Commencement.

32. This Act shall come into force at the expiration of a period of 12 months beginning with the day on which this Act is passed.

Clause 32

The twelve month delay will enable spouses to make arrangements, if they so desire, to exclude statutory co-ownership (see, in particular, clause 8) and to preserve certain rights (see clause 27(3)).
(Paragraphs 1.215, 1.378 and 1.410; and see paragraphs 1.380–1.384.)

Index to general definitions in Part I.

33. The expressions listed in Schedule 3 to this Act have for purposes of Part I, or of the Chapter of that Part mentioned in column 1 of the Schedule, the meanings given them by the provisions of the Act shown in column 2 of the Schedule.

Clause 33

This clause introduces Schedule 3, which contains an index of the expressions to which the Bill gives a special meaning.

Short title, etc.

34.—(1) This Act may be cited as the Matrimonial Homes (Co-ownership) Act 1978.

(2) This Act does not extend to Scotland or Northern Ireland, except in so far as section 14 affects any provision of the law of Scotland or Northern Ireland as to bankruptcy or insolvency in its application to land in England or Wales.

(3) Except in so far as the context otherwise requires, any reference in this Act to any enactment is a reference to it as amended or applied by or under any other enactment, including this Act.

Clause 34

This deals with the short title and the extent of the Bill and with the meaning of certain references in it.

SCHEDULES

Section 23.

SCHEDULE 1

CLASS G LAND CHARGE: AMENDMENT OF OTHER ACTS

Land Charges Act 1972 (*c.* 61)

1.—(1) In section 2 of the Land Charges Act 1972 (the register of land charges) after subsection (7) there shall be inserted the following subsection—

"(7A) A Class G land charge is a land charge registrable under section 23 of the Matrimonial Homes (Co-ownership) Act 1978."

(2) At the end of section 4 of the Land Charges Act 1972 there shall be inserted the following subsection—

"(9) (*a*) A land charge of Class G (as described in section 23(3) of the Matrimonial Homes (Co-ownership) Act 1978) shall, as against a purchaser of the land to which it relates, or of any interest in such land, be unenforceable unless the land charge is registered in the appropriate register before the completion of the purchase.

(*b*) Accordingly, unless the land charge is so registered before the completion of the purchase, the purchase shall overreach the beneficial interest of the person for whose benefit the land charge is registrable whether or not the requirements of section 27(2) of the Law of Property Act 1925 (capital money not to be paid to a single individual as trustee) are complied with.

(*c*) Unless the land charge is so registered before completion of the purchase, the purchase shall not as against the purchaser require that person's consent under section 21 of the Matrimonial Homes (Co-ownership) Act 1978."

Law of Property Act 1925 (*c.* 20)

2. At the end of section 2(3)(v) of the Law of Property Act 1925 (interest protected by registration not to be over-reached under section 2(2) of that Act, but subject to the exceptions in paragraphs (*a*) and (*b*) of the said paragraph (v)) there shall be inserted the following paragraph—

"(*c*) an equitable interest registrable as a land charge of Class G".

County Courts Act 1959 (*c.* 22)

3. In Schedule 1 to the County Courts Act 1959 (county court jurisdiction under section 1(6) of the Land Charges Act 1972) in column 2 against section 10(8) of the Land Charges Act 1925 (re-enacted in the said section 1(6)) for the words "or Class E" there shall be substituted the words "Class E or Class G".

SCHEDULE 1

The Schedule makes amendments to existing enactments consequential upon the introduction of the new Class G land charge by clause 23. (Paragraphs 1.318–1.326.)

Paragraph 1

Sub-paragraph (1) amends the Land Charges Act 1972 so as to include amongst registrable land charges the new land charge of Class G introduced by clause 23.

Sub-paragraph (2) inserts in the 1972 Act provisions dealing with the consequences, to a spouse who had power to register, of failing to register a Class G land charge in due time. (For a full explanation, see paragraph 1.322 of the report.)

Paragraph 2

This ensures that a spouse's beneficial interest in relevant land can be overreached by a conveyance on sale to a purchaser who complies with the two trustee rule despite the fact that the interest has been registered as a land charge.

Paragraph 3

This extends the county court's jurisdiction to vacate registrations, by including Class G land charges.

Section 25.

SCHEDULE 2

MORTGAGEES MAKING FURTHER ADVANCES

Preliminary

1.—(1) This Schedule applies where the estate or interest held by the trustees is subject to a mortgage made, whether before or after the coming into force of Part I of this Act, for securing further advances.

(2) In this Schedule—

(*a*) "mortgage" includes a charge, and "mortgagee" shall be construed accordingly,

(*b*) "mortgagee" includes any person deriving title under the mortgagee.

Further advance to require consent of both co-owners

2.—(1) The trustees shall not without the consent of the husband and wife borrow any money by way of further advance secured by the mortgage.

(2) A person's consent is required by this paragraph, and shall for purposes of this paragraph be valid and binding, notwithstanding that person's minority.

(3) This paragraph has effect subject to section 19 of this Act.

(4) It is hereby declared that no obligation to make a further advance shall be enforceable against the mortgagee so as to require him to make it without a person's consent required by this paragraph.

Avoidance of charge securing a further advance.

3. If a further advance is made without a person's consent required by paragraph 2 above, the mortgage, so far as it secures that further advance, shall be of no effect if, and only if, before the making of the further advance—

(*a*) notice in writing was served on the mortgagee or his agent by or on behalf of the person whose consent was required stating that that consent was required, or

(*b*) that person's consent was required to the creation of the mortgage, and the mortgagee knew that that consent had been given.

SCHEDULE 2

This Schedule deals with further advances secured upon relevant land. (Paragraphs 1.345–1.364.)

Paragraph 1

The Schedule applies only to cases when the trustees hold their estate or interest in relevant land subject to a mortgage which covers the making of further advances. The land may not have been relevant land at the time of the mortgage.

Paragraph 2

Sub-paragaph (1) lays down a consent requirement, analogous to the main requirement of consent to dispositions (clause 21) which does not apply to the taking of a further advance (clause 18(4)(*d*)). This requirement is not a registrable matter. A spouse may give a general consent (at the time of the mortgage or later), so obviating the need to obtain consent when each advance is made (see paragraph 1.354 of the report).

Sub-paragraphs (2) *and* (3) contain ancillary provisions parallel to those which apply to the requirement of consent to dispositions (see clause 21(2) and (4)).

Sub-paragraph (4) makes it clear that if the mortgage imposes upon the lender an *obligation* to make further advances, the obligation cannot be enforced against him if performance would break the consent requirement.

Paragraph 3

This deals with the consequences to the *lender* of failing to obtain the consent of a spouse required by paragraph 2 (the *trustees* would normally be in breach of trust), and with the circumstances in which they arise. The paragraph operates only to nullify the security for the further advance: it does not affect the security for the orginal loan.

Cases in which a further advance overreaches interest of husband or wife

4.—(1) The mortgage, so far as it secures a further advance, shall not overreach the interest of the husband or wife under the trusts if the further advance is paid or applied in contravention of section 27(2) of the Law of Property Act 1925 (capital money not to be paid to a single individual as trustee), and the mortgagee had, before the making of the advance, effective notice, as defined in paragraph 5 below, of that interest:

1925 c. 20.

Provided that if the husband or wife was the person to whom or by whose direction, the further advance was paid or applied this sub-paragraph shall not apply to that person's interest under the trusts.

(2) Except as provided by sub-paragraph (1) above the mortgage, so far as it secures a further advance, shall overreach the interests of the husband and wife under the trusts.

(3) This paragraph has effect whether or not the interest of the husband or wife under the trusts can be or is registered or protected under the Land Charges Act 1972 or the Land Registration Act 1925.

1972 c. 61.
1925 c. 21.

Meaning of effective notice

5.—(1) For purposes of paragraph 4 above the mortgagee has effective notice in the circumstances specified in this paragraph.

(2) The mortgagee has effective notice when notice in writing is served on him or his agent by or on behalf of the spouse stating that the relevant land, or the trustees' estate or interest, is subject to trusts.

(3) The mortgagee has effective notice as from the time when the mortgage is made if the trusts arose before that time and—

(*a*) the mortgage was made by two or more persons, or by a trust corporation known to the mortgagee to be acting as a trustee, or

(*b*) the mortgage did not overreach the interest of the husband or wife under the trusts.

(4) Notice under sub-paragraph (3)(*a*) above is effective notice of the interests under the trusts of both the husband and the wife, and notice under sub-paragraph (2) or sub-paragraph (3)(*b*) above is effective notice of the interest of the spouse by or on behalf of whom the notice is served, or as the case may be of the spouse whose interest was not overreached.

EXPLANATORY NOTES

Paragraphs 4 *and* 5

These paragraphs are concerned, not with the consent requirement, but with the position of the lender making a further advance vis-à-vis a spouse who has a beneficial interest, in relation to that interest. They provide that the further advance will always overreach the spouse's beneficial interest unless the two trustee rule is broken *and* the lender has "effective notice" of the interest. (Even where the rule is broken and the lender does have effective notice, overreaching will take place if the spouse in question is the person to whom, or by whose direction, the advance is paid.) These provisions apply even in the case of an equitable mortgage. The lender may acquire effective notice either by being given express notice (in compliance with paragraph 5(2)), or from circumstances surrounding the making of the original mortgage (paragraph 5(3)).

Section 33.

SCHEDULE 3

INDEX TO GENERAL DEFINITIONS IN PART I

Expression defined	Provision of Act
Disposition of trust property (in Chapter III).	Section 18(4).
Husband (provision in section 18 only for Chapter III).	Section 1(2) and (3); Section 18(3).
Interest (in land)	Section 2(4).
Land	Section 3(4).
Marriage, marry	Section 1(2) and (3).
Own, and related terms	Section 2.
Property	Section 3.
Relevant land (in Chapter III)	Section 18.
Separate interest (in Chapter II)	Section 8(3).
Signed by (in Chapter II)	Section 8(4).
Statutory co-owner or co-ownership ..	Section 1(1).
Substantive interest	Section 13(4).
Trustees (in Chapter III)	Section 18(4).
Trusts (in Chapter III)	Section 18(4).
Wife (provision in section 18 only for Chapter III).	Section 1(2) and (3); Section 18(3)

BOOK TWO: RIGHTS IN RESPECT OF OCCUPATION OF THE MATRIMONIAL HOME

PART I CHANGES RECOMMENDED

The Matrimonial Homes Act 1967: Introductory

2.1. Part 1 of Working Paper No. 42, which dealt with "The Matrimonial Home", was divided into two sections. One was headed "Ownership of the Matrimonial Home", and considered the basis upon which a principle of statutory co-ownership could be introduced. It is with this subject that we have been concerned in Book One of this report. The other section was headed "Rights of Occupation", and considered certain aspects of the Matrimonial Homes Act 1967 and allied enactments with a view to their amendment. It is to these that we now turn.

2.2. The Matrimonial Homes Act 1967 applies whenever "one spouse is entitled to occupy a dwelling house by virtue of any estate or interest or contract or by virtue of any enactment giving him or her the right to remain in occupation and the other spouse is not so entitled"[1]. It goes on to give that other spouse certain statutory "rights of occupation" and the power to protect those rights, by means of registration, against any purchaser or other third party[2]. For convenience of expression we shall assume throughout this Book (since it is most often the case) that the spouse who is entitled to occupy within the provision quoted above is the husband and that the other spouse, who has "rights of occupation" under the Act, is the wife; but we emphasise that the position is the same if these roles are reversed. The wife has rights under the Act only if she is not herself entitled to occupy the property by virtue of any estate, interest, contract or enactment. But she is not treated as being so entitled merely because she has a beneficial interest in the property or its proceeds, unless she is also on the legal title[3]. Mere equitable co-ownership does not affect her rights under the Act, therefore, so statutory co-ownership will not do so. She lacks rights under the Act only if she is on the legal title.

2.3. In considering the desirability of changes in the 1967 Act, we shall be concerned not only with the possible amendments canvassed in the working paper but with one or two other matters as well. It may, therefore, be convenient to sketch out in advance the contents of this Book. In Part I we shall deal, under a series of general headings, with the changes we recommend. Part II lists those few amendments canvassed in the working paper which we have decided not to recommend, and gives reasons for our decision, and concludes with a final section in which we look at the problems which arose under the 1967 Act in the case of *Wroth* v. *Tyler*[4] and consider whether their recurrence could be avoided by any suitable amendment of the Act.

2.4. The field of law with which this part of the report is concerned was also covered by the Report of the Committee on One-Parent Families (1974)[5].

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[1] Sect. 1(1).

[2] The rights do not prevail, however, against the trustee in bankruptcy of the first spouse, against the trustees of any conveyance or assignment he may make for the benefit of his creditors, or, if he dies insolvent, against his personal representatives: s. 2(5).

[3] This was made clear through an amendment to the 1967 Act made by the Matrimonial Proceedings and Property Act 1970, s. 38.

[4] [1974] Ch. 30.

[5] Cmnd. 5629.

We shall have occasion to refer to this report later on, and when we do so we shall call it by its more familiar title, the Finer Report.

2.5. We have thought it desirable to include, in a Schedule to the draft Bill[6], a print of the Matrimonial Homes Act 1967 with the amendments recommended in this report (and with the amendments already made to it by other enactments). We turn first to the amendments which we want to recommend.

Dwelling held by trustees

2.6. Suppose that a dwelling house is trust property and that a married couple are living there because the husband is a trust beneficiary. In most cases there is no doubt that the wife has "rights of occupation" but other aspects of her position under the 1967 Act are doubtful or unsatisfactory.

Wife's right to register against the trustees

2.7. Section 2(1) of the Act says:

> "Where, at any time during the subsistence of a marriage, one spouse is entitled to occupy a dwelling house by virtue of an estate or interest, then the other spouse's rights of occupation shall be a charge on that estate or interest . . .".

Section 2(6)[7] (together with the Schedule to the Act) and (7) then make provision for the registration of this charge in the case of unregistered and registered land respectively—but, in accordance with the general principles governing the registration of land charges, it can in neither case be registered unless it is a charge on a legal estate.

2.8. Since in the case with which we are dealing the legal estate will be held by the trustees, the wife's rights will not be registrable at all unless they amount to a charge on the trustees' estate. It seems that the wife's rights can be a charge on that estate only if it can be said that the husband is entitled to occupy the house "by virtue of" the *trustees'* estate—or, perhaps, that his entitlement is by virtue of that estate coupled with his own beneficial interest under the trust. If, on the other hand, the husband's entitlement were held to depend on his beneficial interest alone, the charge created by the Act would be a charge on that equitable interest only: and, in consequence, would not be registrable.

2.9. In *Miles* v. *Bull* (*No.* 2)[8] the judgment seems to assume that registration is possible against the estate of the trustees (though no express allusion to this point was made), and we understand that the Land Registry do in fact allow registration against the trustees' estate[9]. But we ourselves do not feel convinced that the husband can really be said to occupy by virtue of the trustees' estate at all. It is noteworthy, too, that all the subsequent provisions of the Act which deal with the charge imposed by section 2(1) take it for granted that it is a charge on the *husband's* estate or interest. None of these provisions takes account of the possibility that it might be a charge on the estate or interest of the trustees, still less that it might have been registered against them, and most of the provisions in question seem to us unworkable, as they stand, in

[6] Schedule 2.

[7] Sect. 2(6) of the 1967 Act is now replaced by s. 2(7) of the Land Charges Act 1972 and is accordingly repealed (with savings) by s. 18 of, and Sched. 5 to, that Act.

[8] [1969] 3 All E.R. 1585.

[9] *Ruoff and Roper on the Law and Practice of Registered Conveyancing* (3rd ed., 1972), p. 781.

that situation[10]. On balance, therefore, we think it doubtful that registration can properly be made against the trustees or their estate, and still more doubtful whether such registration, if it were possible, would have the desired effect according to the other provisions of the Act.

2.10. The picture is further confused by the fact that in one particular case registration against a trustee is permitted by the Act: and that is where the trustee is the husband. Suppose the husband holds as trustee for himself and his wife (as he might well do if statutory co-ownership had applied). The purpose of the amendment made to the 1967 Act in 1970[11] was to ensure that the wife had *registrable* "rights of occupation" against the husband in these circumstances[12].

2.11. In the situation described in the preceding paragraph, then, the wife can register against the estate of a trustee-husband. And it should be noted that she can do this no matter how many third party beneficiaries may have interests under the trust in addition to the husband and wife. The same would be true of trusts in general (i.e., whether or not the husband is a trustee) if wives' rights were generally registrable against the estates of trustees.

2.12. It does not seem to us that any of this is satisfactory. We think the wife's rights should normally be a charge on the trustees' estate and registrable as such, but we do not think this should be so in every trust case and we do not think it should make any difference that the husband is a trustee. We therefore recommend that this area of the Act's application should be clarified and revised in the way we are about to indicate.

2.13. For present purposes we think it necessary to draw a clear distinction between cases where no one but the spouses has a beneficial interest under the trust, and cases where third parties have interests. In most cases of the latter kind we do not think that the wife's rights should be a registrable charge on the trustees' estate, because if they were she would have a power to prevent or delay dealings by the trustees with the trust property which would not be available to the third parties (although they would have proprietory interests and she probably would not) and which might well operate to their detriment. But if the third parties did not acquire their interests until some time after the property became a matrimonial home, we think they should be disregarded for this purpose. The distinction we propose is strictly analogous, therefore, to a distinction drawn earlier in this report (for the purposes of the consent requirement and the trusteeship rights recommended in co-ownership cases) and for a fuller illustration of the principles involved reference may be made to that earlier passage[13].

2.14. We may sum the matter up by saying that in any case where the wife has rights of occupation in a matrimonial home, held on a trust under which the husband is a beneficiary, at a time when no one but he (or no one but he

[10] This is why Sched. 1 to the draft Bill contains ten amendments to the 1967 Act consequent upon our recommendation that registration against the trustees should (in certain circumstances) be permitted: see para. 2.14, below.

[11] I.e., the amendment made to s. 1 of the 1967 Act by the Matrimonial Proceedings and Property Act 1970, s. 38.

[12] See para. 59 of our Report on Financial Provision in Matriomonial Proceedings, (1969) Law Com. No. 25, as a result of which this amendment was made.

[13] Paras. 1.272–1.274, above.

and she) has a beneficial interest, her rights should become a charge on the trustees' interest as well as on the husband's interest. If the trustees' interest is a legal estate, as normally it will be, her charge should be registrable against them or (in the case of registered land) against that estate. This charge should have priority as from the date on which it arises. The spouses will not be the sole beneficiaries under the trust if there are other beneficiaries, actual or potential (e.g., unborn children), but the mere fact that trust property can be appointed to others by the exercise of a general power of appointment[14] should not, in our view, disqualify the spouses from being sole beneficiaries. We also recommend that such amendments be made to the 1967 Act as are necessary to make its provisions fit the case where the wife's rights are a charge on the trustees' estate or interest and are registered, not against the husband or his estate, but against the trustees or theirs.

2.15. Finally, in view of the doubts which may have arisen on the present wording of the 1967 Act, we think it desirable to amend that Act in such a way as to make it clear not only that the wife's rights are a charge on the trustees' interest in the cases we have specified, but also that they are not such in any other cases.

Wife's right to stand in the trustees' shoes

2.16. Section 1(5) of the 1967 Act (of which we set out the material part in full because we shall have occasion to refer to it again) is as follows:

> "Where a spouse is entitled under this section to occupy a dwelling house or any part thereof, any payment or tender made or other thing done by that spouse in or towards satisfaction of any liability of the other spouse in respect of rent, rates, mortgage payments or other outgoings affecting the dwelling house shall, whether or not it is made or done in pursuance of an order under this section, be as good as if made or done by the other spouse; and a spouse's occupation by virtue of this section shall for purposes of the Rent Act 1977 (other than Part V and sections 103 to 106)[15] be treated as possession by the other spouse."

2.17. Very broadly this gives a wife with rights of occupation the right to stand, in certain respects, in her husband's shoes. We recommend that where a wife is entitled to occupy the property by reason of her husband's interest under a trust, she should have a similar right to stand in the shoes of the trustees. An example may help to explain this recommendation. Suppose the property is mortgaged and the mortgage payments are not being kept up, so that there is a risk of the wife losing her home through the mortgagee exercising his power of sale. If the mortgagor is the husband, section 1(5) gives the wife the power to step in and avert disaster by making the payments herself. We see no reason why she should not have a similar power when the mortgagor is a trustee for the husband. Nor do we see why this power should not exist in all trust cases. We therefore make no recommendation that it be confined to cases in which the husband and wife are the only beneficiaries.

Dwelling subject to a mortgage

2.18. Our concern with cases in which the wife's rights of occupation subsist in a mortgaged property arose out of a specific problem to which we drew

[14] We include within this recommendation any general power exercisable by either or by both of the spouses, whether or not its exercise requires the consent of some other person.

[15] This reference to the Rent Act 1977 was substituted by para. 40 of Sched. 23 to that Act.

attention in the working paper[16]. If the mortgagee seeks an order for possession of the mortgaged property, the wife's rights under the present law are not altogether satisfactory. To this problem we will turn in a moment, but before we do so we want to deal with a preliminary point to which our consideration of it has led us.

Setting the scene: the application of the 1967 Act to mortgaged property

2.19. The 1967 Act does not apply at all unless one spouse "is entitled to occupy a dwelling house . . ."[17]. A legal mortgage gives the mortgagee a legal estate in possession, and he is, therefore, entitled in law to take possession of the mortgaged property as soon as the mortgage is made[18]; and a legal chargee has a corresponding statutory right[19]. Normally, of course, the mortgagor is allowed to remain in possession unless and until there is default and the mortgagee finds it necessary to exercise his remedies; but unless a right to retain possession is expressly given (as occasionally it is[20]) he has technically no right, as against the mortgagee, to do so. It might, therefore, be argued that an owner who has mortgaged his property is not "entitled to occupy" within section 1 of the 1967 Act, with the consequence that his wife, whose "rights of occupation" depend upon his entitlement, has no such rights.

2.20. If this argument succeeded, it would, of course, drive a coach and horses through the 1967 Act, because most dwelling houses are mortgaged. But it has never (to the best of our knowledge) been seriously advanced and we have no doubt that it would fail if it were. The owner's entitlement to occupy is not to be taken as ousted by the technicality of a mortgagee's right of possession. Although, however, this much is clear enough, the precise nature and extent of the wife's rights of occupation in these circumstances are perhaps not so clear. And since we are proposing to recommend certain changes in the operation of the 1967 Act in the field of mortgaged property, we think the scene should be set for them by a provision clarifying the existing situation. We therefore recommend a provision[21], which should be deemed always to have had effect, as follows:

(*a*) In determining for the purposes of the 1967 Act whether a spouse (or former spouse[22]) is entitled to occupy a dwelling house by virtue of an estate or interest, there should be disregarded any right to possession conferred on a mortgagee through his mortgage.

(*b*) This should be so even if the mortgagee is actually in possession. We are not altogether sure whether this makes any change in the existing law. The working paper[23] suggested that if the mortgagee went into possession—particularly if he did so under a court order—the mortgagor would no longer be "entitled to occupy" for the

[16] Paras. 1.12–1.14.
[17] Sect. 1(1). See also s. 1(8).
[18] This has recently been confirmed by the Court of Appeal in *Western Bank Ltd.* v. *Schindler* [1976] 2 All E.R. 393.
[19] Law of Property Act 1925, s. 87(1).
[20] E.g., by an attornment clause or some other express provision in the mortgage.
[21] We further recommend that a provision having the effect of sub-paras. (*a*) and (*b*) should be inserted in s. 4 of the Domestic Violence and Matrimonial Proceedings Act 1976: see n. 78, below.
[22] Only very rarely will the provision need to apply to a former spouse: see ss. 1(8) and 2(2) of the 1967 Act.
[23] Para. 1.14 (end).

purposes of the 1967 Act. This point had been left open in *Hastings and Thanet Building Society* v. *Goddard*[24], but force was lent to the working paper's suggestion by *Penn* v. *Dunn*[25], although the situation considered in that case was not precisely analogous to the present one. At all events, we recommend that the position be put beyond doubt.

(*c*) But although the wife thus retains her rights of occupation under the Act, they should give her no greater right to occupy, as against the mortgagee, than the husband has—unless her rights have priority over the mortgage. They will not normally have such priority unless they were registered at the time of the mortgage[26], and this will not normally be so (if only because an intending mortgagee, on finding the registration, would almost certainly decide not to proceed with the mortgage).

The problem itself: the wife's right to join in any action by the mortgagee to enforce his security

2.21. The situation to consider is this. A wife has rights of occupation under the 1967 Act (but not in priority to the mortgage) in respect of a property which is mortgaged. The mortgage payments have fallen into arrear, and the mortgagee is going to seek a court order for possession, probably with a view to selling the property in exercise of his power of sale, or some other order to enforce his security. The husband is not going to pay off the arrears—he may well have deserted her—but she herself would be able to obtain (if only by way of social security payments[27]) enough money to do so.

2.22. At this point we should notice section 36 of the Administration of Justice Act 1970, as amplified by section 8 of the Administration of Justice Act 1973. These provisions apply when the mortgaged property consists of or includes a dwelling house. Section 36 provides that if the mortgagee brings an action for possession, the court has a wide discretion to relieve the mortgagor. It may adjourn the proceedings or, if it makes an order, may stay or suspend its execution or postpone the date for delivery of possession. This discretion arises only if it appears to the court that the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage (or to remedy a default consisting of a breach of any other obligation under the mortgage)[28]. Section 8[29] makes it clear that if the mortgage is an instalment one this reference to sums due does not mean the whole of the mortgage debt which may fall due on default, but merely the outstanding instalments and interest (and any further instalments and interest falling due within the "reasonable period").

2.23. If the wife can stand in the mortgagor's shoes, therefore, she has a good prospect of resisting the mortgagee's claim. But can she? The answer is that she can—provided she acts quickly enough. It is this proviso which causes

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[24] [1970] 1 W.L.R. 1544 (C.A.).
[25] [1970] 2 Q.B. 686 (C.A.). See further paras. 2.44 and 2.45, below.
[26] Sect. 2.
[27] In this context the Finer Report makes several recommendations not directly relevant to this present report: paras. 6.117, 6.127 and 6.128.
[29] In *Western Bank Ltd.* v. *Schindler* [1977] Ch. 1, a majority of the Court of Appeal held that the court's discretion arises even if there is no default under the mortgage.
[29] Sect. 8 also extends the protection of s. 36 so that in the case of an instalment mortgage the mortgagee can no longer circumvent it by bringing an action for foreclosure instead of, or as well as, possession.

the difficulty. The wife *can* stand in the mortgagor's shoes by virtue of section 1(5) of the 1967 Act[30], but this applies only so long as she has "rights of occupation". Our earlier recommendations would confirm that she is not deprived of these rights by the mere fact that the property is mortgaged. They would also ensure that she is not deprived of them by the mortgagee going into possession, even under a court order. But this is of limited practical help to her: she still has her rights under section 1(5) and she may be able to get the possession order modified if she acts quickly; but unless and until she does so she has to abide by the order and leave the property (because her right to occupy is no greater than the husband's[31]); and, of course, she loses her rights entirely if the mortgagee sells the property, as he is likely to do. A similar result would follow immediately if the mortgagee obtained a foreclosure order. In practice, therefore, the wife should make her voice heard before the court makes its order.

2.24. We really need to do two things. First, to ensure that she can join in the proceedings if she knows about them. And second, to ensure, so far as possible, that she does know about them. We shall consider these two points separately.

(*i*) *Letting the wife join in*

2.25. The circumstances in which the wife can claim to be joined as a defendant and thus take part in the action by the mortgagee are not altogether clear. In *Hastings and Thanet Building Society* v. *Goddard*[32], the Court of Appeal decided (to quote the headnote):

> "that the possibility that at some uncertain future date the wife might be in funds to redeem the mortgage and exercise her rights under section 1(5) [of the 1967 Act] did not justify . . . making her a defendant and thus postponing the building society's undoubted right to possession . . .".

The converse proposition—that if the wife's ability to redeem were clear she *would* have a right to join in the action—was conceded by the building society but was not expressly decided. Moreover, section 36 of the 1970 Act was not then in force and although the court referred to it, it did not "pause to consider what might have been the situation were that section in force"[33].

2.26. We think that the wife's right to join in should be reinforced and clarified. We recommend a provision, applying whenever the mortgaged land consists of or includes a dwelling house[34], to the effect that if a spouse has rights under section 1(5) of the 1967 Act to perform the mortgagor's[35] obligations under the mortgage, she should have power to apply to the court to be made a

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[30] The relevant part of s. 1(5) is set out in para. 2.16, above. Although we think the statement in the text is correct, the wording of s. 1(5) is perhaps not entirely apt to cover the assurances of *future* ability to pay which the court can take into account under s. 36 of the Administration of Justice Act 1970. But the legislative provision we recommend (see para. 2.26, below) will put this point beyond doubt by referring specifically to s. 36 of the 1970 Act. The Finer Report, para. 6.120, endorsed the suggestion in the working paper (para. 1.13) that the wife should have the benefit of s. 36.

[31] In practice, no doubt, the wife could choose to remain in the property, and if she did the mortgagee would have no real alternative to taking proceedings for possession against her. She might thus prolong the period within which she could apply to the court under s. 1(5).

[32] [1970] 1 W.L.R. 1544.

[33] [1970] 1 W.L.R. at p. 1547.

[34] This corresponds with the wording used in s. 36(1) of the Administration of Justice Act 1970.

[35] It will be appreciated that although the mortgagor will normally be the other spouse he may in certain circumstances be a trustee for the other spouse: see para. 217, above.

party to any action brought by the mortgagee to enforce his security. Such an application should be valid if made at any time before the action is finally disposed of; and the court should accede to it provided that:

(*a*) the court sees no special reason against doing so[36]; and

(*b*) the court is satisfied that the applicant may be expected to make such payments (or do such other things in satisfaction of the mortgagor's liabilities) as might affect the outcome of the proceedings—or that the expectation of her doing so should be considered under section 36 of the Administration of Justice Act 1970 (read with section 8 of the Act of 1973).

(*ii*) *Letting the wife know*

2.27. The working paper[37] proposed that if the wife, even though she had not registered her rights at the time of the original mortgage, had registered them at the time of the mortgagee's action, the mortgagee should be obliged to give her notice of the proceedings, thus enabling her to exercise her right to be joined as a party to them. This proposal still seems to us sound[38]: it will put no unreasonable burden on the mortgagee, but it will provide an additional safeguard for the wife.

2.28. In adopting it as a firm recommendation, however, we have refined it in several ways.

2.29. First of all, we think it should apply only in cases where the mortgaged property consists wholly or substantially of a dwelling house. If the mortgagee is to have a duty to search, we think the duty should be confined to cases in which the presence of a dwelling house in the security must be obvious to him.

2.30. We turn next to the details of the proposals, which differ according to whether the property mortgaged is registered or unregistered land.

2.31. *Registered land.*—One small problem must be overcome if our scheme is to be effective. A mortgagee has normally no right, under the present law,

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[36] These words are deliberately framed in a general way. We think the court would rarely see any special reason against granting the application. It might do so, for example, if the wife, having told the mortgagee that she did not wish to be a party, nonetheless applied at the last minute to be made one—perhaps as a deliberate tactic, planned with the husband, to prolong the proceedings.

[37] Para. 1.14.

[38] The proposal in the working paper was endorsed in the Finer Report, para. 6.120. But that report went further and suggested that the mortgagee's duty to notify the wife should arise whenever she was in fact living in the home, whether she had registered or not. We see the force of the arguments which lead to this suggestion; but these arguments would also seem to suggest that (for example) a purchaser should be bound by the unregistered rights of a wife living in the home, and that would be wholly inconsistent with the policy of the 1967 Act (and with our own earlier recommendations in the field of co-ownership). We think that too heavy a burden would be placed upon a mortgagee (or purchaser) if he were required, in effect, to investigate the property and exclude all possibility of the presence of a wife.

Having said that, however, we are conscious that there may not always be a great deal of difference in practice between our recommendations and those of the Finer Report. Because the wife is not deprived of her rights under the 1967 Act by the fact that the property is mortgaged, or by the fact that the mortgagee is in possession (para. 2.20, above), she may still have some rights to relief even after the court has made an order against the husband. So the fact that she has not been joined in the proceedings is not necessarily fatal. Moreover, having regard to these surviving rights, and to her potential "nuisance value", we think that a prudent mortgagee may well think it wise, irrespective of registration, to join her in the proceedings from the start if he knows of her existence.

to make a search of the register unless his mortgage is a registered charge[39]. We therefore recommend[40] a new right for all mortgagees to search the register of the mortgaged land—but so far only as is necessary to see whether any Class F entry has been made. (We use that term to include the entries made on the register in the case of registered land which correspond with the registration of a Class F land charge in the case of unregistered land.) This will involve the introduction, for registered land, of a new form of search facility for this limited purpose.

2.32. *Unregistered land.*—The difficulty just mentioned does not arise in the case of unregistered land because there is no restriction on searching. But if a limited search facility is introduced for registered land, consideration might be given to the introduction of a similar facility for unregistered land; for there is already a precedent for such a facility in the "bankruptcy only" search procedure which now exists[41]. The problem in the case of unregistered land is of a different kind, and it arises because registration is made against the names of estate owners rather than against the land itself. Against whom must a Class F land charge be registered if it is to affect the mortgagee—or, to put it another way, against whom should he be obliged to search before he brings his action? The answer, we think, should simply be: against the person currently entitled as legal estate owner to the property mortgaged. Normally this will be the original mortgagor but if the property has been transferred, subject to the mortgage, to someone else, that other person will be the one currently so entitled and the one against whom a wife with rights of occupation will have registered them. We see no reason to require a search against predecessors in title of the proposed defendant to the action—except in one case. As a result of recommendations made earlier[42], a wife will sometimes have a right to register against trustees. And although her rights of occupation remain exactly the same, the individual identities of the trustees may change through death, retirement or otherwise. We think it would be wrong if the wife were obliged, on pain of losing her right to notice, to register against every new trustee on appointment. We therefore recommend that if the mortgagor against whom the action is to be brought is a trustee, the mortgagee should be obliged to search against his predecessors in that office since the date of the mortgage.

2.33. An official search certificate issued to a *purchaser* protects him against entries made after the search and before completion[43], provided completion takes place within fifteen working days[44]. We have considered whether an analogous provision should be made in the present context and we have decided that it should. Otherwise a mortgagee would run some risk of being in breach

[39] Land Registration Act 1925, s. 112.

[40] This recommendation is not implemented in the draft Bill because we think it can be carried out through the making of a new rule under the statutory rule-making powers which the Land Registry already possesses.

[41] Land Charges Rules 1974, S.I. 1974 No. 1286, r. 16 (Form K16).

[42] Para. 2.14, above.

[43] In the case of registered land completion, for this purpose, means delivery of the application to register the transfer.

[44] Land Charges Act 1972, s. 11(5) and (6) (as to unregistered land); and Land Registration Act 1925, s. 144, and Land Registration (Official Searches) Rules 1969, S.I. 1969 No. 1179, rr. 2(2) and 5 (as to registered land). In the case of registered land, r. 6 gives power to extend the priority period if the purchaser cannot apply for registration in time, but that power is clearly inappropriate here. We do consider, however, that if the fifteen day period should be varied in the future, such variation should apply automatically for present purposes, and the draft Bill is worded accordingly.

of his duty to give notice no matter how soon after making his search he commenced his action. We therefore recommend that if a mortgagee commences his action within the fifteen day period, he should not be affected by any Class F entry made in that period. It is true that the protection thus afforded to a mortgagee about to bring an action is quite different from the protection afforded to a purchaser about to complete his purchase, and is given for a quite different purpose, but we think it sensible nevertheless to adopt the same period for the new protection as already exists for the old.

Polygamy and the Act of 1967

2.34. In our *Report on Polygamous Marriages*[45], we expressed the opinion that the terms in which the 1967 Act is cast "are capable of application to a husband and a wife whose marriage is polygamous". We maintain the view, there expressed, that it is clearly right that this should be so; and there is no reason, in this context, to distinguish between marriages which are actually polygamous and those which are only potentially so. Since we are recommending other amendments to the 1967 Act, we take this opportunity of recommending the insertion of a declaratory provision putting the scope of the Act in this respect beyond doubt.

Charge on registered land to be entered only as a notice

2.35. At present, rights of occupation affecting registered land may be registered either as a notice or as a caution[46]. The provision for registration as a caution was necessary because a notice cannot be registered unless the Land Certificate is produced to the registrar[47]. As we have pointed out in another context[48], this rule is often no obstacle in practice because if the property is mortgaged by registered charge the Land Certificate will be deposited at the registry in any case[49].

2.36. We have already recommended[50] that the production of the Land Certificate should be dispensed with in relation to the entry of the restrictions corresponding to the Class G land charge. In the interests both of consistency and of simplicity we now recommend that it be dispensed with in relation to the entry of the notice which corresponds with the Class F land charge. On this basis, all rights of occupation will henceforth be capable of entry as notices and none need be entered as cautions. Accordingly, we further recommend that the power to register them as cautions be ended—without prejudice, of course, to the effectiveness of any cautions already registered.

Dwellings held on a protected or statutory tenancy

2.37. Under this heading we deal with several points which have to do with protected tenancies and statutory tenancies, mainly within the Rent Act 1977[51]. "Statutory tenancy" is a phrase used to describe the rights of a person who is

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[45] Law Com. No. 42: see para. 122 of the report.
[46] Sect. 2(7).
[47] Land Registration Act 1925, s. 64(1) (*c*).
[48] Para. 1.253(*a*), above.
[49] Land Registration Act 1925, s. 65.
[50] Para. 1.329, above.
[51] We are, of course, aware that the Government are currently carrying out, through the Department of the Environment, a review of the policy which underlies the Rent Act, and that legislative changes may result in due course. In our view, however, this does not militate against the desirability of making the recommendations which follow.

not (or is no longer) a contractual tenant but who enjoys the security of occupation, and the restriction of rent, provided for in the Act. "Protected tenancy" describes a tenancy which is still contractual but which will if terminated (and if the tenant stays in occupation) turn automatically into a statutory tenancy.

Transfer of tenancy on divorce, etc.

2.38. Section 7 of the 1967 Act allows the court granting a decree of divorce or nullity to order that, as from the decree absolute, a protected or statutory tenancy of the matrimonial home which is held by one spouse, or by the spouses jointly, be transferred, simply by virtue of the order, to the other spouse or to a single spouse. (The section has been amended by the Rent (Agriculture) Act 1976[52], and now extends to statutory tenancies within the meaning of that Act.) The working paper made proposals for the amendment of section 7 which fell into two parts. One of these (which we do not now recommend) is dealt with later[53]. We are concerned here with the other.

2.39. The working paper[54] drew attention to the fact that the court's powers under section 7 not only were separated from its general powers to order transfers of property from one spouse to another in connection with decrees of divorce, nullity or judicial separation, now in section 24 of the Matrimonial Causes Act 1973[55], but differed from them in certain respects. The working paper, therefore, put forward the following suggestions:

(*a*) That it should be considered whether to extend the exercise of the court's powers under section 7 to cases of judicial separation. The court's general powers under section 24 are exercisable in such cases, and we think it anomalous that its powers under section 7 should not be. We therefore recommend that this extension be made.

(*b*) That the rule confining the exercise of the court's powers under section 7 to the period between decree nisi and decree absolute should be altered. The recommendation just made would of itself require some alteration of this rule, because decrees of judicial separation are not made in two stages; but the present rule is in any case out of line with the court's general powers. We recommend that the section 7 powers should be exercisable, as are the general powers, on or at any time after the grant of a decree (whether, in the case of divorce or nullity, before or after the decree nisi is made absolute). They should not be exercisable, however, if the spouse who wishes to apply has actually remarried (and for this purpose remarriage should embrace marriages which are void or voidable). The transfer itself should take place on the date specified in the order (but, in the case of divorce or nullity, that date should not be earlier than the decree absolute).

(*c*) That the criteria in section 25 of the Matrimonial Causes Act 1973[56], which guide the exercise of the court's general powers, should apply also to its powers under section 7. We are now inclined to think this

[52] Sched. 8, para. 16.
[53] Paras. 2.64–2.73, below.
[54] Para. 1.21.
[55] At the time of the working paper, these general powers were in the Matrimonial Proceedings and Property Act 1970, s. 4.
[56] At the time of the working paper, these criteria were in the Matrimonial Proceedings and Property Act 1970, s. 5.

unnecessary. The criteria in section 25 are so framed as to apply to the wide variety of general powers which the court has under section 24, and they are therefore less appropriate to its more limited powers under section 7. We think that the factors which the court should take into account in exercising these latter powers are obvious enough and do not need to be spelt out.

(*d*) That the court's powers under section 7 should "become part" of its general powers under section 24. In so far as this suggestion was intended to achieve harmony between the two sets of powers, we think that the recommendations made above will sufficiently implement it. Further consideration of the relationship between the two sections (including the possibility that they might find a place in the same statute) is germane to the law of matrimonial causes rather than to the particular exercise with which we are now concerned.

2.40. We have two further recommendations, of a consequential nature, to add. First, although we think it should be possible to seek an order under section 7 at any time after the decree (subject only to the proviso about remarriage), we also think it should be possible for rules of court to provide that an application should not be made outside a prescribed period unless the court gives leave. This provision would correspond with the similar provision made, in relation to the court's general powers, by section 26(2) (*b*) of the Matrimonial Causes Act 1973.

2.41. Secondly, we think that, although the court having primary jurisdiction to make an order under section 7 should be the court which granted the decree, it should be possible for rules of court to provide for the transfer of the section 7 proceedings from that court to any other court having divorce jurisdiction.

Rights of spouse after landlord obtains a possession order

2.42. As we have already noted, section 1(5) of the 1967 Act[57] gives a wife extensive rights to step into the shoes of a husband, including the shoes he wears in his capacity as a protected or statutory tenant.

2.43. Suppose, therefore, that a husband who is a protected or statutory tenant deserts his wife. She has a right under section 1(5) to pay the rent, and payment by her is as good as payment by him. And if he was a statutory tenant, his leaving the property does not end the statutory tenancy, because section 1(5) provides that a spouse's occupation by virtue of section 1 shall for the purposes of the Rent Act 1977 (other than Part V and sections 103 to 106) be treated as possession by the other spouse[58].

2.44. So far so good. Now suppose something goes wrong and the landlord brings an action for possession. Probably the rent has not been paid; and this may be because the husband had been paying it but (unknown to the wife) has ceased to do so. Section 100 of the Rent Act 1977 gives the court a wide discretion in such actions for possession. It can adjourn the proceedings. And even when the possession order has been made the court can (provided the order has not actually been executed) stay or suspend execution of the order

[57] The relevant part is set out in para. 2.16, above.

[58] If the statutory tenant was the husband (as we have assumed) possession by his spouse was always treated as possession by him, but this seems not to have been so in the converse case until s. 1(5) made the rule sexually indiscriminate.

or postpone the date of possession. Can the wife step into the husband's shoes and ask the court to exercise this latter power? The unwelcome answer given in *Penn* v. *Dunn*[59] was that she cannot. Section 1(5) applies only if the wife "is entitled under this section to occupy". She is not so entitled unless the husband is entitled to occupy. The making of the possession order had ended the statutory tenancy and, with it, his entitlement to occupy[60], and her entitlement ceased automatically at the same time. So section 1(5) ceased to apply, and, although he could have asked for a stay of execution or a postponement of possession, she could not.

2.45. The working paper[61] suggested that this was wrong and we are satisfied that it is. We therefore recommend that neither the bringing of proceedings for possession nor the making of a possession order should affect the wife's right to apply, by virtue of section 1(5), for the exercise of the court's powers under section 100 of the Rent Act 1977.

2.46. Since the working paper was published, the Rent (Agriculture) Act 1976 has been enacted. This extends to certain agricultural workers a protection analogous to that now conferred by the Rent Act 1977, and section 7 of the 1976 Act contains provisions corresponding with those in section 100 of the 1977 Act. We therefore make a similar recommendation in connection with section 7 of the Rent (Agriculture) Act 1976.

Right of a spouse to succeed to tenancy

2.47. The working paper pointed out[62] that the present provisions allowing one spouse to become the statutory tenant of property held by the other as statutory or protected tenant, on the other's death, are unsatisfactory in two respects. The comments in the working paper were directed specifically at the provision[63] allowing a spouse to succeed on the death of an original tenant (i.e., someone who was either a protected tenant or a statutory tenant by virtue of his own previous protected tenancy[64]); but another provision[65] allows a second succession, on the death of the first statutory tenant by succession, and the same points arise in relation to that.

2.48. The first way in which these provisions are unsatisfactory is that they apply only in favour of a spouse who was residing with the protected or statutory tenant at his death. This means that a wife who has been deserted by her husband, although the 1967 Act is at pains to ensure that she can enjoy the benefit of the protected or statutory tenancy while he lives[66], and that the court can transfer it to her if the marriage ends in divorce or is annulled[67], cannot become statutory tenant through succession on his death because she

[59] [1970] 2 Q.B. 686 (C.A.). At the time of this case, the court's discretion was contained in s. 11 of the Rent Act 1968.

[60] The order in fact required the husband to deliver up possession within 28 days. The judgments leave open the possibility that his entitlement to occupy did not cease until the end of this 28 day period, but nothing turns on this point for present purposes.

[61] Paras. 1.10 and 1.11. The suggestion in the working paper was endorsed by the Finer Report, para. 6.44(3).

[62] Paras. 1.25 and 1.26. The proposals in the working paper were endorsed by the Finer Report, para. 6.44(8), (9).

[63] Now in the Rent Act 1977, Sched. 1, para. 2.

[64] *Ibid.*, para. 1.

[65] *Ibid.*, para. 6.

[66] Sect. 1(5), of which the relevant part is set out in para. 2.16, above.

[67] Sect. 7. Changes in this section are recommended in paras. 2.38–2.41, above.

was not residing with him. This is anomalous. The test should be not whether she is residing *with him* at his death but whether she is residing *in the property* at his death, and we recommend accordingly[68].

2.49. The second point is that the provisions in question apply in favour of a widow but not in favour of a widower. It is true, of course, that succession rights may be claimed not only by spouses but also by "a member of the original tenant's [or the first successor's] family [who] was residing with him at the time of and for the period of six months immediately before his death"[69] and a widower might be able to claim succession as a member of the family. But this is not good enough, for two reasons at least. First, because this joint residence condition is even stricter than the one mentioned above. And second, because the surviving spouse may be only one of several members of the family whose competing claims may have to be resolved by the county court. We see no reason why a widower should be treated less favourably than a widow. Both the Act of 1967 and our scheme for statutory co-ownership apply equally in favour of husbands as of wives. We therefore recommend that widowers should have the same succession rights as widows.

Commencement

2.50. We think that the changes recommended in this Book should come into force a short time after the relevant legislation reaches the statute book. We, therefore, recommend that they should come into force one month after that date.

[68] We appreciate that the new rule recommended will be more prejudicial to the landlord than the old – but only in cases where separation has occurred, and that is, of course, fortuitous from his point of view.

[69] Rent Act 1977, Sched. 1, paras. 3 and 7.

PART II CHANGES CANVASSED IN THE WORKING PAPER BUT NOT NOW RECOMMENDED

2.51. Under this heading we deal with those of the suggestions made in the working paper which, for one reason or another, we do not intend to recommend in this report.

Court's powers over the occupation rights of an "owner" spouse

2.52. Section 1(1) of the 1967 Act says that "[w]here one spouse is entitled to occupy a dwelling house by virtue of any estate or interest or contract or by virtue of any enactment giving him or her the right to remain in occupation, and the other spouse is not so entitled" the other spouse is to have "rights of occupation" under the Act. Subsection (2), as originally enacted, then said:

> "So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights or regulating the exercise by either spouse of the right to occupy the dwelling house."

For our purposes the spouse who is "entitled to occupy" within section 1(1) will be called the "owner spouse" and the spouse who is not will be called the "non-owner spouse". (It will be remembered, however, that the non-owner spouse may in fact have an equitable interest in the property[70].) It is only the non-owner spouse who has "rights of occupation" under the Act; so the first part of subsection (2) (down to the words ". . . those rights") applied only to the rights of that spouse. The court's power over the occupation rights of the owner spouse was contained in the concluding words of the subsection, and was merely that of "regulating [their] exercise."

2.53. The House of Lords decided in *Tarr* v. *Tarr*[71] that this power to regulate the exercise of the owner spouse's rights did not allow the court to prohibit the exercise of those rights altogether, so the owner spouse could not be excluded from the premises[72]. The Finer Report[73], following a similar recommendation made in the working paper[74], recommended that this "gap in the legislation . . . be closed."

2.54. The only reason why we do not recommend its closure in this report is that it has been closed already by the Domestic Violence and Matrimonial Proceedings Act 1976, which was passed before our own work was complete. When the private member's Bill which gave rise to the 1976 Act was being prepared, our own work was sufficiently advanced for draft clauses to have been prepared, on our instructions, dealing with the problem revealed by *Tarr*

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[70] Para. 2.2, above.

[71] [1973] A.C. 254.

[72] It is true that the 1967 Act is not the only source of the court's powers. Occasionally it will be able to exclude an owner spouse under its inherent jurisdiction: *Gurasz* v. *Gurasz* [1970] P. 11 (C.A.). But the court will do so only in special circumstances, and it is more satisfactory for the power to be available under the 1967 Act, when the court has the guidance, ancillary powers and jurisdiction contained in s. 1(3), (4) and (6). It is in any case only sensible that the 1967 Act should give power to produce the same result in regard to the owner spouse as in regard to the non-owner spouse.

[73] Para. 6.44(1).

[74] The recommendation in the working paper, made before the decision in *Tarr* v. *Tarr*, was in fact a slightly narrower one: para. 1.22. But the reasoning behind it leads logically to a proposal to close the gap revealed by that case.

v. *Tarr* (and with allied problems with which we shall deal in a moment). These clauses were therefore made available to the private member[75] concerned and duly found a place in her Bill and in the Act which followed. Since they would otherwise have found a place in our own draft Bill, and been the subject of discussion in this report, we think it may be useful to offer the following brief commentary upon them. It will serve to indicate the position which has now been reached.

(i) *The Tarr v. Tarr problem*

2.55. The 1976 Act[76] deals with the *Tarr* v. *Tarr* problem by deleting the word "regulating" in section 1(2) of the 1967 Act, and substituting the words, "prohibiting, suspending or restricting." The court thus has much wider powers over the rights of the owner spouse, including power to exclude him from the property altogether.

(ii) *The problem of the two owner spouses*

2.56. It is not enough, however, simply to reverse *Tarr* v. *Tarr*. Suppose that instead of having an owner spouse and a non-owner spouse, we simply have two owner spouses: a husband and wife both "on the title." Section 1(2) of the 1967 Act starts with the words, "So long as one spouse has rights of occupation . . .", and in this case neither would have rights of occupation as defined in that Act[77], so the subsection would not apply at all. This is entirely consistent with the scheme of the 1967 Act, which sets out to deal only with cases where one spouse is not entitled as owner. But this situation ought to be covered, and the court's power to make an order "prohibiting, suspending or restricting" the exercise of either spouse's right to occupy should apply in this case. Further, the court should have the same guidance, ancillary powers and jurisdiction as it has under section 1 of the 1967 Act. The Act of 1976 achieves these results[78].

(iii) *The problem of jurisdiction*

2.57. We have been concerned up to now with the court's power to *exclude* an owner spouse from the home. Suppose, however, that the boot is on the other foot and an owner spouse, against whom there is no ground for exercising a power to exclude, seeks the court's help in enforcing his inherent right to *occupy*. There is no doubt that the court can give this help, but there was doubt, before the 1976 Act, whether the county court had power to do so. Section 1(6) of the 1967 Act gave jurisdiction to the county court as well as to the High Court, even in cases which would otherwise have been outside the county court's financial jurisdiction; and this seemed to us right. But it applied only to "[t]he jurisdiction conferred . . . by this section" and power to enforce an owner spouse's right to occupy was not so conferred. Accordingly, the 1976 Act[79] includes expressly among the court's powers a power to make an order "requiring the other spouse to permit" the exercise of that right, so that the relevant jurisdiction is now "conferred by this section."

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[75] Miss J. Richardson.

[76] Sect. 3, para. (*a*).

[77] *Gurasz* v. *Gurasz* [1970] P. 11 (C.A.).

[78] Sect. 4. Consistently with the recommendations made in para. 2.20, above, we do however recommend one minor amendment to s. 4 of the 1976 Act: the addition of words removing any possible doubt as to whether a mortgagee's right to possession under his mortgage renders its provisions inoperative.

[79] Sect. 3, para (*b*), and s. 4(1) (concluding words).

(iv) *A postscript*

2.58. The Domestic Violence and Matrimonial Proceedings Act 1976 was framed to achieve other purposes besides those explained in the three preceding paragraphs. In particular, section 1(1) contains a power for the county court, on the application of one spouse, to exclude the other from the home by injunction; and section 1(2) provides that this power is to apply in relation to unmarried couples who are living together as man and wife and to the homes in which they live. In *B.* v. *B.*[80], a case which concerned such a couple who were living in a house of which the man was the tenant, the Court of Appeal decided that section 1 did not empower the court to override property rights and that in consequence the man could not be excluded from the property of which he was tenant. The same decision was reached in *Cantliff* v. *Jenkins*[81], in which the co-habiting couple were tenants of the property jointly. In *Davis* v. *Johnson*[82] however—another case in which the tenancy was joint—a five-member Court of Appeal decided by a majority that it was entitled to hold that the two earlier decisions were wrong in their construction of section 1, and that the section did allow property rights to be overridden.

2.59. These three cases are relevant only to section 1 of the 1976 Act, which is not strictly within the ambit of this report. We acknowledge that despite the decision in *Davis* v. *Johnson*[83] it may still be argued that the law governing the property and occupation rights of unmarried couples falls short of perfection. But this report is concerned solely (as was the working paper and the consultation on it) with the rights of married people and it is not possible to deal here with the entirely separate and very complex problem of the rights of unmarried but co-habiting couples.

Existence of rights of occupation when the wife is out of occupation

2.60. Section 1(1) of the Act gives the wife

> ". . . the following rights (in this Act referred to as "rights of occupation"):
>
> . . . . . .
>
> (*b*) if not in occupation, a right with the leave of the court . . . to enter into and occupy the dwelling house."

In *Rutherford* v. *Rutherford*[84] it was held that a spouse out of occupation could not register a Class F land charge until the court's leave to enter and occupy had actually been obtained, because until then there were no "rights of occupation" to register. Although the case itself dealt only with the question of registration, the implications of the decision that a spouse out of occupation has no "rights of occupation" within the Act are of course wider.

2.61. The working paper[85] drew attention to this case and suggested one solution to the difficulty. This was overtaken by events, however, because *Rutherford* v. *Rutherford* was subsequently overruled in *Watts* v. *Waller*[86],

[80] [1978] 2 W.L.R. 160.
[81] [1978] 2 W.L.R. 177.
[82] [1978] 2 W.L.R. 182.
[83] [1978] 2 W.L.R. 182.
[84] [1970] 1 W.L.R. 1479.
[85] Paras. 1.6 and 1.7.
[86] [1973] 1 Q.B. 153.

where the Court of Appeal held that such a spouse does have at least a conditional right of occupation which can be registered. The present position is therefore satisfactory.

Court's power on divorce, etc., to deal directly with rights of occupation

2.62. The working paper[87] suggested that the existing law did not enable the court, on granting a decree of divorce, nullity or judicial separation, to make a direct order giving one spouse a right to occupy the former matrimonial home, and proposed that it should be given power to do so. This suggestion was subsequently supported by the Finer Report[88]. When we came to consider this point further, however, we were inclined to think that the court's powers under section 24 of the Matrimonial Causes Act 1973[89] were sufficient to allow this purpose to be achieved by way of settlement if the court wished to achieve it. This view is now confirmed by the case of *Allen* v. *Allen*[90]. There the Court of Appeal held that there was power under section 24(1)(*b*) of the 1973 Act to make an order which would ensure that the wife should have the right to occupy the former matrimonial home—in this case so as to provide a home for the children while they were under her control—to the exclusion of the husband. Since its purpose can be achieved in this way, therefore, we do not think it necessary to recommend the implementation of the working paper proposal.

Court's power to grant occupation rights as family provision on death of one spouse

2.63. The working paper proposed[91]

> "... that whether or not an order concerning occupation rights had been made during joint lives, a surviving spouse should be entitled to apply under the Inheritance (Family Provision) Act 1938 for an order granting or extending occupation rights in the matrimonial home."

But the working paper made it clear that this proposal was most appropriately implemented, not as part of our work on the matrimonial home, but rather as part of our work on family provision, with which the working paper was also concerned. It was accordingly borne in mind in the preparation of our *Second Report on Family Property: Family Provision on Death*[92], and we are satisfied that the powers of the court which we recommended in that report, and which have now been implemented in the Inheritance (Provision for Family and Dependants) Act 1975, are sufficient to enable an order of this kind to be made[93].

Court's power on divorce, etc., to transfer tenancies

2.64. We have already mentioned[94] that section 7 of the 1967 Act allows the court granting a decree of divorce or nullity to order that a tenancy of the

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[87] Paras. 1.16–1.18.
[88] Para. 6.44(5).
[89] Summarised in para. 1.180, above.
[90] [1974] 1 W.L.R. 1171.
[91] Para. 1.24.
[92] (1974) Law Com. No. 61.
[93] See in particular s. 2(1)(*d*) of the Act; and compare *Allen* v. *Allen*, referred to in para. 2.62, above.
[94] Para. 2.38, above.

matrimonial home held by one spouse or by the spouses jointly be transferred, simply by virtue of the order, to the other spouse or to a single spouse. We have also mentioned that the working paper made two proposals for the amendment of this section, and we have recommended the implementation of the main elements of one of these[95]. We now turn to the other.

2.65. The proposal with which we dealt earlier arose from the fact that section 7 is limited to cases where the tenancy is a protected or statutory one (including a statutory tenancy within the Rent (Agriculture) Act 1976). The working paper[96] did not suggest an extension of the section to cover all tenancies, and specifically approved its continued limitation to tenancies within the rateable value limit fixed by the Rent Acts, but it did suggest that tenancies which were excluded from Rent Acts protection solely because of the identity of the landlord[97] should be within section 7. The most significant result[98] of this would be to extend the section to local authority lettings. The Finer Report specifically supported this result by recommending[99]:

> "The power the court has under section 7 . . . to transfer from one spouse to another tenancies to which the Rent Acts apply should be extended to local authority tenancies."

2.66. Since we wrote the working paper, a line of cases has established that the court can very often achieve the desired result by another means. In *Thompson* v. *Thompson*[100] it was held that a council tenancy is "property" within section 24 of the Matrimonial Causes Act 1973, and that the court has power accordingly to order its transfer by one spouse to the other under that section. This is confirmed by *Hutchings* v. *Hutchings*[101], *Regan* v. *Regan*[102] and *Rodewald* v. *Rodewald*[103].

2.67. But section 24 differs from section 7 of the Matrimonial Homes Act 1967 in one relevant respect. Under section 24 the court's order does not of itself bring about the transfer: it merely directs the spouse in question to make the transfer. So if that spouse's own power to transfer is subject to some fetter the court cannot override it and cannot (or will not) make the order. Under section 7, on the other hand, the transfer is effected directly by the court's order so that a fetter of this kind can be overridden; but the order cannot be made unless the landlord has an opportunity of being heard[104].

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[95] Paras. 2.39–2.41, above.

[96] Paras. 1.19 and 1.20.

[97] I.e., the tenancies excluded under ss. 4 and 5 of the Rent Act 1968 (see now ss. 13–16 of the Rent Act 1977).

[98] The other excluded lettings, including those by the Crown and by Government departments, are summarised in para. 1.20 of the working paper. They are of course much less important than local authority lettings, numerically and otherwise, and our reasons for not wishing to bring them within section 7 are much the same, mutatis mutandis, as our reasons for deciding not to recommend the extension of the section to local authority lettings.

[99] Recommendation 154 on p. 511; see also paras. 6.86 and 6.44(7). A suggestion to the same effect is made in the Report on Tenancy Agreements by the Housing Services Advisory Group (Department of the Environment, May 1977), para. 26.

[100] [1975] 2 W.L.R. 868 (C.A.). This decision was reached despite an earlier doubt expressed *obiter* by Dunn J. in *Brent* v. *Brent* [1975] Fam. 1,8.

[101] (1975) 237 Estates Gazette 571 (C.A.).

[102] [1977] 1 W.L.R. 84.

[103] [1977] Fam. 192 (C.A.). See also *Hale* v. *Hale* [1975] 1 W.L.R. 931 (C.A.) (which concerned a weekly contractual tenancy granted by a private landlord).

[104] Sub-sect. (6) and the Matrimonial Causes Rules 1977, S.I. 1977 No. 344, r. 107(4).

2.68. The significance of this in relation to council tenancies is that such tenancies do normally contain a fetter of this kind. Section 113(5) of the Housing Act 1957 provides:

> "The local authority shall make it a term of every letting that the tenant shall not assign, sub-let or otherwise part with the possession of the premises, or any part thereof, except with the consent in writing of the authority, and shall not give such consent unless it is shown to their satisfaction that no payment other than a rent which is in their opinion a reasonable rent has been, or is to be, received by the tenant in consideration of the assignment, sub-letting or other transaction."

Despite this provision, it seems that council tenancies do not always contain such a term in practice. In one of the cases already cited[105] the tenancy contained no such term, and the court ordered its transfer. And even if the tenancy does contain the term, the court will order its transfer in a suitable case if the local authority are in fact willing to give consent[106]. But if the tenancy contains the term and the local authority are not prepared to consent, the court will not make the order[107].

2.69. From the foregoing discussion it may seem clear that in this one class of case—where the council tenancy contains a covenant against assignment and the council are not willing to consent—the court will not order a transfer under section 24 but would do so if council tenancies were brought within the terms of section 7 of the 1967 Act. In fact, however, the position is much less simple than it seems.

2.70. To begin with, the covenant which local authorities are required to insert in their tenancies is not absolute but qualified: it does not forbid all assignment but only assignment without consent. And the general law provides that this consent may not be unreasonably withheld[108]. In theory, therefore, there seems no reason why a council's refusal of consent should of itself prevent the court from ordering a transfer under section 24. Presumably the court could make such an order, leaving the transferor spouse to seek a declaration (probably from another court) that the refusal was unreasonable, or simply to make the transfer without consent, thus putting the onus on the council to take action if it thought it could justify its refusal. The reason why the court has never acted in this way is not, we suspect, because it would be wrong in law but because it would be bad in policy and pointless in practice.

2.71. One point has emerged very strongly from the line of cases to which we have referred: that the court fully recognises the undesirability of trying to interfere with the housing policies of local authorities. In *Regan* v. *Regan*[109], Sir George Baker P. said:

> "Housing is a matter for the local authority. It has always been so, and my own view is that it is unfortunate in many ways that the courts, and particularly registrars and circuit judges, may have to make orders, or are

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[105] *Thompson* v. *Thompson* [1976] Fam. 25 (C.A.).

[106] *Hutchings* v. *Hutchings* (1975) 237 Estates Gazette 571 (C.A.).

[107] *Regan* v. *Regan* [1977] 1 W.L.R. 84. See also dicta in *Thompson* v. *Thompson* [1976] Fam. 25, 29–32 (C.A.), and *Hale* v. *Hale* [1975] 1 W.L.R. 931, 936, 937 (C.A.).

[108] Landlord and Tenant Act 1927, s. 19(1)(*a*). In this case, the reasons mentioned at the end of s. 113(5) of the Housing Act 1957 (quoted in para 2.68, above) must be regarded as good reasons for withholding consent.

[109] [1977] 1 W.L.R. 84, 86.

being persuaded to make orders, or think they ought to make orders, which put pressure on councils, or which may be rejected by councils. That has been referred to, I think, in all the reported cases as undesirable, and this case indicates as clearly as any the undesirability of making such an order."

The housing at the disposal of a local authority should be allocated in accordance with general housing needs and in a way consistent with the authority's housing policy: the local authority must be presumed to be the best judge of who should live in its houses. It must be remembered, too, that if the court did order a transfer against the wishes of a local authority, the authority could immediately rob it of effect by terminating the tenancy: precisely because, as we have already noted, council tenancies are not subject to the Rent Acts, the spouse to whom the transfer was made would gain little in the way of real security of tenure. It is worth noting that the authority in *Hutchings* v. *Hutchings*[110], though it did not oppose the transfer, apparently intended thereafter to terminate the tenancy and re-house the transferee spouse in a smaller dwelling.

2.72. The true conclusion to be drawn from the line of cases cited seems to us to be that, whether or not there is a covenant against assignment[111] (and even, perhaps, whether any covenant which does exist is qualified or absolute[112]), the crucial factor is the local authority's consent. If this is forthcoming the court will consider itself free to make the order; but if not, the order will not be made—and this conclusion arises from considerations of policy and practicality. Exactly the same considerations would have to apply, in our view, if the court had power to make orders in respect of council tenancies under section 7 of the Matrimonial Homes Act 1967.

2.73. One further aspect of this subject should be mentioned. The provisions for statutory co-ownership will normally apply to local authority tenancies, so giving the acquiring spouse a beneficial interest and the benefit of the incidents of co-ownership dealt with in Part II of Book One. We think it would, therefore, be desirable for local authorities to recognise the existence of this co-ownership by making it their normal practice to grant tenancies to spouses jointly, as an increasing number of authorities already do[113]. We also think that such a practice would have advantages for local authorities themselves because they would be in a direct contractual relationship with both spouses. They would also be able to choose the spouse who would continue as tenant if the couple no longer wished to live together, without feeling beholden to the spouse in whose name the tenancy was originally granted[114].

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[110] (1975) 237 Estates Gazette 571 (C.A.).

[111] Even in *Thompson* v. *Thompson* [1976] Fam. 25 (C.A.), where there was no covenant, the court was concerned that the local authority should be willing for the transfer to be made.

[112] Even an absolute covenant (assuming that one could validly be inserted contrary to s. 113(5) of the Housing Act 1957) could of course be waived.

[113] The judgment of Buckley L.J. in *Thompson* v. *Thompson* [1976] Fam. 25 quotes at p. 28 a letter from the housing officer of the local authority concerned in that case: "Although it used always to be the policy to grant a tenancy to the husband, it is the policy of the [authority] to make all tenancies joint between husband and wife. It is also their policy to consider all tenancies that have been granted to the husband in the past as now being joint tenancies and . . . we consider that [the husband and wife] have equal rights to the house."

[114] In *Regan* v. *Regan* [1977] 1 W.L.R. 84 the letting was to the husband alone and the local authority indicated that since he was the tenant and had done no wrong in that capacity they would probably not transfer the tenancy, of their own volition, to the wife – unless she had the custody of young children, as in fact she had not.

Wroth v. Tyler

2.74. It was implicit in the working paper that any aspect of the Matrimonial Homes Act 1967 which might appear to be unsatisfactory fell within the ambit of our review. On this basis, although the case was decided after publication of the working paper itself, we could hardly avoid giving full consideration to *Wroth* v. *Tyler*[115]. If we had felt any doubt as to our obligations on this point it would have been removed by the following comment made by Megarry J. towards the end of his judgment in that case[116]:

> "[I]t seems to me to be a matter of some urgency that the scope and operation of the Act of 1967 be reconsidered so as to evolve some means of protecting those who need protection without the cumbersome uncertainties that the Act of 1967 has produced, to the peril of all, and not least to those of modest means. One must not under-estimate the difficulties; but something better than the Act of 1967—much better—must be possible."

2.75. In *Wroth* v. *Tyler*, Mr. Tyler wanted to sell a bungalow of which he was the sole owner but in which he and his wife had their matrimonial home. The wife had rights of occupation under the 1967 Act and therefore (the bungalow being registered land) the power to enter a notice or caution in respect of those rights under the Land Registration Act 1925[117]. Although initially Mrs. Tyler expressed some opposition to the idea of selling the bungalow, Mr. Tyler apparently thought that she had become reconciled to it and he entered into a contract for its sale to Mr. and Mrs. Wroth. But Mrs. Tyler gave immediate evidence of her continued opposition to the sale by registering, the very next day, a notice of her rights of occupation. The result was that Mr. Tyler could not fulfil his obligations under the contract and so was liable in damages to Mr. and Mrs. Wroth. Because property values had risen steeply between the date of the contract and the hearing of the case, these damages were very heavy and Mr. Tyler could not pay them unless his only substantial asset—the bungalow itself—could be realised. In the face of his wife's continued refusal to remove her notice, it looked when the hearing ended as though Mr. Tyler would have to be made bankrupt so that the bungalow would pass to his trustee in bankruptcy who could then, under a special provision in the 1967 Act[118], sell it free from Mrs. Tyler's rights.

2.76. The result in *Wroth* v. *Tyler* seems clearly to have been a disaster for all concerned—for the purchasers because they bought a lawsuit instead of a bungalow, for Mr. Tyler because he was in a fair way to being made bankrupt and losing not only his sale but a large part of his modest assets as well, and even for Mrs. Tyler because in the end it looked as though her registration would avail her nothing and she would have to leave the bungalow (and to do so in circumstances in which her husband's capacity to acquire another dwelling had perhaps been seriously impaired). A more unfortunate situation could not easily be imagined but it was, on any view, a very exceptional one, and the problem was aggravated by the phenomenal rise in house prices which happened to occur during the period in question. Even so, we must consider those provisions of the 1967 Act which provided the setting for this case with a view

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[115] [1974] Ch. 30.
[116] [1974] Ch. at p. 64.
[117] Matrimonial Homes Act 1967, s. 2(7).
[118] Sect. 2(5).

to deciding whether they can be amended in such a way as to prevent a similar situation arising in the future.

2.77. *Wroth* v. *Tyler* was rendered dramatic by the extent of the damages; and the parties' failure to settle the dispute at an early stage, when the damages would have been less, may have been due to the fact that the case raised certain questions of law, and it was by no means clear what the outcome would be[119]. Those questions have now been answered, and if the facts were reproduced in another case the parties would probably not allow the problems to be exacerbated by protracted litigation. What the case shows is that a vendor (whom we shall presume to be the husband) may find himself in financial difficulties because of the existence of his wife's statutory occupation rights, and a purchaser may find that he has bought a lawsuit, where:

(i) the wife does not agree to the proposed transaction;

(ii) the husband binds himself by contract to complete the transaction, under which the purchaser is to take free from any right of the wife's (and in nearly every case, the transaction would be a sale);

(iii) the wife registers her right at any time—before or after the contract—before the purchaser makes his normal pre-completion official search of the register[120] (or, if the purchaser has not made such a search, at any time before completion of the transaction);

(iv) the purchaser discovers the registration before completion (as he is almost certain to do); and

(v) the wife is not then prepared to withdraw the entry from the register.

2.78. In the vast majority of cases the existence of the wife's statutory rights gives rise to no problem because the wife agrees to the sale. Part of the philosophy underlying the 1967 Act is that one spouse ought not to dispose of the matrimonial home without the consent of the other; the statutory occupation rights bind the owner spouse whether they are registered or not, and so they go some way to ensuring that the owner spouse actively seeks, and obtains, the other's consent. If that consent is not forthcoming the sale should not take place, unless the court is prepared to make an appropriate order under section 1(2) and (3) of the 1967 Act, terminating the statutory rights. There are, in our view, no grounds for sympathising with a husband who proceeds to enter into a contract, which he may not be able to perform, in the face of his wife's known objections or without taking reasonable steps to ascertain her views.

2.79. But cases may occur (indeed, it seems that *Wroth* v. *Tyler* may itself have been one) where the wife agrees to the sale—or, at least, gives signs of acquiescing in it—before the husband enters into the contract, and then changes her mind and registers a Class F land charge. There is nothing in the 1967 Act formally to prevent her from doing this. Unless the contract otherwise provides, the husband will be under a contractual obligation to procure the cancellation of the entry before completion[121]; in any event, the purchaser will be anxious

[119] In particular, it was argued that Mrs. Tyler's rights of occupation under the 1967 Act constituted a "defect in title", and that damages for loss of bargain were accordingly not obtainable, under the rule in *Bain* v. *Fothergill* (1874) L.R. 7 H.L. 158.

[120] If the purchaser makes an official search of the register he obtains fifteen working days' protection against any entry in respect of the wife's rights of occupation.

[121] Sect. 4 of the 1967 Act.

for its removal. Does the law, as it stands, provide any means of achieving this? The answer is yes.

2.80. First, we have no doubt that if the wife has, by her conduct, led her husband positively to believe that her statutory rights will prove no impediment, and he has entered into a binding contract on that basis, the court would not permit her to retain the entry on the register. An application by the husband under section 1(2) and (3) (or perhaps even one founded on the principles of estoppel at common law) would succeed, the wife's rights would be terminated, and the adverse entry would be removed. We accept that this may not be a wholly satisfactory answer from the husband's (or the purchaser's) point of view because the existence of the adverse entry may not be discovered until a late stage (indeed, the registration may not have been made until a late stage) and the proceedings aimed at getting rid of the entry would almost certainly necessitate the postponement of the date fixed for completion.

2.81. Secondly, the 1967 Act expressly enables a spouse with rights of occupation to provide a written release of those rights (section 6). Since it is to be supposed that the wife accepts the proposed transaction at the time when the contract is made, there should be no difficulty in obtaining such a release from her at that juncture. There is, of course, no reason why the release should not be incorporated in the contract itself. After such a release the husband or the purchaser should have no difficulty in procuring the discharge of any Class F entry, whenever made.

2.82. Finally, and apart altogether from these methods of disposing of the wife's adverse entry, the husband may always seek to have included in his contract with the purchaser a term protecting him from the consequences of the emergence of a Class F entry which he could not get his wife to withdraw: a term, for example, giving him a right to rescind without liability in such an event. We do not find this an attractive approach, if only because it would seem to suggest a means whereby a husband, who himself changes his mind about the desirability of the contract, might seek to escape from it. In any event, a purchaser aware of the fact that the draft contract contained such a term would be well advised to seek a section 6 release by the wife; and if this is not obtainable he will know that his proposed purchase will be at risk of going off.

2.83. In our view, sections 1(2) and (3) and 6 of the 1967 Act provide adequate safeguards against abuse by the wife of the rights given to her by the Act. But the exercise by her of her right to register a Class F land charge is not rendered an abuse merely because it may interfere with smooth conveyancing. It is an essential step in protecting her substantive rights and we think that to introduce restrictions on that exercise would be contrary to the policy of the Act.

2.84. The 1967 Act has, however, been subjected to judicial criticism in *Wroth* v. *Tyler*[122] and in the earlier cases of *Miles* v. *Bull*[123] and *Watts* v. *Waller*[124], and we feel that we ought to express our views on those criticisms and the suggestions there made.

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[122] *Wroth* v. *Tyler* has also given rise to academic discussion of the Act, including that by D. G. Barnsley, 1974 Current Legal Problems 76; Stephen Cretney, 117 Sol. J. 475; David J. Hayton, 38 Conv. 110; and R. J. Smith, [1973] Camb. L. J. 223. We have carefully considered this in reaching our own conclusions.

[123] [1969] 1 Q.B. 258.

[124] [1973] Q.B. 153.

2.85. The first point, strongly made by the Court of Appeal in *Watts* v. *Waller*, and endorsed by Megarry J. in *Wroth* v. *Tyler*, is that the Act does not require the Land Registry to notify the husband of the making of a Class F entry, and that it is not the practice of the Registry to inform him. We accept that if an entry is made, and the husband is informed of it before he contracts to sell the house, he will be able to avoid getting into the position Mr. Tyler found himself in, of contracting to perform the impossible. It is, however, clear that a change in the law (or in the practice) would often be of negligible assistance to the husband: notification of an entry made after contract would not save the husband from entering into an embarrassing contract and would merely enable him to institute proceedings for the removal of the entry (if he had any grounds for such an application) a little earlier than might otherwise be the case. Even so, it would probably not enable him to meet the date fixed for completion. It so happens that in both the cases referred to in this paragraph the wife's registration was made after contract—and that is not in any way surprising. Registrations are not made as a matter of common form, but only when the wife is advised, in the light of the prevailing matrimonial circumstances, that she ought to protect her interests. If she has sought advice because she suspects that her rights of occupation are in jeopardy, and her suspicions are correct, it is a matter of chance whether her entry is made before or after her husband contracts.

2.86. There is, however, a positive reason for not notifying the husband of the registration of his wife's rights. Just because such registration is not common form, but is usually resorted to only when the relationship between the spouses is not as it should be, registration is liable to be interpreted as a hostile act, and a wife (anxious to preserve, and indeed improve, the marriage) may well not wish to tell her husband that she has registered. Notification by the Land Registry may, in these circumstances, be worse in so far as it suggests that the wife has acted in a manner not merely hostile but underhand. Fears for the marriage itself should not be permitted to inhibit the wife from protecting her interests and we are satisfied that the "family" considerations (which will be a factor in most cases) outweigh any advantage there may sometimes be, from the conveyancing point of view, in automatically notifying the husband of Class F entries. We accordingly endorse the present practice of not giving such notice. It is only fair to add that these considerations may not have been present to the mind of the Court of Appeal in *Watts* v. *Waller*, where the marriage had already broken down to the extent that the parties were living apart.

2.87. The second point is the absence from the Act of a positive duty on the husband (the owner of the house) to inform his wife in advance of his intention to enter into a transaction affecting her rights of occupation. The absence of such a duty was remarked on by Megarry J. in *Miles* v. *Bull* (and referred to again by him in *Wroth* v. *Tyler*) in connection with his suggestion that if there were such a duty the register would be less likely to be cluttered with unnecessary entries. It is perfectly true that if husbands always gave their wives such notice there would be no need for any entry to be made in the register unless and until such notice were given. We can go further than that. If the husband's notice were given early enough to give the wife an adequate opportunity to register before the husband entered into his contract, then it might be fair to provide that the husband and the purchaser should not be

affected by an entry made after contract. If these propositions were workable, the *Wroth* v. *Tyler* problem would disappear.

2.88. One of the difficulties in this approach is that if the parties to the contract wished to know for certain how they stood vis-à-vis the wife, a search of the register would have to be made immediately before contract—in addition, of course, to the purchaser's normal search before completion. This would represent a retrograde step, since Parliament has recently been at pains, in section 24 of the Law of Property Act 1969, to eliminate any need to make pre-contract searches at the Land Charges Registry.

2.89. But the main problem lies in the absence, as we see it, of any adequate sanction to ensure that the husband always complied with his duty. Plainly, it would not be right to deprive the wife of the right to register after contract if she did not find out about the transaction until then: unless, of course, it were also provided that in the absence of prior notice from her husband her occupation right would bind a purchaser whether she had registered it or not. And that would be grossly unfair to the purchaser. A criminal sanction is out of the question; and a right to damages payable to the wife (even if quantifiable, which must be doubtful) seems to be wholly inappropriate. A right of occupation, if it means anything at all, means a right of occupation, and not a sum of money.

2.90. We have come to the conclusion that further amendments to the 1967 Act along the lines indicated in the recent cases referred to would not, on the whole, improve the working of the Act, consistently with its purposes.

PART III SUMMARY OF RECOMMENDATIONS

2.91. The following is a summary of the recommendations made in this Book. References to paragraphs are to those paragraphs of the report in which the recommendations are made. References to clauses are to those clauses of the draft Matrimonial Homes (Rights of Occupation) Bill which deal with recommendations requiring statutory implementation.

The Matrimonial Homes Act 1967: Introductory

(1) In this Book we consider certain aspects of the Matrimonial Homes Act 1967 and allied enactments with a view to their amendment. The 1967 Act applies when one spouse (whom we assume to be the husband) is "entitled to occupy a dwelling house by virtue of any estate or interest or contract or by virtue of any enactment giving him the right to remain in occupation." Its primary purpose is to give the other spouse (assumed to be the wife) registrable "rights of occupation" in the property. These rights of occupation exist even when the wife has a beneficial interest, but do not exist when she is on the title. The draft bill includes a print of the 1967 Act as already amended and with the further amendments which we recommend.
(Paragraphs 2.1–2.5, and clause 7 and Schedule 2.)

Dwelling held by trustees

Wife's right to register against the trustees

(2) The 1967 Act should be amended so as to deal more satisfactorily with the case where the wife has rights of occupation in a property which the husband occupies by virtue of his beneficial interest under a trust. If the wife's rights are a charge on the husband's beneficial interest at a time when no one but he (or no one but the wife and he) had an interest under the trust, then (and only then) her rights should also be a charge on the *trustees'* interest, registrable as such. This rule should apply whether or not the husband is himself a trustee, or the sole trustee. Necessary consequential amendments should be made to the 1967 Act.
(Paragraphs 2.6–2.15, and clause 1(1), (3) and (4) and Schedule 1.)

Wife's right to stand in the trustees' shoes

(3) Section 1(5) of the 1967 Act gives a wife with rights of occupation the right to stand, in regard to the satisfaction of liabilities etc., in the husband's shoes. Where her rights of occupation arise by reason of her husband's interest under a trust, she should have a similar right to stand in the shoes of the *trustees.*
(Paragraph 2.16 and 2.17, and clause 1(2).)

Dwelling subject to a mortgage

Setting the scene: the application of the 1967 Act to mortgaged property

(4) The 1967 Act should be retrospectively amended so that:

(*a*) In determining for its purposes whether the husband is "entitled to occupy" (and thus, indirectly, whether the wife has "rights of occupation") a mortgagee's right to possession under his mortgage should be disregarded.

(*b*) This should be so even if the mortgagee is actually in possession.

(*c*) But the wife's rights of occupation should give her no greater right to occupy, as against the mortgagee, than the husband has—unless her rights have priority over the mortgage.

Further, a provision having the effect of sub-paragraphs (*a*) and (*b*) above should be inserted in section 4 of the Domestic Violence and Matrimonial Proceedings Act 1976.
(Paragraphs 2.18–2.20, and clauses 2 (and the new section 7A(1) of the 1967 Act) and 4(3).)

The problem itself: the wife's right to join in any action by the mortgagee to enforce his security

(i) *Letting the wife join in*

(5) Whenever mortgaged land consists of or includes a dwelling house, a wife who has rights under section 1(5) of the 1967 Act to perform the mortgagor's obligations under the mortgage should have power to apply to the court to be joined in any action brought by the mortgagee to enforce his security. The application should be valid if made at any time before the action is finally disposed of; and the court should accede to it if:

(*a*) the court sees no special reason against doing so, and

(*b*) the court is satisfied that the wife may be expected to make payments or do other things which might affect the outcome of the proceedings—or that the expectation of her doing so should be considered under section 36 of the Administration of Justice Act 1970 (read with section 8 of the Administration of Justice Act 1973).

(Paragraphs 2.25 and 2.26, and clause 2 (and the new section 7A(2) of the 1967 Act).)

(ii) *Letting the wife know*

(6) Whenever mortgaged land consists wholly or substantially of a dwelling house, a mortgagee bringing an action to enforce his security should be obliged to give notice of his action to a wife who has registered a Class F land charge (protecting her rights of occupation) or its registered land equivalent, so enabling her to exercise her right to be joined. This will involve the mortgagee in searching. In consequence:

(*a*) In the case of *registered* land, the present limited class of mortgagees who can search should be extended to include all mortgagees—but the right to search the register so conferred should be for the purpose only of discovering entries of this particular kind.

(*b*) In the case of *unregistered land*, the main problem in applying our primary recommendation arises from the fact that entries are made against estate owners and not against the land itself: the mortgagee's duty to search should be limited to searching against the name of the person currently entitled as legal estate owner to the property mortgaged—except that if that person is a trustee, the duty should extend to searching against his predecessors in that office since the date of the mortgage.

(*c*) In the case of both registered and unregistered land, the mortgagee who makes an official search should enjoy a period of protection within which he may safely bring his action without giving notice, analogous to that enjoyed by a purchaser.

(Paragraphs 2.27–2.33, and clause 2 (and the new section 7A(3) and (4) of the 1967 Act).)

Polygamy and the Act of 1967

(7) A declaratory provision should be inserted in the 1967 Act to make it clear that the Act applies in all cases of polygamous marriage.
(Paragraph 2.34, and clause 3.)

Charge on registered land to be entered only as a notice

(8) The production of the land certificate should no longer be required on the entry on the register of a notice protecting "rights of occupation" under the 1967 Act. In consequence it will no longer be necessary to protect such rights through the entry of a caution, and the right to do so should cease. (Paragraph 2.36, and clause 4(1).)

Dwellings held on a protected or statutory tenancy

Transfer of tenancy on divorce, etc.

(9) Section 7 of the 1967 Act (which allows the court granting a decree of divorce or nullity to order that a protected or statutory tenancy (including a statutory tenancy under the Rent (Agriculture) Act 1976) which is held by one spouse, or by the spouses jointly, be transferred to the other spouse or to a single spouse) should be amended in such a way that:

(*a*) The court's powers are exercisable also in cases of judicial separation.

(*b*) They are exercisable on or at any time after the grant of the decree (whether, in the case of divorce or nullity, before or after the decree nisi is made absolute). But they should not be exercisable if the spouse who wishes to apply has entered into another marriage (including a marriage which is void or voidable). The transfer of tenancy should take place on the date specified in the order (but, in the case of divorce or nullity, not earlier than the decree absolute).

(*c*) It is possible for rules of court to provide that an application should not be made outside a prescribed period after the decree unless the court gives leave.

(*d*) The court having primary jurisdiction to make an order under section 7 is the court which granted the decree, but it is possible for rules of court to provide for the transfer of the proceedings to any court having divorce jurisdiction.

(Paragraphs 2.38–2.41, and clause 5.)

Rights of spouse after landlord obtains a possession order

(10) Section 100 of the Rent Act 1977 (and section 7 of the Rent (Agriculture) Act 1976) (which give the court extended discretion to help tenants against whom landlords claim possession) should be amended. The amendment should ensure that a wife who is entitled, by virtue of section 1(5) of the 1967 Act, to claim this help, is not deprived of it because the landlord's proceedings, or the possession order, may technically end the husband's entitlement to occupy and, with it, her rights of occupation.
(Paragraphs 2.42–2.46, and clause 6(1) and (3).)

Right of a spouse to succeed to tenancy

(11) In paragraphs 2 and 6 of Schedule 1 to the Rent Act 1977 (under which on the death of the original tenant under a protected or statutory tenancy, or of the first statutory tenant by succession, his widow if residing with him becomes a statutory tenant by succession) the following changes should be made:

(*a*) The provisions should also apply in favour of a widower.

(*b*) The widow or widower should not be disqualified merely because he or she was not living with the deceased: the provisions should be

capable of applying in favour of deserted widows or widowers. The test, therefore, should be whether the would-be successor was living, not *with the deceased*, but *in the property*.

(Paragraphs 2.47–2.49, and clause 6(2).)

Commencement

(12) The changes recommended in this Book should come into force one month after the implementing legislation reaches the statute book.

(Paragraph 2.50, and clause 8.)

PART II CHANGES NOT RECOMMENDED

(13) In paragraphs 2.51–2.73 we discuss those of the working paper's suggestions which we do not now recommend, and give our reasons. They are not summarised here.

Wroth v. Tyler

(14) In paragraphs 2.74–2.90, we examine those parts of the 1967 Act which provided the setting for the case of *Wroth* v. *Tyler* [1974] Ch. 30 and consider the underlying policy of the Act. We consider that the problem for the owner spouse (and the purchaser) which is revealed by this unfortunate but exceptional case can be ameliorated by making use of the statutory provisions which already exist—and that no better or simpler solution could be provided except by weakening the protection of the other spouse to an extent which would be unacceptable and contrary to the policy which underlies the Act.

Matrimonial Homes (Rights of Occupation) Bill

ARRANGEMENT OF CLAUSES

EXPLANATORY NOTES

GENERAL NOTE. In the case of nearly every clause of the Bill, the explanatory notes begin with an introductory passage which incorporates a paragraph reference in brackets. This reference is to those paragraphs of the report in which the subject matter of the clause is discussed.

The Bill is mainly concerned to make changes in the scheme laid down in regard to occupation of the matrimonial home by the Matrimonial Homes Act 1967, and this it does by means of textual amendment of that Act. The Act is reprinted in Schedule 2 in a form which shows the amendments proposed by the Bill (and those already made by other enactments), thus making it clear how the amendments fit into the existing scheme.

In these notes it is assumed that the husband is the "owner" spouse who is entitled to occupy by virtue of rights not derived from the Matrimonial Homes Act 1967, and that the spouse who has rights of occupation under that Act is the wife; but the legal position is exactly the same in the converse case.

DRAFT

OF A

BILL

TO

A.D. 1977.

Amend the Matrimonial Homes Act 1967, and to make further provision as to the rights of husbands and wives to possession or occupation of any matrimonial home or former matrimonial home, by virtue of a protected or statutory tenancy or otherwise.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Dwelling house held by trustees. 1967 c. 75.

1.—(1) In the Matrimonial Homes Act 1967 ("the Act of 1967") for the words "any estate or interest" in section 1(1) and for the words "an estate or interest" in section 2(1) (which refer in each case to the estate or interest entitling a spouse to occupy a dwelling house) there shall be substituted the words "a beneficial estate or interest".

(2) In section 1(5) of the Act of 1967 (which relates to the satisfaction by a spouse having rights of occupation under the Act of liabilities of the other spouse) the words down to "possession by the other spouse" shall be numbered as subsection (5)(*a*), and the following words as subsection (5)(*b*); and at the end of the subsection there shall be added as paragraph (*c*)—

"(*c*) Where a spouse is entitled under this section to occupy a dwelling house or part thereof by reason of an interest of the other spouse under a trust, paragraphs (*a*) and (*b*) above shall apply in relation to the trustees as they apply in relation to the other spouse."

(3) In section 2 of the Act of 1967, after subsection (1), there shall be inserted as subsection (1A)—

"(1A) If, at any time when a spouse's rights of occupation are a charge on an interest of the other spouse under a trust, there are, apart from either of the spouses, no persons, living or unborn, who are or could become beneficiaries under the trust, then those rights shall be a charge also on the estate or interest of the trustees for the other spouse, having the like priority as if it were an equitable interest created (under powers overriding the trusts) on the date when it arises.

In determining for purposes of this subsection whether there are any persons who are not, but could become, beneficiaries under the trust, there shall be disregarded any potential exercise of a general power of appointment exercisable by either or both of the spouses alone (whether or not the exercise of it requires the consent of another person)."

EXPLANATORY NOTES

Clause 1

This clause contains amendments designed to ensure that the Matrimonial Homes Act 1967 deals more satisfactorily with cases where the husband is a beneficiary under a trust.
(Paragraphs 2.6–2.17.)

Subsection (1) makes it clear that the wife's rights of occupation derive only from a *beneficial* interest of the husband, and so (subject only to the exception provided for in subsection (3)) are a charge only upon his *beneficial* interest. If the husband is beneficial owner of a legal estate, her charge is upon that. But if his only beneficial interest is an equitable one, then (subject only to subsection (3)) her charge is only upon that; and this is so even if he happens also to be trustee of the legal estate.

Subsection (2) ensures that, in all cases where the husband's only beneficial interest is one under a trust, the wife has power, under section 1(5) of the 1967 Act, to stand in the shoes of the trustees in the way indicated in paragraph 2.17 of the report.

Subsection (3) applies only where (after the Bill is in force) the husband is the *sole* beneficiary, or he and the wife are the *sole* beneficiaries, as defined, under the trust in question. If this state of affairs exists at a time when the wife's rights are a charge on the husband's beneficial interest, they become a charge on the estate or interest of the trustees also.

(4) In the provisions of the Act of 1967 mentioned in Schedule 1 to this Act there shall be made the amendments provided for by that Schedule, being amendments arising out of the insertion of section 2(1A) in that Act.

Clause 1 (*continued*)

Subsection (4) introduces Schedule 1 which contains consequential amendments to the 1967 Act—including amendments to ensure that where the wife's rights are a charge, under subsection (3) above, on registered land held by trustees, it can be entered on the register. The combination of the new section 2(1A) of the 1967 Act and the terms of section 2(7) of the Land Charges Act 1972 is enough to achieve a corresponding effect for unregistered land.

Dwelling house subject to mortgage.

2. In the Act of 1967, after section 7, there shall be inserted the following section 7A, and subsection (1) of that section 7A shall be deemed always to have had effect:—

"Dwelling house subject to mortgage.

7A.—(1) In determining for the purposes of this Act whether a spouse or former spouse is entitled to occupy a dwelling house by virtue of an estate or interest there shall be disregarded any right to possession of the dwelling house conferred on a mortgagee of the dwelling house under or by virtue of his mortgage, whether the mortgagee is in possession or not; but the other spouse shall not by virtue of the rights of occupation conferred by this Act have any larger right against the mortgagee to occupy the dwelling house than the one first mentioned has by virtue of his or her estate or interest and of any contract with the mortgagee, unless under section 2 of this Act those rights of occupation are a charge, affecting the mortgagee, on the estate or interest mortgaged.

(2) Where a mortgagee of land which consists of or includes a dwelling house brings an action in any court for the enforcement of his security, any person who is not a party to the action and who is enabled by section 1(5) of this Act to meet the mortgagor's liabilities under the mortgage, on applying to the court at any time before the action is finally disposed of in that court, shall be entitled to be made a party to the action if the court—

(*a*) does not see special reason against it; and

(*b*) is satisfied that the applicant may be expected to make such payments or do such things in or towards satisfaction of the mortgagor's liabilities or obligations as might affect the outcome of the proceedings or that the expectation of it should be considered under section 36 of the Administration of Justice Act 1970.

1970 c. 31.

Clause 2

This clause (after clarifying the situation which exists under the 1967 Act when the home is mortgaged) makes provision for the wife to join in any proceedings brought by a mortgagee to enforce his security. (Paragraphs 2.18–2.33.)

The new section 7A(1) removes a possible doubt by confirming that in deciding (for the purposes of the Act) whether the husband is entitled to occupy—and consequently whether the wife has rights of occupation—one can disregard the fact that the property is mortgaged in such a way as to give the mortgagee a right to possession. This remains true even if the mortgagee is in actual possession. But the wife's rights of occupation give her no greater right, as against the mortgagee, to occupy than the husband has, unless her rights were registered before the mortgage and took priority over it. This provision operates retrospectively.

The new section 7A(2) gives added force to a wife's right, under section 1(5) of the 1967 Act, to meet the mortgagor's liabilities. If she has this right, she may apply to the court to be made a party to any proceedings brought by the mortgagee to enforce his security, and her application will succeed if the conditions set out in paragraphs (*a*) and (*b*) are fulfilled. Points worth particular notice are:

(i) The wife's right arises whenever she has a right to discharge the mortgagor's liabilities: the action itself does not have to be brought against the mortgagor. So if the husband is entitled to occupy as a trust beneficiary, and the trustees have mortgaged the property, the wife could apply to be joined in an action for possession brought by the mortgagee against the husband.

(ii) In considering the wife's application, the court must have regard to the possibility of her being able to utilise section 36 of the Administration of Justice Act 1970 (amplified by section 8 of the Administration of Justice Act 1973) which applies when it is "likely" that sums due under the mortgage can be paid "within a reasonable period."

(3)(*a*) Where a mortgagee of land which consists or substantially consists of a dwelling house brings an action for the enforcement of his security, and at the relevant time there is—

(i) in the case of unregistered land, a land charge of Class F registered against the person who is the estate owner at the relevant time or any person who, where the estate owner is a trustee, preceded him as trustee during the subsistence of the mortgage; or

(ii) in the case of registered land, a subsisting registration of a notice or caution entered pursuant to section 2(7) of this Act;

notice of the action shall be served by the mortgagee on the person on whose behalf the land charge is registered or the notice or caution entered, if that person is not a party to the action.

(*b*) For the purposes of paragraph (*a*) above, if there has been issued a certificate of the result of an official search made on behalf of the mortgagee which would disclose any land charge of Class F, notice or caution within sub-paragraph (i) or (ii) of paragraph (*a*) above, and the action is commenced within the period for which a certificate on an official search operates in favour of a purchaser, the relevant time is the date of that certificate; and in any other case the relevant time is the time when the action is commenced.

(4) In this section—

(*a*) "mortgage" includes a charge and "mortgagor" and "mortgagee" shall be construed accordingly;

(*b*) "mortgagor" and "mortgagee" includes any person deriving title under the original mortgagor or mortgagee."

Clause 2 (*continued*)

The new section 7A(3) supplements the new subsection (2) by requiring the mortgagee to notify the wife when he brings his action. This obligation only exists, however, if the wife has made an appropriate registration in respect of her rights. In the case of unregistered land, that means a registration against the estate owner at the relevant time— unless that estate owner is a trustee, in which case a registration against any trustee since the date of the mortgage will suffice. Further, the obligation exists only where a dwelling house forms the whole security or a substantial part of it (because it is only in such a case that the mortgagee should be expected to search).

Paragraph (*b*), through its definition of "the relevant time", allows a mortgagee who obtains a clear official search certificate to ignore any registration made during the period (at present of 15 working days: see footnote 44 of Book Two of the report) for which purchasers are protected by such a certificate, provided he begins his action within that period.

Polygamous marriages.

3. At the end of section 1 of the Act of 1967 there shall be inserted the following subsection—

"(10) It is hereby declared that this Act applies as between a husband and a wife notwithstanding that the marriage in question was entered into under a law which permits polygamy (whether or not either party to the marriage in question has for the time being any spouse additional to the other party)."

Clause 3

This declaratory provision makes it clear that the 1967 Act applies in all cases of polygamous marriage.
(Paragraph 2.34.)

Minor amendments.

4.—(1)(*a*) In section 2(7) of the Act of 1967 (which provides that in the case of registered land registration of a spouse's charge in respect of rights of occupation shall be effected by registering a notice or caution under the Land Registration Act 1925) there shall be added at the end the words—

"Production of the land certificate shall not be required by section 64(1)(*c*) of the Land Registration Act 1925 when a person applies for the registration of a notice by virtue of this subsection.";

1925 c. 21.

and in section 64(1)(*c*) of the Land Registration Act 1925 after the words "except as hereinafter mentioned" there shall be inserted the words "or as provided by section 2(7) of the Matrimonial Homes Act 1967 as amended by section 4(1)(*a*) of the Matrimonial Homes (Rights of Occupation) Act 1978".

(*b*) Accordingly in section 2(7) of the Act of 1967 the words "or caution" shall be omitted, but without prejudice to any caution already registered.

(2) In section 2(8) of the Act of 1967 after the words "section 94 of that Act" there shall be inserted the words "of 1925".

1976 c. 50.

(3) At the end of section 4 of the Domestic Violence and Matrimonial Proceedings Act 1976 (order restricting occupation of matrimonial home) there shall be inserted the following subsection—

"(4) In determining for the purposes of this section whether two spouses are entitled to occupy a dwelling-house there shall be disregarded any right to possession of the dwelling house conferred on a mortgagee of the dwelling house under or by virtue of his mortgage, whether the mortgagee is in possession or not.

In this subsection—

(*a*) "mortgage" includes a charge and "mortgagee" shall be construed accordingly;

(*b*) "mortgagee" includes any person deriving title under the original mortgagee".

Clause 4

This makes three minor amendments. (As to the first and last, see paragraphs 2.35 and 2.36, and footnotes 21 and 78, respectively.)

Subsection (1) refers to section 2(7) of the 1967 Act, which allows a wife to register her charge on registered land either as a notice or as a caution. It provides that the entry of a notice is not in future to require the production of the Land Certificate. Accordingly, the wife will always be able to protect her charge by notice, and the reference to cautions is no longer required. A notice is a more secure method of protecting rights—especially, perhaps, rights under the 1967 Act.

Subsection (2) removes an inelegance which crept into section 2(8) of the 1967 Act when it was amended by the Land Charges Act 1972.

Subsection (3) does for section 4 of the Domestic Violence and Matrimonial Proceedings Act 1976 what the new section 7A(1) (see clause 2, above) will do for the Matrimonial Homes Act 1967. The spouses' entitlement to occupy the dwelling house (upon which the rights under section 4 of the 1976 Act depend) is, for the purposes of the section, unaffected by the existence of a mortgage.

Protected and statutory tenancies

Transfer on termination of marriage etc.

5. For section 7 of the Act of 1967 (which enables the court to transfer certain tenancies on the grant of a decree of divorce or nullity of marriage) there shall be substituted the following section—

"Termination of marriage etc.: dwelling house subject to Rent Acts.

7.—(1) Where one spouse is entitled, either in his or her own right or jointly with the other spouse, to occupy a dwelling house by virtue of—

(*a*) a protected tenancy or statutory tenancy within the meaning of the Rent Act 1977, 1977 c. 42.
or

(*b*) a statutory tenancy within the meaning of the Rent (Agriculture) Act 1976, 1976 c. 80.

then, on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter (whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute), the court by which the decree is granted may make an order under subsection (2), (3) or (4) below according to the circumstances.

(2) Where a spouse is entitled as aforesaid to occupy the dwelling house by virtue of a protected tenancy within the meaning of the Rent Act 1977, the court may by order direct that, as from such date as may be specified in the order, there shall, by virtue of the order and without further assurance, be transferred to, and vested in, the other spouse—

(*a*) the estate or interest which the spouse so entitled had in the dwelling house immediately before that date by virtue of the lease or agreement creating the tenancy and any assignment of that lease or agreement, with all rights, privileges and appurtenances attaching to that estate or interest but subject to all covenants, obligations, liabilities and incumbrances to which it is subject; and

(*b*) where the said spouse is an assignee of such lease or agreement, the liability of the said spouse under any covenant of indemnity by the assignee expressed or implied in the assignment of the lease or agreement to that spouse;

and where such an order is made, any liability or obligation to which the said spouse is subject under any covenant having reference to the dwelling house in such lease or agreement, being a liability or obligation falling due to be discharged or performed on or after the date so specified, shall not be enforceable against the said spouse.

Clause 5

This clause makes certain amendments to section 7 of the 1967 Act. (Paragraphs 2.38–2.41.) Since this section has been extensively amended already, it has been thought helpful to replace it altogether. The *changes* being made are as follows:

(*a*) The court's powers to order the transfer of tenancies under the section are to apply in cases of *judicial separation* as well as in those of divorce and nullity (*the new subsection* (1)).

(*b*) These powers are to be exercisable on *or at any time after* the grant of a decree (*the new subsection* (1)). But they are not to be exercisable if the spouse who wishes to apply has remarried (*the new subsection* (7)), even if that marriage is void or voidable (*the new subsection* (14)).

(*c*) The transfer of tenancy is to take place on the date specified in the order (*the new subsections* (2), (3) and (4) with a consequential change in *the new subsection* (5)). But in the case of divorce or nullity, this date is not to be earlier than the decree absolute (*the new subsection* (6)).

(*d*) Rules of court may provide that an application may not be made outside a prescribed period after the decree unless the court gives leave (*the new subsection* (9)).

(*e*) The court having primary jurisdiction to make an order under section 7 is the court which granted the decree (*the new subsection* (1)), but there are extensive powers of transfer (*the new subsections* (10), (11) and (in part) (13)).

(*f*) The words "or widower" appear in *the new subsection* (3) by reason of the change made by clause 6(2) of the Bill, below.

(3) Where the spouse is entitled as aforesaid to occupy the dwelling house by virtue of a statutory tenancy within the meaning of the Rent Act 1977, the court may by order direct that, as from such date as may be specified in the order, that spouse shall cease to be entitled to occupy the dwelling house and that the other spouse shall be deemed to be the tenant or, as the case may be, the sole tenant under that statutory tenancy; and the question whether the provisions of paragraphs 1 to 3 or, as the case may be, paragraphs 5 to 7 of Schedule 1 to the Rent Act 1977 as to the succession by the widow or widower of a deceased tenant or by a member of his family to the right to retain possession are capable of having effect in the event of the death of the person deemed by an order under this subsection to be the tenant or sole tenant under the statutory tenancy shall be determined according as those provisions have or have not already had effect in relation to the statutory tenancy.

(4) Where the spouse is entitled as aforesaid to occupy the dwelling house by virtue of a statutory tenancy within the meaning of the Rent (Agriculture) Act 1976, the court may by order direct that, as from such date as may be specified in the order, that spouse shall cease to be entitled to occupy the dwelling house and that the other spouse shall be deemed to be the tenant or, as the case may be, the sole tenant under that statutory tenancy; and a spouse who is deemed as aforesaid to be the tenant under a statutory tenancy shall be (within the meaning of that Act) a statutory tenant in his own right, or a statutory tenant by succession, according as the other spouse was a statutory tenant in his own right, or a statutory tenant by succession.

(5) Where the court makes an order under this section it may by the order direct that both spouses shall be jointly and severally liable to discharge or perform any or all of the liabilities and obligations in respect of the dwelling house (whether arising under the tenancy or otherwise) which have at the date of the order fallen due to be discharged or performed by one only of the spouses or which, but for the direction, would before the date specified as the date on which the order is to take effect fall due to be discharged or performed by one only of them; and where the court gives such a direction it may further direct that either spouse shall be liable to indemnify the other in whole or in part against any payment made or expenses incurred by the other in discharging or performing any such liability or obligation.

(6) In the case of a decree of divorce or nullity of marriage, the date specified in an order under this section as the date on which the order is to take effect shall not be earlier than the date on which the decree is made absolute.

(7) If after the grant of a decree dissolving or annulling a marriage either spouse remarries, that spouse shall not be entitled to apply, by reference to the grant of that decree, for an order under this section.

(8) Rules of court shall be made requiring the court before it makes an order under this section to give the landlord of the dwelling house to which the order will relate an opportunity of being heard.

(9) Rules of court may provide that an application for an order under this section shall not, without the leave of the court by which the decree of divorce, nullity of marriage or judicial separation was granted, be made after the expiration of such period from the grant of the decree as may be prescribed by the rules.

(10) Rules of court may provide for the transfer of proceedings pending by virtue of this section in the court which granted the decree of divorce, nullity of marriage or judicial separation as follows—

(*a*) if the proceedings are pending in the High Court, for the transfer of the proceedings to a divorce county court;

(*b*) if the proceedings are pending in a divorce county court, for the transfer of the proceedings to the High Court or to some other divorce county court;

and a court shall have jurisdiction to entertain any proceedings transferred to the court by virtue of rules made in pursuance of this subsection.

(11) For the purposes of subsection (10) above—

(*a*) any proceedings pending in the divorce registry shall be treated as pending in a divorce county court; and

(*b*) the power to provide for the transfer of proceedings to a divorce county court shall include power to provide for the transfer of proceedings to the divorce registry.

(12) Where a spouse is entitled to occupy a dwelling house by virtue of a tenancy, this section shall not affect the operation of sections 1 and 2 above in relation to the other spouse's rights of occupation, and the court's power to make orders under this section shall be in addition to the powers conferred by those sections.

(13) In this section—

"divorce county court" means a county court designated under section 1 of the Matrimonial Causes Act 1967; 1967 c. 56.

"divorce registry" means the principal registry of the Family Division of the High Court;

"landlord" includes any person from time to time deriving title under the original landlord and also includes, in relation to any dwelling house, any person other than the tenant who is, or but for Part VII of the Rent Act 1977 or Part II of the Rent (Agriculture) Act 1976 would be, entitled to possession of the dwelling house; 1977 c. 42. 1976 c. 80.

"tenancy" includes sub-tenancy.

(14) For the avoidance of doubt it is hereby declared that the reference in subsection (7) above to remarriage includes a reference to a marriage which is by law void or voidable."

Amendments of Rent Acts.

6.—(1) In section 100 of the Rent Act 1977 (which gives the court an extended discretion in actions for possession of certain dwelling-houses) after subsection (4) there shall be inserted as subsection (4A)—

"(4A) Where proceedings are brought for possession of a dwelling-house which is let on a protected tenancy or subject to a statutory tenancy, and the tenant's spouse or former spouse having rights of occupation under the Matrimonial Homes Act 1967 is then in occupation of the dwelling-house, then nothwithstanding any termination of the other spouse's tenancy by the bringing of those proceedings or by an order for possession made therein, that spouse or former spouse, so long as he or she remains in occupation, shall have the same rights in relation to or in connection with any such adjournment as is referred to in subsection (1) above or any such stay, suspension or postponement as is referred to in subsection (2) above as he or she would have if those rights of occupation were not affected by the termination as aforesaid of the other spouse's tenancy."

1977 c. 42.

(2) In Schedule 1 to the Rent Act 1977, for paragraphs 2 and 6 (under which on the death of the original tenant under a protected or statutory tenancy or of the first statutory tenant by succession his widow if residing with him at his death becomes a statutory tenant by succession) there shall in relation to deaths occurring after the coming into force of this subsection be substituted respectively—

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

(*b*) "6. The surviving spouse (if any) of the first successor, if residing in the dwelling-house immediately before the death of the first successor, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence."

Clause 6

This makes several amendments to the Rent Act 1977 and the Rent (Agriculture) Act 1976.
(Paragraphs 2.42–2.49.)

Subsection (1) in effect reverses the decision in *Penn* v. *Dunn* [1970] 2 Q.B. 686 (C.A.). Section 100 of the Rent Act 1977 gives the court an extended discretion to help tenants against whom landlords claim possession. The benefit of the section is normally available also to tenants' wives, through section 1(5) of the 1967 Act. This subsection ensures that a wife does not lose that benefit merely because the landlord's proceedings, or the possession order, may end her husband's entitlement to occupy and, with it, her own rights of occupation (upon which the operation of section 1(5) depends).

Subsection (2): the right to succeed as a spouse to a tenancy under the Rent Act 1977 is at present enjoyed only by a widow; and the subsection extends it to widowers. It also alters the qualifying test: the widow or widower may succeed if she or he was living in the house in question when the tenant died—the spouses need not have been living together.

1976 c. 80.

(3) In section 7 of the Rent (Agriculture) Act 1976 (which corresponds to section 100 of the Rent Act 1977) after subsection (5) there shall be inserted as subsection (5A)—

"(5A) Where proceedings are brought for possession of a dwelling-house which is subject to a protected occupancy or statutory tenancy, and the tenant's spouse or former spouse having rights of occupation under the Matrimonial Homes Act 1967 is then in occupation of the dwelling-house, then nothwithstanding any termination of the other spouse's tenancy by the bringing of those proceedings or by an order for possession made therein, that spouse or former spouse, so long as he or she remains in occupation, shall have the same rights in relation to or in connection with any such stay, suspension or postponement as is referred to in subsection (3) above as he or she would have if those rights of occupation were not affected by the termination as aforesaid of the other spouse's tenancy.";

and at the end of subsection (6) (definition of "tenant") there shall be added the words "and "tenancy" shall be construed accordingly".

Clause 6 (*continued*)

Subsection (3) does in relation to section 7 of the Rent (Agriculture) Act 1976 what subsection (1), above, does in relation to section 100 of the Rent Act 1977.

Supplemental

Text of Act of 1967 as amended.

7.—(1) In accordance with the provisions of this Act the Act of 1967 is to have effect as set out in Schedule 2 to this Act with the amendments made by this Act and by the provisions listed in subsection (2) below, but without prejudice to the operation of any enactment affecting the operation of that Act and not here specified.

(2) The provisions above referred to are—

1968 c. 23. 1977 c. 42. (*a*) Schedule 15 to the Rent Act 1968, as saved by paragraph 30 of Schedule 24 to the Rent Act 1977;

1969 c. 59. (*b*) section 17(1) of, and Part II of Schedule 2 to, the Law of Property Act 1969;

1970 c. 45. (*c*) section 38 of the Matrimonial Proceedings and Property Act 1970;

1972 c. 61. (*d*) Schedules 3 and 5 to the Land Charges Act 1972;

1976 c. 50. (*e*) section 3 of the Domestic Violence and Matrimonial Proceedings Act 1976;

(*f*) paragraph 40 of Schedule 23 to the Rent Act 1977.

Commencement.

8. This Act shall come into force with the expiration of one month beginning with the day on which this Act is passed.

Clause 8

This provides for the provisions of the Act to come into force one month after it is passed.
(Paragraph 2.50.)

Interpretation. 1967 c. 75.

9.—(1) In this Act "the Act of 1967" means the Matrimonial Homes Act 1967.

(2) Except in so far as the context otherwise requires, any reference in this Act to any other enactment shall be taken as referring to that enactment as amended by or under any other enactment, including this Act.

Short title, repeals and extent.

10.—(1) This Act may be cited as the Matrimonial Homes (Rights of Occupation) Act 1978.

(2) The enactments specified in Schedule 3 to this Act (which to the extent specified in column 3 of that Schedule are superseded by section 5 of this Act) are hereby repealed to that extent.

(3) This Act does not extend to Scotland or Northern Ireland.

Clause 10

Subsection (2) introduces Schedule 3, which repeals certain enactments amending section 7 of the 1967 Act. These need not be preserved now that the section is wholly replaced by the new version contained in clause 5, above.

SCHEDULES

Section 1(4).

SCHEDULE 1

AMENDMENTS OF ACT OF 1967 RELATED TO CHARGE ON ESTATE OR INTEREST OF TRUSTEES

1. In section 2 of the Act of 1967—

(*a*) in subsection (3)—

(i) after the words "the estate or interest of the other spouse" there shall be inserted the words "or of trustees for the other spouse"; and

(ii) after the words "deriving title under the other spouse", in paragraph (*a*) and in paragraph (*b*), there shall be inserted the words "or under the trustees";

(*b*) in subsection (4)—

(i) for the words "the estate or interest of the other spouse", there shall be substituted the words "the estate or interest surrendered"; and

(ii) after the words "deriving title to the other estate or interest under the other spouse" there shall be inserted the words "or, as the case may be, under the trustees for the other spouse";

(*c*) in subsection (5) after the words "the estate or interest of the other spouse" there shall be inserted the words "or of trustees for the other spouse";

(*d*) in subsection (7) after the words "the legal estate by virtue of which a spouse is entitled to occupy a dwelling house" there shall be inserted the words "(including any legal estate held by trustees for that spouse)";

(*e*) in subsection (8) after the words "the estate or interest of the other spouse" there shall be inserted the words "or of trustees for the other spouse".

2. In section 3 of the Act of 1967 for the words "charge on the estate or interest of the other spouse in each of two or more dwelling houses" there shall be substituted the words "registrable charge in respect of each of two or more dwelling houses".

3. In section 5(1) of the Act of 1967 for the words "the estate or interest of the other spouse" there shall be substituted the words "an estate or interest".

4. In section 6(3) of the Act of 1967 the words "of the other spouse" shall be omitted.

Section 7.

SCHEDULE 2

ACT OF 1967 REPRINTED WITH AMENDMENTS

[*In the provisions set out in this Schedule the words inserted by the Bill are set out in* **heavy type** *and the words inserted by other Acts, which are those listed in clause* 7(2), *are underlined.*]

1967 c. 75.

MATRIMONIAL HOMES ACT 1967

ARRANGEMENT OF SECTIONS

NOTE.

This Act came into operation on the 1st January 1968; see The Matrimonial Homes Act 1967 (Commencement) Order 1967 (S.I. 1967/1790).

An Act to amend the law of England and Wales as to the rights of a husband or wife to occupy a dwelling house which has been the matrimonial home; and for connected purposes.

[27th July 1967]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Protection against eviction, etc., from matrimonial home of spouse not entitled by virtue of estate etc., to occupy it.

1.—(1) Where one spouse is entitled to occupy a dwelling house by virtue of **a beneficial estate or interest** or contract or by virtue of any enactment giving him or her the right to remain in occupation, and the other spouse is not so entitled, then, subject to the provisions of this Act, the spouse not so entitled shall have the following rights (in this Act referred to as "rights of occupation"):—

(*a*) if in occupation, a right not to be evicted or excluded from the dwelling house or any part thereof by the other spouse except with the leave of the court given by an order under this section;

(*b*) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling house.

(2) So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights or prohibiting, suspending or restricting the exercise by either spouse of the right to occupy the dwelling house, or requiring either spouse to permit the exercise by the other of that right.

(3) On an application for an order under this section the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case, and, without prejudice to the generality of the foregoing provision,—

(*a*) may except part of the dwelling house from a spouse's rights of occupation (and in particular a part used wholly or mainly for or in connection with the trade, business or profession of the other spouse);

(*b*) may order a spouse occupying the dwelling house or any part thereof by virtue of this section to make periodical payments to the other in respect of the occupation;

(*c*) may impose on either spouse obligations as to the repair and maintenance of the dwelling house or the discharge of any liabilities in respect of the dwelling house.

(4) Orders under this section may, in so far as they have a continuing effect, be limited so as to have effect for a period specified in the order or until further order.

(5) (*a*) Where a spouse is entitled under this section to occupy a dwelling house or any part thereof, any payment or tender made or other thing done by that spouse in or towards satisfaction of any liability of the other spouse in respect of rent, rates, mortgage payments or other outgoings affecting the dwelling house shall, whether or not it is made or done in pursuance of an order under this section, be as good as if made or done by the other spouse; and a spouse's occupation by virtue of this section shall for purposes of the Rent Act 1977 (other than Part V and sections 103 to 106) be treated as possession by the other spouse.

1977 c. 42.

(*b*) Where a spouse entitled under this section to occupy a dwelling house or any part thereof makes any payment in or towards satisfaction of any liability of the other spouse in respect of mortgage payments affecting the dwelling house, the person to whom the payment is made may treat it as having been made by that other spouse, but the fact that that person has treated any such payment as having been so made shall not affect any claim of the first-mentioned spouse against the other to an interest in the dwelling house by virtue of the payment.

(*c*) **Where a spouse is entitled under this section to occupy a dwelling house or part thereof by reason of an interest of the other spouse under a trust, paragraphs (a) and (b) above shall apply in relation to the trustees as they apply in relation to the other spouse.**

(6) The jurisdiction conferred on the court by this section shall be exercisable by the High Court or by a county court, and shall be exercisable by a county court notwithstanding that by reason of the amount of the net annual value for rating of the dwelling house or otherwise the jurisdiction would not but for this subsection be exercisable by a county court.

(7) In this Act "dwelling house" includes any building or part thereof which is occupied as a dwelling, and any yard, garden, garage or outhouse belonging to the dwelling house and occupied therewith.

(8) This Act shall not apply to a dwelling house which has at no time been a matrimonial home of the spouses in question; and a spouse's rights of occupation shall continue only so long as the marriage subsists and the other spouse is entitled as mentioned in subsection (1) above to occupy the dwelling house, except where provision is made by section 2 of this Act for those rights to be a charge on an estate or interest in the dwelling house.

(9) It is hereby declared that a spouse who has an equitable interest in a dwelling house or in the proceeds of sale thereof, not being a spouse in whom is vested (whether solely or as a joint tenant) a legal estate in fee simple or a legal term of years absolute in the dwelling house, is to be treated for the purpose only of determining whether he or she has rights of occupation under this section as not being entitled to occupy the dwelling house by virtue of that interest.

(10) **It is hereby declared that this Act applies as between a husband and a wife whether or not the marriage is polygamous.**

Effect of statutory rights of occupation as charge on dwelling house.

2.—(1) Where, at any time during the subsistence of a marriage, one spouse is entitled to occupy a dwelling house by virtue of **a beneficial estate or interest,** then the other spouse's rights of occupation shall be a charge on that estate or interest, having the like priority as if it were an equitable interest created at whichever is the latest of the following dates, that is to say,—

(*a*) the date when the spouse so entitled acquires the estate or interest;

(*b*) the date of the marriage; and

(*c*) the commencement of this Act.

(1A) **If, at any time when a spouse's rights of occupation are a charge on an interest of the other spouse under a trust, there are, apart from either of the spouses, no persons, living or unborn, who are or could become beneficiaries under the trust, then those rights shall be a charge also on the estate or interest of the trustees for the other spouse, having the like priority as if it were an equitable interest created (under powers overriding the trusts) on the date when it arises.**

In determining for purposes of this subsection whether there are any persons who are not, but could become, beneficiaries under the trust, there shall be disregarded any potential exercise of a general power of appointment exercisable by either or both of the spouses alone (whether or not the exercise of it requires the consent of another person).

(2) Notwithstanding that a spouse's rights of occupation are a charge on an estate or interest in the dwelling house, those rights shall be brought to an end by—

(*a*) the death of the other spouse, or

(*b*) the termination (otherwise than by death) of the marriage,

unless in the event of a matrimonial dispute or estrangement the court sees fit to direct otherwise by an order made under section 1 above during the subsistence of the marriage.

(3) Where a spouse's rights of occupation are a charge on the estate or interest of the other spouse **or of trustees for the other spouse**—

(*a*) any order under section 1 above against the other spouse shall, except in so far as the contrary intention appears, have the like effect against persons deriving title under the other spouse **or under the trustees** and affected by the charge; and

(*b*) subsections (2) to (5) of section 1 above shall apply in relation to any person deriving title under the other spouse **or under the trustees** and affected by the charge as they apply in relation to the other spouse.

(4) Where a spouse's rights of occupation are a charge on an estate or interest in the dwelling house, and that estate or interest is surrendered so as to merge in some other estate or interest expectant thereon in such circumstances that, but for the merger, the person taking **the estate or interest surrendered** would be bound by the charge, then the surrender shall have effect subject to the charge and the persons thereafter entitled to the other estate or interest shall, for so long as the estate or interest surrendered would have endured if not so surrendered be treated for all purposes of this Act as deriving title to the other estate or interest under the other spouse **or, as the case may be, under the trustees for the other spouse,** by virtue of the surrender.

(5) Where a spouse's rights of occupation are a charge on the estate or interest of the other spouse, **or of trustees for the other spouse,** and the other spouse—

(*a*) is adjudged bankrupt or makes a conveyance or assignment of his or her property (including that estate or interest) to trustees for the benefit of his or her creditors generally; or

(*b*) dies and his or her estate is insolvent;

then, notwithstanding that it is registered under section 2 of the Land
1972 c. 61. Charges Act 1972 or subsection (7) below, the charge shall be void against the trustee in bankruptcy, the trustee under the conveyance or assignment or the personal representative of the deceased spouse, as the case may be.

(7) Where the title to the legal estate by virtue of which a spouse is entitled to occupy a dwelling house **(including any legal estate held by trustees for that spouse)** is registered under the Land Registration Act
1925 c. 21. 1925 or any enactment replaced by that Act, registration of a land charge affecting the dwelling house by virtue of this Act shall be effected by registering a notice . . . under that Act, and a spouse's rights of occupation shall not be an overriding interest within the meaning of that Act affecting the dwelling house notwithstanding that the spouse is in actual occupation of the dwelling house.

Production of the land certificate shall not be required by section 64(1) (c) of the Land Registration Act 1925 when a person applies for the registration of a notice by virtue of this subsection.

(8) Where a spouse's rights of occupation are a charge on the estate or interest of the other spouse, **or of trustees for the other spouse,** and that estate or interest is the subject of a mortgage within the meaning of
1925 c. 20. the Law of Property Act 1925, then, if, after the date of creation of

the mortgage, the charge is registered under section 2 of the Land Charges Act 1972, the charge shall, for the purposes of section 94 of that Act **of 1925** (which regulates the rights of mortgagees to make further advances ranking in priority to subsequent mortgages), be deemed to be a mortgage subsequent in date to the first-mentioned mortgage.

Restriction on registration where spouse entitled to more than one charge.

3. Where one spouse is entitled by virtue of section 2 above to a **registrable charge in respect of each of two or more dwelling houses,** only one of the charges to which that spouse is so entitled shall be registered under section 2 of the Land Charges Act 1972 or section 2 (7) above at any one time, and if any of those charges is registered under either of those provisions, the Chief Land Registrar, on being satisfied that any other of them is so registered, shall cancel the registration of the charge first registered.

Contract for sale of house affected by registered charge to include term requiring cancellation of registration before completion.

4.—(1) Where one spouse is entitled by virtue of section 2 above to a charge on an estate or interest in a dwelling house and the charge is registered under section 2 of the Land Charges Act 1972 or section 2(7) above, it shall be a term of any contract for the sale of that estate or interest whereby the vendor agrees to give vacant possession of the dwelling house on completion of the contract that the vendor will before such completion procure the cancellation of the registration of the charge at his expense:

Provided that the foregoing provision shall not apply to any such contract made by a vendor who is entitled to sell the estate or interest in the dwelling house freed from any such charge.

(2) If, on the completion of such a contract as is referred to in subsection (1) above, there is delivered to the purchaser or his solicitor an application by the spouse entitled to the charge for the cancellation of the registration of that charge, the term of the contract for which subsection (1) above provides shall be deemed to have been performed.

(3) This section applies only if and so far as a contrary intention is not expressed in the contract.

(4) This section shall apply to a contract for exchange as it applies to a contract for sale.

(5) This section shall, with the necessary modifications, apply to a contract for the grant of a lease or underlease of a dwelling house as it applies to a contract for the sale of an estate or interest in a dwelling house.

Cancellation of registration after termination of marriage, etc.

5.—(1) Where a spouse's rights of occupation are a charge on **an estate or interest** in a dwelling house and the charge is registered under section 2 of the Land Charges Act 1972 or section 2(7) above, the Chief

Land Registrar shall, subject to subsection (2) below, cancel the registration of the charge if he is satisfied—

(*a*) by the production of a certificate or other sufficient evidence, that either spouse is dead, or

(*b*) by the production of an official copy of a decree of a court, that the marriage in question has been terminated otherwise than by death, or

(*c*) by the production of an order of the court, that the spouse's rights of occupation constituting the charge have been terminated by the order.

(2) Where—

(*a*) the marriage in question has been terminated by the death of the spouse entitled to an estate or interest in the dwelling house or otherwise than by death, and

(*b*) an order affecting the charge of the spouse not so entitled had been made by virtue of section 2(2) above,

then if, after the making of the order, registration of the charge was renewed or the charge registered in pursuance of subsection (3) below, the Chief Land Registrar shall not cancel the registration of the charge in accordance with subsection (1) above unless he is also satisfied that the order has ceased to have effect.

(3) Where such an order has been made, then, for the purposes of subsection (2) above, the spouse entitled to the charge affected by the order may—

(*a*) if before the date of the order the charge was registered under section 2 of the Land Charges Act 1972 or section 2(7) above, renew the registration of the charge, and

1972 c. 61.

(*b*) if before the said date the charge was not so registered, register the charge under section 2 of the Land Charges Act 1972 or section 2(7) of this Act.

(4) Renewal of the registration of a charge in pursuance of subsection (3) above shall be effected in such manner as may be prescribed, and an application for such renewal or for registration of a charge in pursuance of that subsection shall contain such particulars of any order affecting the charge made by virtue of section 2(2) above as may be prescribed.

(5) The renewal in pursuance of subsection (3) above of the registration of a charge shall not affect the priority of the charge.

(6) In this section "prescribed" means prescribed by rules made under section 16 of the Land Charges Act 1972 or section 144 of the Land Registration Act 1925, as the circumstances of the case require.

Release of rights of occupation and postponement of priority of charge.

6.—(1) A spouse entitled to rights of occupation may by a release in writing release those rights or release them as respects part only of the dwelling house affected by them.

(2) Where a contract is made for the sale of an estate or interest in a dwelling house, or for the grant of a lease or underlease of a dwelling house, being (in either case) a dwelling house affected by a charge registered under section 2 of the Land Charges Act 1972 or section 2(7) above, then, without prejudice to subsection (1) above, the rights of occupation constituting the charge shall be deemed to have been released on the happening of whichever of the following events first occurs, that is to say, the delivery to the purchaser or lessees as the case may be, or his solicitor on completion of the contract of an application by the spouse entitled to the charge for the cancellation of the registration of the charge or the lodging of such an application at Her Majesty's Land Registry.

(3) A spouse entitled by virtue of section 2 above to a charge on an estate or interest . . . may agree in writing that any other charge on, or interest in, that estate or interest shall rank in priority to the charge to which that spouse is so entitled.

Termination of marriage etc.: dwelling house subject to Rent Acts. 1977 c. 42. 1976 c. 80.

7.—(1) Where one spouse is entitled, either in his or her own right or jointly with the other spouse, to occupy a dwelling house by virtue of—

(a) a protected tenancy or statutory tenancy within the meaning of the Rent Act 1977, or

(b) a statutory tenancy within the meaning of the Rent (Agriculture) Act 1976,

then, on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter (whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute), the court by which the decree is granted may make an order under subsection (2), (3) or (4) below according to the circumstances.

(2) Where a spouse is entitled as aforesaid to occupy the dwelling house by virtue of a protected tenancy within the meaning of the Rent Act 1977, the court may by order direct that, as from such date as may be specified in the order, there shall, by virtue of the order and without further assurance, be transferred to, and vested in, the other spouse—

(a) the estate or interest which the spouse so entitled had in the dwelling house immediately before that date by virtue of the lease or agreement creating the tenancy and any assignment of that lease or agreement, with all rights, privileges and appurtenances attaching to that estate or interest but subject to all covenants, obligations, liabilities and encumbrances to which it is subject; and

(b) where the said spouse is an assignee of such lease or agreement, the liability of the said spouse under any covenant of indemnity by the assignee expressed or implied in the assignment of the lease or agreement to that spouse;

and where such an order is made, any liability or obligation to which the said spouse is subject under any covenant having reference to the dwelling

house in such lease or agreement, being a liability or obligation falling due to be discharged or performed on or after the date so specified, shall not be enforceable against the said spouse.

(3) Where the spouse is entitled as aforesaid to occupy the dwelling house by virtue of a statutory tenancy within the meaning of the Rent Act 1977, the court may by order direct that, as from such date as may be specified in the order, that spouse shall cease to be entitled to occupy the dwelling house and that the other spouse shall be deemed to be the tenant or, as the case may be, the sole tenant under that statutory tenancy; and the question whether the provisions of paragraphs 1 to 3 or, as the case may be, paragraphs 5 to 7 of Schedule 1 to the Rent Act 1977 as to the succession by the widow or widower of a deceased tenant or by a member of his family to the right to retain possession are capable of having effect in the event of the death of the person deemed by an order under this sub-section to be the tenant or sole tenant under the statutory tenancy shall be determined according as those provisions have or have not already had effect in relation to the statutory tenancy.

(4) Where the spouse is entitled as aforesaid to occupy the dwelling house by virtue of a statutory tenancy within the meaning of the Rent (Agriculture) Act 1976, the court may by order direct that, as from such date as may be specified in the order, that spouse shall cease to be entitled to occupy the dwelling house and that the other spouse shall be deemed to be the tenant or, as the case may be, the sole tenant under that statutory tenancy; and a spouse who is deemed as aforesaid to be the tenant under a tenancy shall be (within the meaning of that Act) a statutory tenant in his own right, or a statutory tenant by succession, according as the other spouse was a statutory tenant in his own right, or a statutory tenant by succession.

(5) Where the court makes an order under this section it may by the order direct that both spouses shall be jointly and severally liable to discharge or perform any or all of the liabilities and obligations in respect of the dwelling house (whether arising under the tenancy or otherwise) which have at the date of the order fallen due to be discharged or performed by one only of the spouses or which, but for the direction, would before the date specified as the date on which the order is to take effect fall due to be discharged or performed by one only of them; and where the court gives such a direction it may further direct that either spouse shall be liable to indemnify the other in whole or in part against any payment made or expenses incurred by the other in discharging or performing any such liability or obligation.

(6) In the case of a decree of divorce or nullity of marriage, the date specified in an order under this section as the date on which the order is to take effect shall not be earlier than the date on which the decree is made absolute.

(7) If after the grant of a decree dissolving or annulling a marriage either spouse remarries, that spouse shall not be entitled to apply, by reference to that grant of the decree, for an order under this section.

(8) Rules of court shall be made requiring the court before it makes an order under this section to give the landlord of the dwelling house to which the order will relate an opportunity of being heard.

(9) Rules of court may provide that an application for an order under this section shall not, without the leave of the court by which the decree of divorce, nullity of marriage or judicial separation was granted, be made after the expiration of such period from the grant of the decree as may be prescribed by the rules.

(10) Rules of court may provide for the transfer of proceedings pending by virtue of this section in the court which granted the decree of divorce, nullity of marriage or judicial separation as follows—

(a) if the proceedings are pending in the High Court, for the transfer of the proceedings to a divorce county court;

(b) if the proceedings are pending in a divorce county court, for the transfer of the proceedings to the High Court or to some other divorce county court;

and a court shall have jurisdiction to entertain any proceedings transferred to the court by virtue of rules made in pursuance of this subsection.

(11) For the purposes of subsection (10) above—

(a) any proceedings pending in the divorce registry shall be treated as pending in a divorce county court; and

(b) the power to provide for the transfer of proceedings to a divorce county court shall include power to provide for the transfer of proceedings to the divorce registry.

(12) Where a spouse is entitled to occupy a dwelling house by virtue of a tenancy, this section shall not affect the operation of sections 1 and 2 above in relation to the other spouse's rights of occupation; and the court's power to make orders under this section shall be in addition to the powers conferred by those sections.

(13) In this section—

1967 c. 56.

"divorce county court" means a county court designated under section 1 of the Matrimonial Causes Act 1967;

"divorce registry" means the principal registry of the Family Division of the High Court;

"landlord" includes any person from time to time deriving title under the original landlord and also includes, in relation to any dwelling house, any person other than the tenant who is, or but for Part VII

1977 c. 42.

of the Rent Act 1977 or Part II of the Rent (Agriculture) Act 1976

1976 c. 80.

would be, entitled to possession of the dwelling house;

"tenancy" includes sub-tenancy.

(14) For the avoidance of doubt it is hereby declared that the reference in subsection (7) above to remarriage includes a reference to a marriage which is by law void or voidable.

Dwelling house subject to mortgage.

7A.—(1) In determining for the purposes of this Act whether a spouse or former spouse is entitled to occupy a dwelling house by virtue of an estate or interest there shall be disregarded any right to possession of the dwelling house conferred on a mortgagee of the dwelling house under or by virtue of his mortgage, whether the mortgagee is in possession or not; but the other spouse shall not by virtue of the rights of occupation conferred by this Act have any larger right against the mortgagee to occupy the dwelling house than the one first mentioned has by virtue of his or her estate or interest and of any contract with the mortgagee, unless under section 2 of this Act those rights of occupation are a charge, affecting the mortgagee, on the estate or interest mortgaged.

(2) Where a mortgagee of land which consists of or includes a dwelling house brings an action in any court for the enforcement of his security, any person who is not a party to the action and who is enabled by section 1(5) of this Act to meet the mortgagor's liabilities under the mortgage, on applying to the court at any time before the action is finally disposed of in that court, shall be entitled to be made a party to the action if the court—

(a) does not see special reason against it; and

(b) is satisfied that the applicant may be expected to make such payments or do such things in or towards satisfaction of the mortgagor's liabilities or obligations as might affect the outcome of the proceedings or that the expectation of it should be considered under section 36 of the Administration of Justice Act 1970.

1970 c. 31.

(3)(a) Where a mortgagee of land which consists or substantially consists of a dwelling house brings an action for the enforcement of his security, and at the relevant time there is—

(i) in the case of unregistered land, a land charge of Class F registered against the estate owner or any person who, where the person who is the estate owner at the relevant time is a trustee, preceded him as trustee during the subsistence of the mortgage; or

(ii) in the case of registered land, a subsisting registration of a notice or caution entered pursuant to section 2(7) of this Act;

notice of the action shall be served by the mortgagee on the person on whose behalf the land charge is registered or the notice or caution entered, if that person is not a party to the action.

(b) For the purposes of paragraph (a) above, if there has been issued a certificate of the result of an official search made on behalf of the mortgagee which would disclose any land charge of Class F, notice or caution within sub-paragraph (i) or (ii) of paragraph (a) above and the action is commenced within the period for which a certificate on an official search operates in favour of a purchaser, the relevant time is the date of that certificate; and

in any other case the relevant time is the time when the action is commenced.

(4) In this section—

(a) "mortgage" includes a charge and "mortgagor" and "mortgagee" shall be construed accordingly;

(b) "mortgagor" and "mortgagee" includes any person deriving title under the original mortgagor or mortgagee.

Short title, commencement, extent and construction.

8.—(1) This Act may be cited as the Matrimonial Homes Act 1967, and shall come into operation on such date as the Lord Chancellor may by order made by statutory instrument appoint.

(2) This Act shall not extend to Scotland or Northern Ireland.

(3) References in this Act to any enactment are references to that enactment as amended, extended or applied by any other enactment, including this Act.

SCHEDULE

Consequential Amendments as to Land Charges

. . . . . .

1959 c. 22.

4. In Schedule 1 to the County Courts Act 1959 (which specifies the cases in which a county court has jurisdiction under certain enactments), at the end of the second column of the entry relating to section 10(8) of the Land Charges Act 1925, there shall be added the following paragraph:—

"In a case where the land charge is within Class F, if the land affected by the charge is the subject of an order made by the court under section 1 of the Matrimonial Homes Act 1967 or an application for an order under the said section 1 relating to such land has been made to the court".

Section 10(4).

SCHEDULE 3

REPEALS

Chapter	Short Title	Extent of Repeal
1968 c. 23.	Rent Act 1968.	In Schedule 15 the amendments of section 7 of the Matrimonial Homes Act 1967 (as saved by paragraph 30 of Schedule 24 to the Rent Act 1977).
1976 c. 80.	Rent (Agriculture) Act 1976.	In Schedule 8 paragraph 16.
1977 c. 42.	Rent Act 1977.	In Schedule 23 paragraph 41.

BOOK THREE: USE AND ENJOYMENT OF THE HOUSEHOLD GOODS

PART I RIGHTS OF OWNERSHIP AND RIGHTS OF USE: THE BACKGROUND TO THE PRESENT RECOMMENDATIONS

Introductory

3.1. As the background to the recommendations which we now make, it is necessary to give the following account of the present law and the discussion of it in Working Paper No. 42.

Rights of ownership

3.2. In section 2 of Part 2 of the working paper[1] we reviewed the present rules relating to ownership of the household goods. It is unnecessary to recapitulate those rules in detail, but the relevant principles may be summarised as follows:—

(*a*) if the purchase price was provided by one spouse or if the goods were given to one spouse, then prima facie the goods belong to him or her;

(*b*) if the purchase price was provided by both spouses or came from a common fund then prima facie the property would be shared;

(*c*) under the Married Women's Property Act 1964, if the purchase price was provided from savings made by a wife from a housekeeping allowance, the property would prima facie be shared;

(*d*) a spouse who carries out or pays for a substantial improvement to an item belonging to the other spouse may under section 37 of the Matrimonial Proceedings and Property Act 1970 acquire an interest in that item; but

(*e*) all the rules mentioned above are subject to an agreement to the contrary made between the spouses.

3.3. In the working paper we referred to certain criticisms which had been made of these rules. First, the law was said to be unfair. A wife who was unable to earn money, because of family duties, and had no other means, could not make a financial contribution to the acquisition of the household goods and could not therefore acquire any interest in them, except by way of gift. Secondly, the law was said to be uncertain, since the effect of a particular payment by a spouse might depend on the view taken by the court of the spouses' intentions or on whether there was any implied agreement between them, though which spouse pays for a particular item is often fortuitous.

3.4. The working paper considered two possible ways of reforming the law relating to the ownership by married couples of their household goods[2]. The first possibility was to confer on the court discretionary powers to decide what was equitable, taking into account the parties' contribution to the marriage as a whole. We thought that a discretionary power of that kind would not overcome the uncertainties of the present law, since there would be no established proprietary rights pending a decision.

[1] Paras. 2.4–2.9.
[2] Paras. 2.23–2.26.

3.5. The second possibility was the introduction of a system of automatic co-ownership of the household goods. We did not put forward proposals for such a system on the ground first, that it would be difficult to apply a co-ownership principle to the household goods since they are numerous and liable to rapid change; and, whatever definition were chosen, difficult problems would arise of identification and of tracing funds where old items were sold or part exchanged for new items. Secondly, we said that a change in the rules concerning ownership (for example, by the introduction of a presumption of co-ownership) would not necessarily provide adequate protection for a spouse, as the market value of the household goods was usually far less than the cost of replacing them. It would be of little value to a deserted wife to be awarded half the proceeds of sale or half the value of the household goods, if her husband had already sold them or removed them from the home. The amount received would usually be inadequate to cover replacement.

3.6. Accordingly, in the working paper, we made no proposals "for the moment" to reform the law relating to ownership of the household goods[3]. Some commentators expressed disappointment that we had not proposed a scheme of co-ownership, and in the light of their comments we have considered again whether we should now propose such a scheme.

3.7. In our view it would not be possible to devise a scheme of co-ownership which would entirely avoid the difficulties referred to in paragraph 3.5 above. In any event we do not think it would be right to submit a report recommending co-ownership in the absence of consultation on a detailed scheme presented in a working paper. However, there are, in our view, reforms falling short of co-ownership which should be put into effect now and our proposals for such reforms are contained in this Book.

Rights of use

3.8. Having in the working paper, as explained above, rejected the immediate possibility of reforming the rules as to ownership of the household goods, we expressed the view that the reform most needed was that of providing effective protection of a spouse's use and enjoyment of them.

3.9. Although comment on Part 2 of the working paper was not very extensive, the commentators in general expressed agreement with that proposition.

The Married Women's Property Act 1882, section 17

3.10. In considering our proposals in relation to household goods, we have borne in mind that disputes between husband and wife regarding the title to or possession of property are frequently determined in proceedings brought in the High Court or a county court under section 17 of the Married Women's Property Act 1882. The judge "may make such order with respect to the property in dispute . . . as he thinks fit"[4], and the remedy provided by section 17 is available while husband and wife are living together as well as when the marriage has

[3] We indicated, however, the possibility of formulating some proposals in that regard "when the overall pattern of the family property law has been settled" see para. 2.26.

[4] Where at the time of adjudication the property in dispute has been disposed of, the court has power to order the defendant to pay to the plaintiff a sum of money equivalent to the plaintiff's interest in the property or to make an order in respect of any other property which represents the whole or part of the property in dispute: Matrimonial Causes (Property and Maintenance) Act 1958 s 7. See for example, *Bothe* v. *Amos* [1976] Fam. 46.

broken up[5]. Where both spouses have an interest in property the court has power to sever a joint interest and to order sale and division of the proceeds[6].

3.11. After much judicial controversy as to the extent of the judge's powers under section 17 it is now settled that this jurisdiction confers no power on him to transfer or create interests in property[7]. The court does, however, have a discretion as to the enforcement against a spouse of the proprietary or possessory rights of the other spouse in any property[8].

3.12. We have considered whether the court's discretion as to the enforcement of a spouse's rights under section 17 of the Married Women's Property Act 1882 is sufficient to protect a spouse's use of the household goods and in particular that of a spouse who has no proprietary interest in them.

3.13. There are few reported decisions on the application of the section to goods, but the question arose in *W.* v. *W.*[9]. In that case the issue was whether the wife who continued to occupy the matrimonial home after her husband had left should deliver to him articles admittedly owned by him which formed a substantial part of the furnishing of the home. The court ordered the return to the husband of all the items. Although in *W.* v. *W.* the ownership rights of the husband prevailed over the wife's claim to retain the furniture, the judgment of Devlin J. indicates that the court had a discretion to refuse an order. Devlin J. said:—

> "I do not find it necessary to decide the case as a matter of principle, as the principle is not rigid and the Court's discretion is unfettered. The discretion should not necessarily be exercised in the same way in respect of the furniture and the premises which form the matrimonial home. If the husband wanted to make a clean sweep of all the furniture so as to leave his wife with nothing but bare boards, a mere empty shell, an order for the return of the furniture might be refused. That is not the position in this case."[10]

3.14. It therefore appears that in cases such as *W.* v. *W.*, where the husband has left home and is seeking to take away the furniture by virtue of a proprietary right, the discretion to refuse an order under section 17 may in some cases provide some protection to a wife who needs the furniture for her own use. But the extent of the protection is uncertain. Moreover, it is doubtful whether, if, in a case such as *W.* v. *W.*, the application had been initiated by the wife the discretion of the court under section 17 could operate to enable the court to order the husband to deliver to her articles he undoubtedly owned. It is difficult to see on what proprietary right the wife could base her claim.

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[5] It is also available for three years after the dissolution or annulment of a marriage: Matrimonial Proceedings and Property Act 1970, s.39.

[6] Matrimonial Causes (Property and Maintenance) Act 1958, s.7(7).

[7] *Pettitt* v. *Pettitt* [1970] A.C. 777 (H.L.).

[8] *Ibid.*, at p. 820 D-E Lord Diplock said of section 17: "it provides a summary and relatively informal forum which can sit in private for the resolution of disputes between husband and wife as to the title to or possession of any property . . . The power conferred upon the judge . . . gives him a wide discretion as to the enforcement of the proprietary or possessory rights of one spouse in any property against the other, but confers upon him no jurisdiction to transfer any proprietary interest from one spouse to the other or to create new proprietary rights in either spouse.

[9] [1951] 2 T.L.R. 1135.

[10] *Ibid.*, at p. 1136.

3.15. We have therefore concluded that section 17 of the Married Women's Property Act 1882 does not provide the remedy required. In our view section 17 is primarily designed to protect proprietary rights; insofar as it protects the use and enjoyment of household goods by a spouse who does not have proprietary rights, it does so only incidentally and only in some but not in all the cases which need to be covered.

PART II THE SCHEME PROVISIONALLY PROPOSED IN WORKING PAPER NO. 42

Introductory: the relevance of the Matrimonial Homes Act 1967 (as amended and supplemented)

3.16. The provisional proposals in the working paper for protecting a spouse's use and enjoyment of the household goods were much influenced by the analogy of the Matrimonial Homes Act 1967, which provides protection for a spouse in respect of the occupation of the matrimonial home[11]. It is therefore convenient, before considering those proposals, to refer to the provisions of the 1967 Act as amended and supplemented by the Domestic Violence and Matrimonial Proceedings Act 1976.

3.17. Under the 1967 Act (as amended and supplemented by the 1976 Act) a spouse who, broadly, is not an owner or tenant of the matrimonial home[12] has certain rights of occupation in the matrimonial home itself. Those rights are:—

(*a*) if in occupation, a right not to be evicted or excluded from the dwelling house by the other spouse except with the leave of the court, and

(*b*) if not in occupation, a right with the leave of the court to enter into and occupy the dwelling house[13].

The High Court or a county court has extensive powers to control the exercise of either spouse's right of occupation[14].

3.18. Under section 2 of the 1967 Act a spouse's statutory rights of occupation are a charge on the other spouse's estate or interest. This charge may be protected by registration[15]. These statutory rights of occupation do not, however, extend in terms to the use or enjoyment of the household goods. Nonetheless, as we pointed out in the working paper[16], it would not often be practicable for a spouse out of occupation to remove the goods, so that the statutory rights to occupy the home do afford a certain de facto protection to the use of the household goods.

The general principle provisionally proposed

3.19. The broad principle underlying the provisional proposals in the working paper was contained in paragraph 2.37 where we said:—

> "In our view the right of each spouse to the continued use and enjoyment of the household goods should be . . . protected by a provision to the effect that a spouse in occupation of the home is entitled to the continued use and enjoyment of the household goods until that right is terminated by a court order. Such a provision would reinforce a spouse's occupation rights under the Matrimonial Homes Act 1967 and would link use and enjoyment of the household goods to occupation of the home."

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[11] Para. 2.37. Certain changes in the 1967 Act are recommended in Book Two but they are not relevant to the recommendations in this Book.

[12] The terms "owner" and "tenant" in this context do not extend to a spouse's interest under a trust: s.1(9) of the 1967 Act, added by s.38 of the Matrimonial Proceedings and Property Act 1970.

[13] s.1(1).

[14] s.1(2), as amended by s.3 of the Domestic Violence and Matrimonial Proceedings Act 1976. s.4 of the 1976 Act confers similar powers on the court in the case where the spouses are co-owners or co-tenants of the home at law.

[15] Where the land is unregistered, as a class F land charge, and in the case of registered land by a notice or caution.

[16] Para. 2.11.

The provisional proposals in detail

3.20. Our detailed provisional proposals in the working paper were as follows:—

(*a*) A spouse in occupation of the matrimonial home should be entitled to the continued use and enjoyment of the household goods[17] until that right is terminated by a court order.

(*b*) Where a spouse has made an application under section 1 of the Matrimonial Homes Act 1967, until the application has been determined neither spouse should be entitled to remove any of the household goods without the consent of the other spouse or leave of the court.

(*c*) The county court[18] should have power to make orders concerning the use and enjoyment of the household goods on the application of either spouse in separate proceedings or in proceedings under section 1 of the Matrimonial Homes Act 1967.

(*d*) In determining an application relating to the use and enjoyment of the household goods the court should have regard to the same criteria as those laid down by section 1(3) of the Matrimonial Homes Act 1967[19].

(*e*) On an application relating to the use and enjoyment of the household goods, the orders which the court is empowered to make should include the following:

(i) an order requiring either spouse to allow the other spouse to have the use and enjoyment of the household goods;

(ii) an order restraining either spouse from removing the household goods from the use and enjoyment of the other spouse or from making any disposition with the intention of depriving the other spouse of their use and enjoyment;

(iii) an order requiring a spouse to restore or deliver the household goods to the other spouse;

(iv) an order regulating or terminating the right of either spouse to the use and enjoyment of any of the household goods.

(*f*) On granting a decree of divorce, nullity or judicial separation the court's powers to make orders for financial provision should include power to make orders concerning the use and enjoyment of the household goods; similar power should be exercisable by the court on an application for family provision.

(*g*) The proposals under (*c*), (*d*), (*e*) and (*f*) above should apply to a car or other vehicle owned by either spouse[20].

3.21. Paragraph 2.50 (viii) of the working paper contained provisional proposals relating to household goods subject to credit transactions. We deal separately with these in Part VI below.

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[17] In the working paper the expression "household goods" did not extend to the car: see paras. 3.117–3.118 below.

[18] We deal separately with the question of which courts are to have jurisdiction: see Part VII below.

[19] We discuss these criteria further at paras. 3.37–3.39 below.

[20] Working Paper No. 42, para. 2.50(i)—(vii).

The results of consultation

3.22. As already mentioned, the proposals in Part 2 of the working paper met with general approval and on balance the comments supported our view that it was a spouse's use and enjoyment of the goods that needed protection[21]. We received very few comments, however, on our detailed proposals except on those concerning the car. In reconsidering the scheme we provisionally proposed we have taken particular note of the following comments:—

(*a*) that it is rare for a husband on leaving home to deprive his wife of the use of the goods;

(*b*) that in divorce proceedings the parties do not usually invoke the existing powers of the court in relation to household goods because they arrive at agreement about them;

(*c*) that most couples, and especially wives, have very clear ideas of "who owned what possession" (with the possible exception of the family car);

(*d*) that personal chattels are things about which people are apt to feel more strongly than about other kinds of property because of the sentimental attachments which are often present;

(*e*) that treating objects acquired by one spouse from a third party by way of gift or inheritance as assets in which the other spouse has rights of property may cause distress because such articles cannot as a rule be easily replaced and are often similar in nature to heirlooms, having been given with a request to pass them on to a named person on the death of the recipient spouse.

Critique of the scheme provisionally proposed: the main criticism

3.23. In the light of the consultation we remain convinced that a spouse's use of the household goods, including the family car, needs to be protected by law. However, we have come to the conclusion that there are objections to the provisional proposal set out in paragraph 3.20(*a*) above that a spouse in occupation of the matrimonial home should be entitled to the continued use and enjoyment of the household goods until the court orders otherwise.

3.24. It is apparent from paragraph 2.37 of the working paper that this provisional proposal was designed to meet situations where a crisis has arisen in the relationship between husband and wife. One such situation is where the husband, having left the wife in the home or having been excluded from the home by a court order[22], removes or is threatening to remove essential items from the home. Another is where the husband removes such items in connection with his intended departure from the home. Another is where the husband expels the wife from the home and then removes the contents of the home.

3.25. However, the provisional proposal as formulated in the working paper is not confined to emergency situations of that kind. The proposal formulates, as a general proposition, a rule under which a spouse's right to the use and

[21] See para. 3.9 above.

[22] See Domestic Violence and Matrimonial Proceedings Act 1976 and the recommendation relating to exclusion orders at para. 3.40(b) of our Report on Matrimonial Proceedings in Magistrates' Courts, Law Com. No. 77 (1976). See also generally "Violence in the home: the new law" by M. D. A. Freeman; New Law Journal, Vol. 127, 17 February 1977 at pp. 159–166.

enjoyment of the household goods would arise, automatically and by operation of law, whenever the spouse is in occupation of the matrimonial home. If such a right is to arise by operation of law, it would in our view be essential that the parties should be able to determine easily and with certainty the goods over which the right exists. This depends in turn on devising a statutory definition which would leave little or no room for dispute over individual items and would at the same time be suitable for the infinitely varying circumstances of every kind of marriage. We do not think it possible to devise a definition which meets both those requirements.

3.26. Moreover, a right of use and enjoyment arising by operation of law would be bound to interfere with the free disposal of goods. It would be difficult to formulate such a right in legislative terms so as not to interfere unduly with the many ways in which a husband or wife may quite legitimately dispose of some of the household goods on many different occasions in the course of their married life.

3.27. We think it important to bear in mind that in the normal happy marriage no problem arises about the use of the household goods. The Institute of Legal Executives commented to us that it is doubtful whether the difficulties are so serious or so widespread as to warrant a change in the law. Even where divorce proceedings are instituted, the parties do not usually invoke the existing powers of the court in relation to the household goods, because they normally arrive at an agreement about them[23].

3.28. The considerations set out in paragraphs 3.24–3.27 above have led us to the conclusion that it is not necessary and not desirable to include in the scheme a provision to the effect that a spouse in occupation of the matrimonial home should be entitled to the continued use and enjoyment of the household goods until the court orders otherwise. Such a provision would not in itself be effective unless supported by a procedural remedy involving an application to the court[24]. In the emergency situations which such a provision is designed to cover[25], an application to the court would almost certainly be necessary in any event. We have, accordingly, concluded that the protection which should be given to a husband or wife in relation to his or her use and enjoyment of the household goods should not, as we provisionally proposed[26], include a right of user arising by operation of law, but should essentially consist of a procedural remedy enabling the aggrieved spouse, where need arises, to apply to the court for an order conferring a right of user. We have further concluded that, in order to do justice in the many different cases which can arise, the court should have a wide discretion to grant or withhold such an order.

3.29. One of the advantages of a scheme on the lines described in paragraph 3.28 is that it can be so constructed as to make it possible for the parties to know with certainty what household goods are subject to the rights of use and enjoyment created by an order under the scheme. The provision empowering the court to make an order could adopt a very wide and general definition of household goods, leaving it to the court, within the terms of that definition, to specify precisely the goods to which the order was to apply.

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[23] See para. 3.22(*b*) above.
[24] Working Paper No. 42, paras. 2.38 and 2.39.
[25] See para. 3.24 above.
[26] Working Paper No. 42, para. 2.50(i).

Critique of the scheme provisionally proposed: other matters

3.30. There are other and less important respects in which the provisional scheme of the working paper is in our view capable of improvement. Our views on these points will become apparent in the course of this Book, and at this stage we mention two of them only:

(*a*) It was provisionally proposed in the working paper[27] that, where a spouse has made an application under section 1 of the Matrimonial Homes Act 1967, until the application has been determined neither spouse should be entitled to remove any of the household goods without the consent of the other spouse or leave of the court. We do not think that the interim protection which is provided should be limited to cases where there has been an application under section 1 of the 1967 Act, and our present proposals on this matter are contained in paragraph 3.68 below.

(*b*) It was provisionally proposed in the working paper[28] that in determining an application relating to the use and enjoyment of the household goods the court should have regard to the same criteria as those laid down in section 1(3) of the Matrimonial Homes Act 1967. On reconsideration we do not think these criteria entirely appropriate, and our present proposals on this point are contained in paragraphs 3.37–3.42, below.

[27] Para. 2.50(ii).
[28] Para. 2.50(iv).

PART III THE SCHEME NOW RECOMMENDED

The nature of the remedy

3.31. Briefly, our proposal is that at any time during the subsistence of the marriage (except while a decree of judicial separation is in force) the court should have power on the application of either spouse to make an order giving him or her the right, as against the other spouse, to use and enjoy the household goods or some of them. The effect of the order will thus be to confer a right of user on the applicant spouse, and that right will be secured by the sanctions which will be available against the spouse who acts in breach of the order.

The circumstances in which the remedy should be available

3.32. The remedy should be available whenever the need for it arises. No doubt the need will frequently arise in emergency situations such as we have described in paragraph 3.24 above. Although our intention is to provide primarily for such situations, we think it would be wrong to impose statutory restrictions limiting the power to make orders to situations of that kind. Cases may occur in which there is some degree of danger of a spouse being unjustly deprived of the use and enjoyment of the household goods, but in which it is impossible to say that an emergency has arisen or is threatened. There may even be cases in which it cannot be said with confidence that there is any danger, but in which nevertheless it may be wise to make an order as a precautionary measure. In some cases an order may be justified simply to put an end to uncertainty. We therefore propose that the discretion of the court should not be fettered by confining the court's power to make orders to situations of an emergency character.

The goods to which the proposed order should apply

3.33. It is our primary objective to secure for a spouse the use and enjoyment of the items needed to meet the ordinary requirements of his or her daily life. We have accordingly concluded that, while the court should have a wide discretion as to whether to make an order and as to what order it should make, this primary objective should be specified as a guideline to aid the court in exercising its discretion. We deal with the guideline fully in paragraphs 3.37–3.42 below.

3.34. Under the scheme we propose, the goods to which the order applies will be described or particularised in the order in such a manner as to leave no room for doubt. It will, of course, be a condition of the power to make the order that the goods to which it applies should be "household goods" within the definition adopted for the scheme. We believe that, provided that the courts are supplied with a guideline such as that proposed in the preceding paragraph, the definition of "household goods" should be framed in broad terms so as to ensure that the powers of the court are sufficiently wide to deal with the varying circumstances of individual cases. We also think that the definition should be as simple as possible, so as to be readily intelligible and to preclude argument and uncertainty. The definition which we propose is set out in paragraph 3.104 below and is discussed fully in Part IV of this Book.

The detailed orders which the court should be able to make

3.35. We consider that the court should be empowered to make the following detailed orders:—

(*a*) an order that one spouse should be entitled to the use and enjoyment of such household goods in the possession or control of either party as may be specified in the order; and, in connection with any such order,

(*b*) an order that

(i) in so far as the order relates to goods already in the possession or control of the spouse in whose favour an order is made ("the applicant"), the other spouse ("the respondent") shall not remove such goods and

(ii) in so far as the order relates to items not in the possession or control of the applicant, the respondent shall deliver them to the applicant, and in either case,

(iii) that the respondent shall not sell or otherwise dispose of any goods comprised in the order.

3.36. Cases may arise where the court, while wishing primarily to award the use and enjoyment of goods to one party, considers it just that provision should be made for the other party to have the use of the goods from time to time. The court might also wish to direct, for example, who is to be responsible for the servicing and insurance of the family car, in respect of which an order has been made. In order to provide for such cases and to introduce a necessary degree of flexibility into the scheme generally, we propose that the court should have power to make a use and enjoyment order subject to such exceptions and conditions as may be specified in the order and to include in the order such incidental, supplementary and consequential provisions as may seem necessary.

A guideline for the exercise of the court's discretion in respect of orders

3.37. In paragraph 2.41 of the working paper we proposed that the court, in exercising its general power to make an order for the use and enjoyment of the household goods, should take account of guidelines similar to those laid down in section 1(3) of the Matrimonial Homes Act 1967, which provides that:—

> ". . . the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case . . ."[29].

3.38. We think on reconsideration that those guidelines are not entirely appropriate for giving effect to our objectives. As we have stated above[30], the primary objective of our scheme is to safeguard a spouse's use and enjoyment of the goods needed to meet the ordinary requirements of his or her daily life. In expressing the primary objective of the scheme in that way, we have it in mind that a person's ordinary requirements might include requirements arising from the needs of others. Thus, for example, if a spouse is discharging family responsibilities towards children or old people or the sick, the needs arising from the discharge of those responsibilities may be part of the ordinary requirements of that spouse's daily life.

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[29] This guideline applies also to applications made under section 4 of the Domestic Violence and Matrimonial Proceedings Act 1976.

[30] See para 3.33 above.

3.39. We have reached the conclusion that the best way of assisting the court in the exercise of its general discretion will be to provide specifically that the court in dealing with an application under the scheme shall have regard to the extent to which the goods to which the application relates are needed to meet the ordinary requirements of the applicant's daily life. Apart from that guideline, we think it sufficient to require the court to have regard to all the circumstances of the case. Thus, the needs of the respondent spouse may be relevant and, if they are, they will be taken into account as part of the circumstances. It may be that the conduct of the spouses in relation to each other and otherwise will sometimes be relevant; if so, it will be taken into account as part of the circumstances of the case.

3.40. The wide definition of the expression "household goods" which we recommend[31] will no doubt in many cases cover goods of a kind that a spouse does not need to meet the ordinary requirements of daily life. On the other hand, circumstances will differ from case to case, and unless the definition of "household goods" is widely drawn there will be a risk of the court being unable to make an order in respect of goods which are necessary to meet those requirements in a particular case. We think that, against the background of a widely drawn definition of "household goods", the guideline described in paragraph 3.39 above will be sufficient to enable the court to do justice in the various situations with which it will have to deal.

3.41. We therefore do not propose any guidelines additional to that to which we have referred in paragraph 3.39 above[32]. Although applications under the scheme we propose will sometimes be associated with applications under section 1 of the Matrimonial Homes Act 1967 or under section 4 of the Domestic Violence and Matrimonial Proceedings Act 1976, we see no reason why the court should not apply a different guideline in dealing with the question of the use and enjoyment of the household goods from those which it is required to consider on applications under those Acts. In our view the fact that the court is required under the scheme to have regard to a different guideline would not be a source of difficulty.

3.42. We accordingly propose that in deciding whether to make an order and, if so, what order to make, the court should have regard to all the circumstances of the case, and, in particular, to the extent to which the goods in question are needed by the applicant to meet the ordinary requirements of his or her daily life, including any requirements arising from any family responsibilities of the applicant.

The period during which an order may be obtained

3.43. As is apparent from the summary in paragraph 3.20 above, the provisional proposals in the working paper were primarily concerned with protecting a spouse in the use and enjoyment of the household goods during the subsistence of the marriage. However, the working paper also proposed[33] that

[31] See para. 3.104 below.

[32] We have not, for example, suggested a specific guideline directing the court to have regard to whether the parties have separated or are contemplating separation. Although we envisage that the court would only rarely make an order where no question of separation arises, an order may be useful in some such cases; and we prefer not to qualify the discretion of the court to make an order in such cases, even to the limited extent of proposing a guideline in that regard.

[33] Working Paper No. 42, para. 2.43, the substance of which is set out at para. 3.20(f), above.

on a decree of divorce, nullity or judicial separation and on an application for family provision on death the court should have power to make orders as to the use and enjoyment of household goods. For the reasons given in paragraphs 3.48 and 3.49 below, we now think that the court, on granting a decree of divorce, nullity or judicial separation, or on dealing with an application for family provision on death, has sufficient powers to secure to a spouse (or a surviving spouse) the right to use and enjoy goods which formed part of the household goods. We have therefore arrived at the view that there is no occasion for the scheme with which we are now concerned to make provision for protecting that right after the termination of the marriage or after a decree of judicial separation[34].

3.44. We would comment here particularly on the position on the filing of a matrimonial petition. The court has power, when such a petition has been or is on the point of being filed, to protect proprietary rights by means of an injunction. However, we think that the court should continue to have power to make an order under our proposed scheme after a matrimonial petition has been presented. Such a power would be useful for instance in cases where the wife has left the home but the court thinks that she ought to have the use and enjoyment of some of the household goods pending the determination of the petition. We have concluded that the powers of the court to make orders under our scheme should be available notwithstanding that a matrimonial petition has been presented.

3.45. We therefore propose that our scheme for the protection of a spouse's use of the household goods should apply for so long as the marriage subsists, or until a decree of judicial separation is granted, and should apply notwithstanding that a petition for divorce, nullity or judicial separation has been filed. The court should have no power to make a use and enjoyment order while a decree of judicial separation is in force or after the termination of the marriage by a decree of divorce or nullity.

Duration of orders

3.46. The question of the duration of the court orders which we propose presents no special problems and we make the following proposals:

(a) During the subsistence of the marriage

3.47. In practice it may well be that in the majority of cases orders will not continue for long periods, as the problems of the parties will be subsequently resolved by a matrimonial decree. In other cases, however, to impose a limitation as to the period for which an order may continue during the subsistence of a marriage would unduly derogate from the protection necessary to safeguard a spouse's use and enjoyment of the relevant articles. Accordingly, we propose that (as in the case of the orders made concerning occupation of the home under the Matrimonial Homes Act 1967[35] or under the Domestic Violence and Matrimonial Proceedings Act 1976[36]) the court should have power to make orders "until further order" or for such period as it thinks right[37].

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[34] As we explain in para. 3.88 below the use and enjoyment scheme should not, in our view, apply at all to a marriage which is wholly void.

[35] s. 1(4).

[36] s. 4(2).

[37] Thus, for example, the court may, in a case where the parties have but recently separated and reconciliation is possible, order that one spouse should have the use of certain articles for a period of, say, one month.

(*b*) *On the death of one of the spouses*

3.48. We propose that an order concerning the use and enjoyment of household goods should terminate by operation of law on the death of the spouse in whose favour the order was made. We also propose that the order should terminate by operation of law on the death of the spouse against whom the order was made. Under the provisions of the Inheritance (Provision for Family and Dependants) Act 1975, which gave effect to recommendations contained in our Report on Family Provision on Death (Law Com. No. 61, 1974), the court has extensive powers, in respect of deaths occurring on or after 1 April 1976, enabling it to order the transfer or settlement of any property forming part of the estate of the deceased for the benefit of the surviving spouse, in cases where reasonable provision for the surviving spouse is not made by the will of the deceased or the law of intestacy[38]. We think that these powers are sufficient to enable the court to confer on the surviving spouse all such rights as may be required in respect of household goods which belonged to the deceased.

(*c*) *On the termination of the marriage by a decree of divorce or nullity, or on a decree of judicial separation*

3.49. By section 2(2) of the Matrimonial Homes Act 1967 a spouse's rights of occupation in the home conferred by section 1 of the Act come to an end on the termination of the marriage "unless in the event of a matrimonial dispute or estrangement the court sees fit to direct otherwise by an order made under section 1 . . . during the subsistence of the marriage". The power to give such a direction was conferred at a time when the powers of the court to deal with rights of property on granting a decree of divorce, nullity or judicial separation were much less extensive than they are now. The court granting a decree of divorce, nullity or judicial separation now has power under the Matrimonial Causes Act 1973[39] to make financial provision for the other spouse or the children of the family by way of lump sum or periodical payments or by transfer or settlement of any property. These powers are very wide and the court would be able to make whatever adjustment was appropriate in the circumstances in respect of the household goods owned by one or both spouses[40].

3.50. We have accordingly concluded that an order relating to the use and enjoyment of the household goods should cease to have effect on the termination of the marriage by a decree of divorce or nullity, or on a decree of judicial separation.

Variation and discharge of orders

3.51. The necessity to confer upon the court a power to vary or discharge any order requires little explanation: we would however indicate one situation in which a power to vary or discharge will be desirable. We expect that orders made under the powers we propose will often be made at or shortly after the time that the spouses are separating. It is on such occasions especially that it

[38] See especially ss. 1 and 2 of that Act.

[39] ss. 23 and 24. The court must have regard to the guidelines laid down by s. 25.

[40] See, for example, *Allen* v. *Allen* [1974] 1 W.L.R. 1171 (C.A.), where it was held that, under s. 24(1)(*b*) of the Matrimonial Causes Act 1973, the court had power to order the transfer of a matrimonial home by the husband to himself and his wife on terms that would ensure the wife's right to occupy the home to the exclusion of the husband during the period when she was providing a home for the children. As that provision refers to "property", it would follow that the court has a similar power in relation to the household goods.

might be necessary, as a matter of urgency, to protect the use of certain articles indefinitely pending a more general settlement of the future relationship of the spouses. When the future of that relationship becomes clearer it may no longer be reasonable for the order to remain in force, in whole or in part.

3.52. We accordingly propose that where the court has made a use and enjoyment order the court should thereafter, in relation to the goods specified therein, have power to vary or discharge that order.

The position of third parties

3.53. We have considered whether orders made by the court under the scheme should create rights of a proprietary nature binding not only the other spouse, but also third parties. It is convenient to divide the discussion here into two parts:

(*a*) rights of third parties existing at the time when the court is about to make an order, and

(*b*) rights of third parties subsequently acquired.

(a) Third party rights subsisting when an order is made

3.54. A common case where a third party will have rights in household goods at the time when the court is considering whether to make an order under the powers we propose will be the case where the husband or wife holds the goods on hire or hire-purchase. We propose that articles held under a hire, hire-purchase or conditional sale agreement should not be subject to the scheme recommended in this report, and we discuss this matter in detail in Part VI below.

3.55. There may be other cases where the household goods include goods of which a third party is the owner at the time when the court is invited to make an order. There are two possible ways of dealing with such cases:—

(*a*) One would be to provide that the court should have no power to make an order in respect of any such goods.

(*b*) The other would be to permit the court to make an order under the scheme in respect of such goods, but to provide that the order should not affect the rights of the third party.

3.56. We do not think that it would be right to confer power on the court to make an order under the scheme in respect of goods belonging to a third party. There is the obvious objection that the protection conferred by such an order on the spouse in whose favour it was made would be largely illusory, since the third party could at any time reclaim the goods. There is also the danger that if the courts were empowered to make an order in respect of goods belonging to a third party, the effect of the order might be misapprehended. The order would not affect the third party's legal rights, but there is a risk that in many cases the order would be thought by one or both of the spouses, or indeed by the third party himself, albeit erroneously, to confer rights as against the third party. This could well cause resentment and misunderstanding on the part of all concerned.

3.57. There is the further objection that, if an order were made, the third party who wished to reclaim the goods might well find his position prejudiced in fact, if not in law. For example, if a mother lent furniture to her son which was

then made subject to a use and enjoyment order in favour of the son's wife, the mother might be forced to have dealings with her daughter-in-law in order to recover her own furniture. Such a situation could be a potential source of unfairness, embarrassment and friction.

3.58. The above considerations, which apply to goods owned by a third party jointly with one or both spouses as well as to goods owned exclusively by a third party, have led us to conclude that the court should have no power to make orders concerning items in which a third party has a proprietary interest.

3.59. We would add for the sake of completeness that references to ownership and proprietary rights are to beneficial interests.

(b) Third party rights arising after the making of an order

3.60. In considering what the effect of an order should be on third party rights arising after the making of an order, we have borne in mind that a spouse's right to occupy the home under the Matrimonial Homes Act 1967, though personal in nature, will bind most third parties after registration[41] and will then have most of the incidents of a proprietary right. In the case of land, however, it is the standard procedure for a third party who proposes to acquire an interest to effect a search in the appropriate registry; there is no corresponding procedure in the case of goods.

3.61. A typical example of the class of case we are now considering is where a husband, who is subject to an order requiring him to allow his wife to have the use of certain goods in the home, sells or gives the goods to a third party. We propose, that, whether or not the third party knows of the existence of the order, he should take the goods free of the wife's right. If on the one hand he has no knowledge of the order it would be both unfair and inconvenient if his rights were affected. If on the other hand he was aware of the order, then, though taking free of the wife's right, he will be involved in the husband's breach of the order and liable to the sanctions to which we refer below[42]. We consider his liability to those sanctions a sufficient discouragement to him from entering into transactions of that nature. We accordingly propose that an order under the scheme should not affect the subsequent acquisition by a third party of proprietary rights in the goods.

The enforcement of orders

(a) Sanctions for breach of an order

3.62. Later in this Book[43] we recommend that the High Court and a county court should have jurisdiction to make orders concerning use and enjoyment of household goods. Orders made by those courts will of course be enforceable against a spouse by ordinary proceedings for civil contempt.

3.63. Furthermore, a third party accepting any of the goods under a sale or other disposition which he knew to be a breach of the order would similarly be guilty of contempt.

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[41] As a Class F land charge where the land is unregistered and by a notice or caution in the case of registered land. As to cautions, however, see our recommendations in Book Two, para. 2.36.

[42] See paras. 3.62, 3.63 and 3.65 below.

[43] See para. 3.146 below.

(b) Compensation as a sanction

3.64. Any penalty imposed by the court as a consequence of a breach of its order will not necessarily assist the other spouse. We think therefore that there is a case for conferring a discretionary power on the court to order the payment of a lump sum by the party in default as compensation to the spouse in whose favour the use and enjoyment order was made. This power would, of course, be additional to that of imposing a penalty for disobedience and in some cases might be the only order which the court would consider it appropriate to make[44].

3.65. Further, we think that the power to award such compensation should be available not only against the spouse who has acted in breach of the order but also against a third party who has knowingly accepted a disposition in breach of the terms of the order.

3.66. We accordingly propose that the court should have a discretionary power to order the spouse in breach of a use and enjoyment order and a third party who has knowingly accepted a disposition in breach of such an order to pay a lump sum to the spouse in whose favour the order was made.

Disposals prior to the making of an order

3.67. In devising the recommended scheme it is necessary to deal with the situations where the respondent spouse is able in practice to defeat the application by disposing of the goods before the court's order has been made. Our conclusions on the different questions which can arise are as follows.

(a) Disposals after the date of service but before the hearing of an application

3.68. We have first considered the position which would arise if one spouse were to dispose of goods after the other has applied for a use and enjoyment order but before the application has been determined. Clearly, it is desirable that the relevant goods should remain available while the application is pending. We therefore propose that, after the respondent spouse has been served with the application and until the application has been determined, the respondent should be prohibited from selling or otherwise disposing of any of the goods comprised in the application without the written consent of the other party or the leave of the court. The court would have power to grant such leave on an interlocutory application; and the existence of the power would be a safeguard against the inclusion in an application for a use and enjoyment order of goods in respect of which there was plainly no prospect of a use and enjoyment order being made. A disposal in breach of the prohibition on disposal which we propose in this paragraph should be treated as disobedience of an order of the court[45].

3.69. Earlier in this Book[46] we have recommended that the court should have a discretionary power (additional to that of imposing a penalty for disobedience) to order a spouse who is in breach of a use and enjoyment order, and a third party who has knowingly accepted a disposition in breach of such an order, to pay compensation to the spouse in whose favour the order was made.

[44] We discuss the assessment of compensation later: see paras. 3.77–3.83 below.
[45] See para. 3.62 above.
[46] See para. 3.66 above.

3.70. We have considered whether the power to award compensation should be extended to the case where a spouse has disposed of items while an application is pending, in breach of the prohibition proposed in paragraph 3.68 above.[47] We have borne in mind that in a case of that kind the applicant spouse, in the absence of such compensation, would be left without any relief, particularly where the disposal has taken the form of a sale or other transaction in favour of a third party, since the latter could in no circumstances be ordered to restore the articles to the applicant[48].

3.71. We have concluded that the court should be empowered to award compensation against the respondent in cases where it considers that, if the respondent had not disposed of the goods, it would have made a use and enjoyment order in respect of those goods. The power would be exercisable also against a third party who had knowingly accepted a disposition of the goods in breach of the prohibition against disposal.

(b) Disposals before the making of an application

3.72. We have next considered whether the power to award compensation should be further extended so as to deal with disposals by one spouse at a time when the other has not as yet applied for an order under the scheme. We think that the arguments in favour of some extension on these lines are strong. For example, a husband who has decided to leave his wife may, surreptitiously or openly (but in either case without her consent), remove goods from the home and sell them before she has had the opportunity to apply for an order. In such a case, we think it right that the court should have some powers to award compensation to the wife. On the other hand, we think that justice and convenience require that there should be a time limit on dispositions in respect of which the court would have power to award compensation. It would be unreasonable that a husband should be required to pay compensation in respect of goods disposed of a substantial time before any application has been made. We consider that a time limit of three months would be reasonable and fair to both parties.

3.73. In formulating proposals for dealing with dispositions at a time when no application has been made, two cases require to be distinguished:—

(*a*) the case where a spouse knows that an application for a use and enjoyment order would be futile because the other spouse has already disposed of the goods;

(*b*) the case where a spouse makes an application for a use and enjoyment order in respect of goods in ignorance of the fact that the other party has already disposed of the goods.

In the next paragraph we deal with the former case, and in paragraph 3.75, with the latter.

3.74. In order to deal with the situation where a spouse knows that an application for a use and enjoyment order would be ineffectual because the other spouse has already disposed of the goods, we propose that such a spouse should be entitled to apply simply for an order for compensation in respect of such items, provided that the disposition was without the applicant's consent

[47] It was suggested to us on consultation that the court should be able to make an order compensating in money the spouse who has suffered from a "wrongful" sale by the other.

[48] See paras. 3.60–3.61 above.

and did not occur more than three months before the date of the application. The court would have power to order the respondent to pay compensation to the applicant in respect of such goods if the court is of the opinion that, but for the disposition, it would have made a use and enjoyment order in respect of those goods.

3.75. There will be cases where a wife applies for a use and enjoyment order when the appropriate application would have been an application for compensation under the preceding paragraph. Thus, for example, a wife may apply for a use and enjoyment order in respect of goods which she believes to be in her husband's possession when in fact he has sold them a month earlier. We think that in any case where, on an application for a use and enjoyment order, it appears that without the consent of the applicant the respondent has disposed of the goods within the period of three months before the application, the court should have power to treat the application as if it were an application for compensation. The court would, however, only have power to make an order for compensation if it considers that, had the goods not been disposed of, it would have made a use and enjoyment order in respect of those goods.

(c) Disposals after the making but before the service of an application

3.76. Another case for which provision needs to be made is the case where the wife applies for a use and enjoyment order and the husband disposes of the goods without her consent between the time when the application is made and the time when it is served on him. In such cases also, we think that the court should have power to treat the application as an application for compensation and to make an order for compensation if it considers that, had the goods not been disposed of, it would have made a use and enjoyment order in respect of the goods[49].

Principles governing the award of compensation

3.77. To summarise, we have proposed that the court should be empowered to order compensation to be paid by one spouse (assumed here for ease of reference to be the husband) to the other spouse in the following situations:—

(*a*) Where the husband has disposed of any of the household goods without the consent of the wife within the period of three months immediately preceding the making of an application for a use and enjoyment order or of an application for compensation, or between the date of the making of an application for a use and enjoyment order and the service of it upon him, and the court considers that, if the husband had not disposed of the goods, it would have made a use and enjoyment order in respect of those goods[50].

(*b*) Where the husband has disposed of any of the household goods without the written consent of the wife or the leave of the court after service of an application for a use and enjoyment order and while the application is pending, and the court considers that, if the husband had not disposed of the goods, it would have made a use and enjoyment order in respect of those goods[51].

(*c*) Where the husband disobeys a use and employment order[52].

[49] How compensation should be assessed is dealt with in paras. 3.77–3.83 below.
[50] See paras. 3.74–3.76 above.
[51] See paras. 3.68–3.71 above.
[52] See paras. 3.64–3.66 above.

Further, we have proposed that the court may also order compensation to be paid to the wife by a third party who has knowingly accepted a disposition in breach of an order, or in breach of the automatic prohibition referred to in paragraphs 3.68 and 3.71 above.

3.78. We intend that any payment made by the husband or third party under a court order by way of compensation should belong beneficially to the wife and that she should be entitled to dispose of the money as she wishes, so that any property she acquires with it would also belong to her.

3.79. We have considered whether it is desirable to provide statutory guidelines for the court as to the manner in which it should exercise its powers to award compensation under the provisions to which we have referred. In this connection, there are two problems which require consideration.

3.80. The first problem relates to the basis on which any compensation awarded should be assessed. Should it be assessed on the basis of awarding the replacement value of the relevant articles, or on some other basis? It may be said that the sum awarded is payable solely to compensate the wife for the loss of the use and enjoyment of articles which, had they been available, she would have had by virtue of a use and enjoyment order. A strict application of that principle would result in the court putting a value only on the right to use and enjoy the articles in question and would often preclude the court from awarding compensation equal to the cost of replacing them. On the other hand, this approach would in many cases be unrealistic. A wife who has been deprived, say, of the only table on the premises needs it to be replaced, and it may be argued that the lump sum to be awarded should be sufficient to enable her to obtain another one (though not necessarily a table as valuable as the one she has lost).

3.81. In our view, it would be wrong to tie the court down to either the "loss of use" or the "replacement" principle. In fixing the amount of any award which it would be fair and reasonable to order, we envisage that the court would take into account both the needs of the wife and the loss she has suffered by reason of being deprived of the use and enjoyment of the goods in question. We do not think it desirable to direct the court to apply one principle to the exclusion of the other.

3.82. The second problem relates to the husband's motives in disposing of the goods and arises in those cases referred to in paragraph 3.77(*a*) and (*b*) above where the court is considering whether to award compensation and, if so, how much, in respect of a disposal which in practice prevents the court from making a use and enjoyment order which it would otherwise have made. In some cases a husband may dispose of the goods knowing full well that his wife has applied or is likely to apply for a use and enjoyment order. In other cases he may have no such knowledge at the time of the disposal. We would expect the court to take account of such factors in exercising its discretion as to the award of compensation. For example, where the husband has disposed of goods within the period of three months preceding the application, the court will no doubt take into account whether or not the husband has been endeavouring to anticipate the break-up of the marriage and a possible application of the wife under the scheme, and to deprive the wife in advance of the possession of the goods. We do not think it necessary or desirable to devise a specific

guideline directed to such cases; we think it will be sufficient if the court is required to award what is fair and reasonable, having regard to all the circumstances.

3.83. We therefore propose that the power of the court to award compensation should be a power to award fair and reasonable compensation to the applicant in respect of the loss of the use and enjoyment of the goods. It should be specifically provided that in deciding whether to award compensation and if so, how much, the court should have regard to all the circumstances of the case. It should further be provided that, in determining the amount of any compensation to be awarded for the loss of the use and enjoyment of the goods, the court may take into account any expenditure incurred or to be incurred by the applicant by reason of that loss, including any expenditure incurred or to be incurred in providing a substitute or replacement for the goods.

Procedural matters

3.84. We think that the wife (assuming her to be the applicant) should be required to identify with certainty in her application the goods to which it relates. This is necessary because of the proposed prohibition on the husband disposing of the goods after the application has been served upon him[53]. We also think it should be a requirement that the goods specified in the application should not be goods in which a third party has an interest: in the absence of such a requirement the prohibition on disposals by the husband pending the hearing might work to the disadvantage of that third party. We would add, finally, that the right to apply for a use and enjoyment order should be limited to goods which are in the possession or control of the husband or wife when the application is made.

3.85. Where an application for a use and enjoyment order is made, the circumstances may be such that an interim order for use and enjoyment is required pending a full hearing of the application. A typical example of such circumstances is where the husband has left the home and has stripped it of its contents. We therefore think that the court should have power, at the instance of a spouse who has made an application for a use and enjoyment order, to make an interim order for the use and enjoyment by the applicant of any of the goods specified in the application. We further think that the power to make such an interim order should be exercisable, if the court thinks fit, notwithstanding that the application for the use and enjoyment order and the application for the interim order have not been served on him. We therefore propose that rules of court should be made conferring on the court power to make interim orders for use and enjoyment, including power to make such orders *ex parte*. We think that an express power to make such rules of court will be required, and we propose that such a power should be included in the legislation giving effect to our scheme.

3.86. There is a minor procedural point to be noted in connection with our proposals for interim orders. If an application for a use and enjoyment order is made and not served on the respondent, and then an application for an interim order is made and is served on the respondent, should the service of the application for the interim order have the effect of prohibiting the respondent

[53] See para. 3.68 above.

from selling or disposing of the goods? To make provision for that purpose might be thought to be a reasonable extension of our proposal in paragraph 3.68 above, under which service of the application for the final order has the effect of imposing such a prohibition. However, such provision would add to the complications of the scheme and is in our view unnecessary. If the application for the interim order is served, there is no reason why the application for the final order should not be served at the same time (if indeed it has not been served earlier). Service of the application for the final order will bring the prohibition into operation, and no further provision appears to be required.

The scheme to apply to all valid marriages

3.87. We think that the general principle should be that the use and enjoyment scheme should extend to all marriages which are regarded as valid marriages in English law. Where a voidable marriage is annulled by a decree which has been made absolute, we think that the marriage should nevertheless be treated for the purposes of the use and enjoyment scheme as having existed up to the time when the decree is made absolute. This accords with the rule laid down in section 16 of the Matrimonial Causes Act 1973. The mere fact that a marriage is voidable should not preclude the court from making a use and enjoyment order in favour of one party to the marriage as against the other.

3.88. Where, however, a marriage is void from the beginning[54] we do not think that the use and enjoyment scheme should apply to it. We think it is wrong in principle that the scheme should apply to a marriage which is wholly void: and we think there are practical considerations which indicate that little would be achieved by applying the scheme to such a marriage. Where there is a dispute between the parties as to whether their marriage was void from the beginning, we think it unlikely that such a dispute will arise merely as an incidental issue on an application for a use and enjoyment order. Such a dispute is more likely to arise on a petition for a decree of nullity. If a decree of nullity is granted, the court will, apart from the use and enjoyment scheme, have ample powers to grant ancillary relief. If, on the other hand, the court decides that the marriage is valid and refuses a decree of nullity, the power to grant relief under the use and enjoyment scheme will remain.

Polygamous marriages

(*a*) *Introductory*

3.89. Where a marriage, recognised as valid under English law, has been entered into under a law which permits polygamy, it is necessary to distinguish between two classes of case:—

(*a*) At the time when a use and enjoyment order is sought one party to the marriage (whom for ease of reference we assume to be the husband) may have more than one spouse recognised as such by English law. We refer to this situation as an actually polygamous marriage.

(*b*) At the time when a use and enjoyment order is sought the husband may have only one spouse so recognised. We refer to this as a potentially polygamous marriage.

[54] The grounds on which marriages are void from the beginning and merely voidable are now set out in ss. 11 and 12 respectively of the Matrimonial Causes Act 1973.

Section 47 of the Matrimonial Causes Act 1973 permits the granting of matrimonial relief (including financial and other relief ancillary to a decree of divorce, nullity or judicial separation) in respect of actually and potentially polygamous marriages. It is therefore necessary that we state our view on whether the use and enjoyment scheme which we propose should apply to each class of polygamous marriage.

(*b*) *Potentially polygamous marriages*

3.90. In our view the scheme for the use and enjoyment of household goods should clearly apply in the case of a potentially polygamous marriage, provided that the marriage is recognised as valid in English law. In this respect our view regarding the use of household goods is on all fours with our views in Book Two regarding the application of the Matrimonial Homes Act 1967 to potentially polygamous marriages[55].

(*c*) *Actually polygamous marriages*

3.91. As we have said in Book Two, it has always been our view that under the Matrimonial Homes Act 1967 the protection afforded for a spouse's occupation of the matrimonial home is available where the marriage is polygamous as well as where it is monogamous[56]. In any event we now recommend that a declaratory clause to this effect should be added to the 1967 Act to remove any possible doubt on the point[57].

3.92. We have also said earlier in this report[58] that we regard the scheme proposed in this Book to protect a spouse's use and enjoyment of the household goods as a scheme which supplements the protection of the occupation of the home itself, which is afforded by the 1967 Act.

3.93. Accordingly we consider it is both logical and right in principle that the scheme proposed in this Book should also apply where the marriage is actually polygamous.

3.94. Where there is an actually polygamous marriage two factual situations can arise in this country;

(*a*) The husband is living with one wife in a de facto monogamous household, the second wife having remained in, say, Pakistan. This case may well arise.

(*b*) The husband is living with both his wives in the same matrimonial home. However, as disclosed by our consultation with the representatives of immigrant communities, which we have described earlier in this report, this case seems likely to be very rare[59].

3.95. In the first case—that of the polygamous marriage which de facto is monogamous—we feel it would be unjust for the wife to be deprived of the protection of the use and enjoyment scheme, merely on the technical ground that her husband has a second wife in his native country. To deprive her of the protection would be to fly in the face of the reality of the marital situation in this country.

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[55] See Book Two, para. 2.34.
[56] See Book Two, para. 2.34.
[57] See Book Two, para. 2.34.
[58] See the Introduction to this report at para. 0.20, and also paras. 3.16–3.19 above.
[59] See Book One, para. 1.79.

3.96. Although the second case is likely to be rare, it is obviously desirable that it should be covered by the same or a similar scheme of protection. The question for decision is whether the scheme set out in the earlier paragraphs of this Part should be applied without modification to marriages which are de facto polygamous, or whether the scheme should be modified in its application to such marriages in order to meet certain special problems to which they are likely to give rise.

3.97. To illustrate the kind of special problems we have in mind, we may refer to our proposal in paragraph 3.58 above that the court should not have power to make orders concerning items in which a third party has a proprietary interest. Thus, in a de facto polygamous marriage an applicant wife would not be entitled to protection under the scheme in respect of goods owned by the second wife, or by the second wife and the respondent husband jointly, or by all three of them. If the scheme were extended to enable the court to make an order in favour of the applicant wife in such cases, questions would then arise of imposing restrictions on the second wife in respect of the disposition of the goods pending the hearing of the application.

3.98. In our view it would not be right to introduce what would inevitably be elaborate modifications into our main scheme in order to meet the exceptional case of the polygamous marriage where a husband and two wives are living in the same household. The practical benefits, if any, would be extremely small, but the practical disadvantages in terms of complex legislation would be considerable.

3.99. It is worth observing that some of the problems which arise for an applicant wife where two polygamous wives are living together would also arise for a monogamous wife who is sharing her home and the household goods with a third party such as a relative. We think that the scheme we have put forward is fair to all concerned where a monogamous wife is in that situation; and we think it will prove equally fair where two polygamous wives are living in the same household.

3.100. Our conclusion therefore is that the scheme as we have described it in the earlier paragraphs of this Part should apply in all cases of actually polygamous marriage, and that no modifications of the scheme should be made in its application to the second of the two cases referred to in paragraph 3.94 above. This result can be achieved by the inclusion in our draft Bill of a provision making it clear that the scheme applies to all potentially and actually polygamous marriages which are recognised as valid in English law.

3.101. We would add, in conclusion, that in the case where the two wives are both in this country there might be circumstances in which the court hearing an application by one wife might consider that it would be expedient to hear the views of the other. In such a case the court could adjourn the proceedings in order to give that wife an opportunity of being heard. Rules of court could make provision for notice of the proceedings to be given to the other wife in such a case.

Summary of the scheme

3.102. In the foregoing paragraphs of this Part we have explained the main features of the scheme we now recommend. Those features are summarised in sub-paragraphs (1) to (20) of paragraph 3.161 in Part VIII below, and we refer the reader to those sub-paragraphs if he feels the need for a conspectus of our proposals at this stage.

PART IV THE DEFINITION OF HOUSEHOLD GOODS

General considerations

3.103. There are three main criteria in formulating the definition of household goods. First, the definition should enable the court to apply a simple factual test. Secondly, it should not take the form of a statutory list of items, which of its nature can never be exhaustive, but should be framed in wide and general terms so as to be capable of being applied flexibly. Thirdly, it should be related to the actual circumstances in which the spouses have lived together[60].

Recommendation

3.104. *We accordingly recommend* that the definition of household goods should be formulated as follows:—

> "Household goods" means any goods, including a vehicle, which are or were available for use or enjoyment in or in connection with any home which the spouses are occupying or have at any time during their marriage occupied as their matrimonial home.

For reasons which are explained at paragraph 3.122 in Part V below, we think that it will be necessary to make special provision for the application of our scheme to caravans and houseboats; and, in connection with the special provision we are proposing, it will be necessary to circumscribe the foregoing definition by excluding caravans and houseboats from its scope. However, except in regard to caravans and houseboats the foregoing definition represents the essence of what we propose, and for the purposes of general discussion it is convenient to treat it as being our recommended definition.

3.105. The essence of the definition is that the goods should be, or should have been, available for use or enjoyment in connection with a home, and that the home should, or should at one time have been, the matrimonial home of the parties.

The proposed definition and goods of certain particular kinds

3.106. For completeness sake it is necessary to explain how the definition we propose will apply in relation to certain kinds of goods which, as discussed in the working paper, give rise to special problems, namely:—

(*a*) Personal possessions

(*b*) Goods used for business purposes

(*c*) Articles acquired by gift or inheritance

(*d*) Consumables

(*e*) Articles in the gardens or grounds of the home

(*f*) The family car

[60] We have considered the definition of "personal chattels" in s. 55(1) (x) of the Administration of Estates Act 1925. That definition does not however fully satisfy the three criteria which we have set out.

(a) *Personal possessions*

3.107. In the working paper we proposed that purely personal items, such as clothing and jewellery, should be excluded from the definition of "household goods". As to other categories of goods we said:—

> " . . . opinions may vary as to what are the household goods. Most people would probably accept that the furniture, carpets, curtains, linen, kitchen and laundry equipment were part of the household goods. On the other hand, each spouse's clothing, jewellery, equipment used for sports or hobbies (a tennis racket, a camera, etc.) would probably be regarded as personal to that spouse. Between, there is a range of items which might be hotly contested: for example, paintings and other objets d'art, hi-fi equipment, gramophone records, books, television and radio . . ."[61].

3.108. We have now concluded that the definition need not by its terms specifically exclude even strictly personal possessions such as clothing. It would no doubt have been possible to devise a definition which would have had this effect. We think it unnecessary to do so, however, because the court, in exercising its discretion and in applying the guideline we have recommended[62], namely, whether the relevant goods are of a kind needed by the applicant to meet the ordinary requirements of his or her daily life, is unlikely to conclude that a spouse's personal possessions should be the subject of an order in favour of the other spouse.

(b) *Goods used for business purposes*

3.109. In the working paper we proposed that items used for business purposes should be excluded from the definition of household goods[63]. However, we now take the view that an exclusion in those terms would place emphasis on the wrong factor. The essential question is whether the relevant article has in fact been comprised in the goods used or enjoyed in or in connection with the home. If the answer to that question is in the affirmative, it may well be that justice requires the item to be made the subject of a use and enjoyment order. The commercial interest involved would of course be taken into account by the court in determining whether to exercise its discretion to make an order and, if so, for what period and on what terms.

3.110. We illustrate the possible commercial interest by the following examples:—

(a) In the first case, a husband carries on business as a furniture dealer at shop premises and from time to time he uses a spare room in the home for temporary storage of articles comprised in his stock-in-trade. Such items would fall outside the need for protection of the wife's use and enjoyment of the household goods since they had not been used or available for use by the couple in their home.

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[61] Working Paper No. 42, para. 2.35.
[62] See para. 3.161 (2) below.
[63] Working Paper No. 42, para. 2.36. The language of this paragraph differs from that of para. 2.3 of the working paper under which goods used for business purposes would be excepted from the category of household goods only if used exclusively for those purposes.

(*b*) In another case, a husband carries on business as a furniture dealer but, in his home, he and his wife have been using a dining table that happens to be part of his stock-in-trade. In that kind of situation, we think that the wife should not be precluded from applying to the court for an order protecting her use of the table.

In exercising its discretion the court will of course take into account the needs of the husband's business (which may prevail over the wife's conflicting claim) and so be able to do justice on broad lines. If in the second case the husband carries on business in partnership with a third party, the court would have no power to make an order affecting the third party's rights[64]: thus the court will have no power to make an order relating to partnership property.

3.111. We have concluded it is unnecessary that goods used for business purposes should be specifically excluded from the definition of "household goods."

(*c*) *Articles acquired by gift or inheritance*

3.112. One of the suggestions made to us on consultation[65] was that objects acquired by way of gift or by inheritance from a third party should be excluded from the definition of the household goods.

3.113. By no means all objects acquired by gift or inheritance come into the category of treasured possessions. Many such objects are articles in common and daily use to which no sentimental value attaches. We see no reason why the court should not have power to make a use and enjoyment order in respect of such articles. Where sentimental value does attach to an article which one of the spouses has acquired by gift or inheritance, we think that the court would in the great majority of cases make no order in respect of the article in favour of the other spouse. The requirement that the court must have regard to whether the relevant items are "needed by the applicant to meet the ordinary requirements of his or her daily life" will often preclude the making of an order concerning the type of article likely to be regarded as an "heirloom". In any event the court will be under a duty to consider all the circumstances of the case; and where an item is specially treasured by a respondent spouse as a gift or an "heirloom" that will be a relevant consideration of which the court will take account in deciding whether to make an order. We do not think it right in principle that there should be an unqualified prohibition on the making of an order in such a case.

3.114. Accordingly, we have concluded that it is unnecessary specifically to exclude articles acquired from a third party by gift or inheritance from the definition of "household goods".

(*d*) *Consumables*

3.115. The use and enjoyment of certain items necessarily involves their consumption—for example, food, drink, or fuel. We consider that, as a matter of principle, the consumable nature of a particular article should not of itself preclude it from falling within the scope of the definition. If, for example, a husband has left his wife in the matrimonial home, we do not think he should

[64] See para. 3.58 above.
[65] See para. 3.22(*e*) above.

be able to prevent her from using a supply of coal on the ground that such use would in effect destroy his ownership; in such a case, we think it may be more important to confer a right of use on the wife than to preserve the husband's property. In practice, however, we feel it would be most unusual for a spouse to dispute the other's right to use up consumable goods. Our proposed definition extends to consumable goods, but we think that orders in relation to such goods will be comparatively rare.

(e) Articles in the garden and grounds of the home

3.116. In general, articles in the garden or grounds (for example, lawn mowers and other garden tools) can be fairly regarded as comprised in the goods used or enjoyed in the household and we have accordingly formulated the definition so as to include them.

(f) The family car

(i) Our provisional proposals

3.117. We proposed in the working paper that a car (or other vehicle) should be excluded from the definition of the household goods. We thought the car was too important, and gave rise to too many problems of its own to be included merely as an item in the group of household goods[66].

3.118. Nevertheless we realised that there were cases where the car was necessary to the running of the home and others where a spouse, though not the owner of the car, might have a just claim to its use; and we proposed accordingly that a spouse should be enabled to apply to the court for an order as to such use[67].

(ii) Our present view

3.119. On consultation, the great majority of those who commented on the proposals in respect of the car supported them and confirmed us in our provisional view that the use of the car should be protected. We took particular note of the comment that in country areas where public transport is poor either spouse could suffer hardship through deprivation of the car; but in urban areas, too, the car may be essential for the running of the home.

3.120. As we have explained above[68], we have, on reconsideration, formed the view that the provisional proposals in the working paper in relation to the household goods generally (under which a spouse's right of user would arise without a court order) were not what was required and that the scheme should operate by way of a right, when need arises, to apply to the court to make an order conferring the right of use. This approach renders superfluous the differentiation we made in the working paper between the household goods and the car. We have accordingly concluded that the car or other vehicle should be included in the definition.

3.121. We appreciate that in practice the use of the car will commonly present special problems. To mention but two—the car is often the most valuable asset owned by a spouse and an order made under the proposed scheme would impede a possible sale; it would also often be difficult for the

[66] Paras. 2.3 and 2.44.
[67] *Ibid.*
[68] See para. 3.28 above.

court to balance the needs, say, of a husband who needed the car to earn his living against those of the wife who required it to shop and take the children to school. However, we think that the task of doing justice as between the spouses should be left to the court. There may often be cases where the circumstances are such that it will not be expedient for an order to be made relating to the car; but we consider that the proposed scheme (including the guideline which we have recommended for the assistance of the court)[69] contains all the elements which are necessary to enable the court to dispose satisfactorily of the problems which will arise in relation to the use of the car. A company car (even though used quite properly for family purposes) would not, of course, be subject to a use and enjoyment order because, under our recommendation, at paragraph 3.161 (3) below, the court should have no power to make an order concerning goods in which a third party has a proprietary interest.

[69] See para. 3.42 above.

Caravans: a special subject

3.122. Caravans require to be dealt with as a special subject in relation to our use and enjoyment scheme. They are not "household goods" in the sense which most people would attribute to that expression and as we have said in paragraph 3.104 above they are excluded from the definition of household goods which we have recommended. Our definition of household goods was not designed for dealing with caravans, and in our view it would not be satisfactory if the application of the use and enjoyment scheme to caravans were to depend on the terms of that definition. The social considerations which are relevant to caravans are of a widely different nature from those which are relevant to household goods in the ordinary sense of the term. The location and use of a caravan may be subject to planning and public health controls. Where a caravan is located on land owned or controlled by a third party, questions may arise as to the security of tenure against the third party, as to the obligations of the third party to provide services, and as to his right to make charges. Where the caravan is a matrimonial home, questions may arise between husband and wife as to the right to occupy the home.

The caravan as a "dwelling house"

3.123. Where a husband and wife are occupying a caravan which is the matrimonial home, the caravan may be so attached to the land as to be part of the land itself. In such a case the application of our use and enjoyment scheme to the caravan would serve no useful purpose, nor indeed (since the scheme was designed for goods and not land) would it be appropriate. The caravan will be a dwelling house within the meaning of the Matrimonial Homes Act 1967[70]. The party who is not the owner or tenant of the home will have rights of occupation under that Act as amended by the Domestic Violence and Matrimonial Proceedings Act 1976[71]. Questions of co-ownership between husband and wife will, if our recommendations in Book One of this report are accepted, be dealt with in accordance with those recommendations.

The caravan as a mobile home

3.124. In the common case, however, a caravan which is used as a home will not be land and therefore will not be a dwelling house to which the 1967 Act extends. Such caravans are commonly referred to as 'mobile homes'. They fall within the category of goods as opposed to land, and it is pertinent to consider whether, and if so how, the use and enjoyment scheme should be applied to them.

3.125. The social problems attaching to the mobile home were recognised by the Secretary of State for the Environment in 1974, when he set up a com-

[70] The expression "dwelling house" is defined for the purposes of the 1967 Act by s.1(7) of the Act. The definition is not exhaustive and does not deal specifically with the question whether the expression includes a dwelling which *is not* land. In our view it is clear from the Act as a whole that it does not extend to a dwelling which is not land.

[71] See para. 3.17 and footnote 14 above.

mittee, under the chairmanship of Mr Gerald Kaufman, MP, Under-Secretary of State for the Environment[72] with the following terms of reference:—

> "To review, in consultation with interested bodies, the problems of mobile home residence and the contribution that mobile homes make towards meeting the nation's housing needs; in particular to consider the relevant legislative provisions as they affect site-owners and residents; the planning considerations involved; the terms and conditions on which pitches are let; the problems of charges, security of tenure and ownership of mobile homes which may arise; and to advise the Secretary of State on legislative or other action which should be considered."

The committee's report entitled "Report of the Mobile Homes Review—A study carried out within the Department of the Environment" was published on 24 August 1977. We are indebted to the findings in that report for the information we give here regarding mobile homes.

3.126. It is estimated that the total number of mobile homes in England and Wales (accommodating some 147,000 people) is about 67,000[73]. Of this total the following estimated breakdown can be given:—

(*a*) 90% of the residents in mobile homes own their home[74] and the majority of them buy the home for cash[75].

(*b*) The 10% of the residents who do not own their mobile home hire or rent it from the owner of the site[76].

Since 1959 there has been a marked change in the type of households occupying mobile homes. In 1959 the great majority were young or youngish married couples, about half of them with children. To-day over half of all residents are middle-aged, more than a quarter are over 65 and only 28 per cent have children. Of all residents 27 per cent are single. Mobile homes are still attractive for some younger people and for single people of all ages a significant number of whom are divorced or separated, but of recent years a large and increasing proportion have been acquired by elderly retired married couples[77].

3.127. The wide range of prices paid for mobile homes reflects the different needs and pockets of the residents. The new expensive units cost up to £9,000 and are mainly bought by retired couples for cash. For younger persons, second-hand units can be bought for anything from a few hundred pounds to about £5,000. Except for the oldest models, loans are generally available in the form of hire-purchase agreements[78].

3.128. We are not in this report concerned with the rights of the occupier of a mobile home against the site owner, or with his security of tenure of the site. Nor are we concerned with conferring rights against the owner of the site upon the husband or wife of the occupier of a mobile home. These are questions

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[72] Mr Kaufman has been succeeded as chairman of the committee by Mr Ernest Armstrong M.P.

[73] Report of the Mobile Homes Review, para. 1.31.

[74] *Ibid.*, para. 1.7.1.

[75] *Ibid.*, para. 1.5.1. Fewer than 2 in 5 residents buy with the aid of a loan; about 70% of these use hire-purchase which does not attract the tax relief available on interest payments on other kinds of loans. Loans are rarely made for periods of more than 7 years and the average is 4 years.

[76] This information was supplied to us by the Department of the Environment.

[77] Report of the Mobile Homes Review, paras. 1.4.1–1.4.2.

[78] *Ibid.*, para. 1.5.1.

which involve amendments or extensions of the Mobile Homes Act 1975. They are within the terms of reference of the Armstrong Committee and are dealt with in that committee's report[79].

3.129. What we are concerned with in this report are the rights of husband and wife as against each other in a mobile home which belongs to one or other of them. It may well be that the ideal solution in such a case would be some form of co-ownership of the mobile home. This is a matter which in our view would repay further study[80]. Since a mobile home is a chattel and not land, our co-ownership proposals in Book One of this report could not readily be adapted to mobile homes; and the probability is that a scheme of co-ownership for such homes would be a matter of some elaboration and complexity. We have not undertaken consultations on such a scheme and do not propose to advance such a scheme in this report.

3.130. On the other hand, we think that our scheme for use and enjoyment of household goods could be applied to mobile homes, and indeed to caravans generally (except where the caravan, as explained in paragraph 3.123 above, is so attached to the land as to be part of the land itself), with very little modification. If our scheme were so applied, we think there would be many cases—since 90% of residents own their mobile home[81]—in which it will provide a useful protection for one spouse against the other in respect of the occupation of a mobile home owned by one party or the other.

3.131. The only modification which appears to us to be necessary in applying the scheme to mobile homes and to caravans generally relates to the guidelines to be applied by the court in determining whether to make a use and enjoyment order. It is not entirely appropriate, in relation to a mobile home, to require the court to have regard to the extent to which the caravan in question is needed by the applicant for the purpose of the ordinary requirements of his daily life. If he needs it at all, it will certainly be for those requirements that he needs it. We therefore think that in the case of all caravans, including mobile homes the court should be required simply to have regard to the needs of the applicant (including needs arising from the family responsibilities of the applicant) and to all the other circumstances of the case.

Recommendations

3.132. *We accordingly recommend* that the use and enjoyment scheme proposed in Part III above should apply to all caravans other than those which are part of the realty. The scheme should be applied specifically to all such caravans, and such caravans should be expressly excluded from the definition of household goods. The guideline in Part III should be modified so that the court should be required to have regard simply to the needs of the applicant (including needs arising from the applicant's family responsibilities) and all the other circumstances of the case.

Houseboats

3.133. The subject of houseboats has not been the subject of special study, either by the Armstrong Committee or by ourselves. It is plain, however, that

[79] *Ibid.*, paras. 8.2.1–8.2.2. (Recommended programme of action).

[80] Such a study may well include house-boats used as a matrimonial home. As to our immediate proposals with regard to house-boats, see paragraphs 3.133–3.134 below.

[81] See para. 3.126(*a*) above.

our scheme for use and enjoyment of household goods can be applied to houseboats in precisely the same way as we have proposed that it should be applied to caravans which do not form part of the realty. The application of the scheme to houseboats in this way will undoubtedly serve as some protection to the wife who is unjustly evicted by her husband (or threatened by him with unjust eviction) from a houseboat which has been the matrimonial home. It will also enable the court to make such orders for use and enjoyment as may be fair between husband and wife in the case of a houseboat which has not been the matrimonial home.

Recommendations

3.134. *We accordingly recommend* that the use and enjoyment scheme proposed in Part III of this Book should apply to all houseboats. The scheme should be applied specifically to all houseboats, and houseboats should be expressly excluded from the definition of household goods. The guideline proposed in Part III should be modified so that the court should be required to have regard simply to the needs of the applicant (including needs arising from the applicant's family responsibilities) and to all the other circumstances of the case.

PART VI GOODS ON HIRE, HIRE-PURCHASE OR CONDITIONAL SALE

The provisional proposals in the working paper

3.135. In the working paper[82], we referred to the fact that household goods are often acquired by hire-purchase. We pointed out that where, as was the more common case, the agreement was effected in the name of one spouse (assumed hereafter for ease of reference to be the husband) the other spouse could acquire no rights against the owner of the goods. Thus, if the husband failed to keep up the payments (because, for example, he had left the home) the wife had no right to continue the payments, nor to exercise the option to purchase, even if she had made a contribution[83] to the payments previously made.

3.136. However, paragraphs 2.20 and 2.21 of the working paper went on to say:—

> "2.20. Under the present law of hire-purchase it would be difficult to introduce effective reforms of the law relating to household goods; where the goods were held under a hire-purchase agreement it would be necessary to take account of the owner's position and possibly to involve the owner in litigation. The position would, however, be much simplified if the recommendations in the Report of the Committee on Consumer Credit[84] were implemented. In a sweeping review of credit law they recommend that the fictions relating to hire-purchase agreements should be abandoned, and that they and all instalment sales should be regarded as outright sales financed by loans repayable by instalments[85]. The reservation of title under a hire-purchase or similar agreement should be regarded as a chattel mortgage securing a loan, and all forms of security interest should be dealt with by a uniform legal structure[86].
>
> 2.21. Under the Crowther Committee recommendations the seller or finance company would not continue to own goods being purchased, as under present law, but would be a lender, who might in some cases retain a security interest in the goods[87]. Subject to this, the beneficial interest in the goods being purchased on credit would pass to the purchaser[88]. Although the lender might, subject to certain restrictions, be entitled to realise his security, the purchaser would in the meantime be able to dispose of the goods subject to the security interest[89]. The problems referred to in para. 2.18 above would be minimised since the purchaser's spouse would be able to acquire an interest in the goods, and an assignment of the purchaser's interest would be possible. The proposals made in the Paper take account of these recommendations; they are based on the assumption that the present law, under which the owner retains title throughout the period of the agreement, will be changed."

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[82] Paras. 2.17–2.21.

[83] Although the working paper did not refer in terms to conditional sale agreements, it is clear that, despite differences between the legal form of the two types of transaction, similar considerations of policy apply to them as apply to hire-purchase agreements. In this report we use the expression "hire-purchase agreement" to include a "conditional sale agreement" as defined in s. 189(1) of the Consumer Credit Act 1974.

[84] (1971) Cmnd. 4596, Vol. 1, Part 5, pp. 182–230.

[85] *Ibid.*, paras. 5.2.1–5.2.4.

[86] *Ibid.*, para. 5.2.8.

[87] *Ibid.*, para. 5.5.1 *et seq.*

[88] *Ibid.*, para. 5.6.8.

[89] *Ibid.*, paras. 5.6.17, 6.7.17 and para. 5.6.9. A bona fide purchaser for value without notice would take free of the interest.

3.137. On that assumption we envisaged that the provisional proposals in the working paper (summarised in paragraph 3.20 above) would apply in principle to all household goods, including those subject to a credit transaction, but without prejudice to third party interests[90]. We went on to propose that where a third party had a security interest in an item forming part of the household goods, (*a*) the spouse in possession of that item should be given certain rights against the creditor; and (*b*) the court should be empowered to make certain orders regulating the obligations of the spouses *inter se*[91].

The Consumer Credit Act 1974

3.138. When the working paper was published on 26 October 1971 most of the relevant hire-purchase transactions were governed by the detailed provisions of the Hire Purchase Act 1965[92]. That remains the position, but wide-ranging changes have been made in the field of consumer credit law by the Consumer Credit Act 1974 which, when its relevant parts are brought into force, will, among other reforms, repeal and replace the 1965 Act in relation to the law of hire-purchase[93], and it will also introduce new detailed control over hiring agreements[94]. However, the 1974 Act, though based substantially on recommendations of the Crowther Committee, contains no provisions implementing the recommendations of that Committee on which our proposals in the working paper were based.

The need for further reforms in the law of hire-purchase and hire

3.139. The essence of the scheme provisionally proposed in the working paper was to confer on the husband or wife rights of use and enjoyment over goods owned by one of the parties to the marriage. It was a scheme for regulating the rights and obligations of two people in respect of goods in which no third party has rights of ownership. The scheme we have proposed in the preceding parts of this Book is a scheme of a similar nature. We believe that this is the most satisfactory type of scheme for dealing with cases where the goods are not owned by a third party.

3.140. The problem of third party ownership arises both in regard to goods held on hire-purchase and in regard to goods held on hire. Both types of transaction are of considerable importance in domestic life. Many articles in the home, including the car, are frequently acquired on hire-purchase. Other articles, such as television sets, are often held on hire.

3.141. Where goods are held by a husband on hire or hire-purchase, it would be of little or no practical assistance to the wife to confer on her a right to use and enjoy the goods unless the right were enforceable not only against

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[90] Working Paper No. 42, para. 2.47(*a*).

[91] *Ibid.*, paras. 2.47(*b*) to (*d*) and para. 2.50 (viii).

[92] The 1965 Act applied to goods in respect of which the hire-purchase price did not exceed £2,000: see s.2(2).

[93] The 1974 Act regulates agreements where the amount of "credit extended" does not exceed £5,000. In contrast to the position under the 1965 Act, it is the amount of credit, not the hire-purchase price, which determines whether the agreement falls within the provisions of the Act, so that neither the credit charge nor any deposit is included in the computation of that figure: see ss. 8(1) and 8(2) and 9(3).

[94] In general, the 1974 Act regulates a "consumer hire agreement" defined as an agreement (other than a hire-purchase agreement) for the bailment of goods which is capable of subsisting for more than three months and does not require the hirer to make payments exceeding £5,000: see s. 15(1).

the husband, but also against the owner of the goods. But it would hardly be practicable to confer on the wife rights enforceable against the owner of the goods without requiring her to discharge some of the obligations of the agreement under which the goods are held.

3.142. The conclusion is, we think, inescapable that the law relating to contracts of hire and of hire-purchase requires to be reviewed with particular reference to the question of conferring rights on the husband or wife of the hirer. This report is not the appropriate place for reviewing the law relating to contracts of hire and hire-purchase. We think, however, that such a review should be undertaken. We shall consult with the Director General of Fair Trading as to the means of putting such a review in hand, and shall be prepared to undertake it ourselves if that appears to be the most convenient course.

The present scope of our proposed scheme

3.143. Pending such a review, we have concluded that the court should not be empowered to make orders under our recommended scheme in regard to goods held under a hire or hire-purchase agreement. Cases could arise (though we think that in practice they will be rare) in which the court hearing an application for a use and enjoyment order remains unaware of the fact that the relevant items are subject to a hire or hire-purchase agreement and makes an order relating to them. So far as it relates to such items, such an order will be of no effect[95].

Recommendation

3.144. *We accordingly recommend* that the court should not have power to make an order under the scheme proposed in this Book in respect of household goods, caravans or houseboats, which are the subject of a hiring, hire-purchase or conditional sale agreement.

[95] This proposition is subject to one qualification. The spouse against whom such an order is made will be bound to comply with it as if it were a valid order until it is set aside by a competent court: see *In re F(Infants)* (Adoption Order: Validity) [1977] Fam. 165.

The High Court and the county court

3.145. In the working paper we proposed that jurisdiction to make orders concerning the use and enjoyment of the household goods should be exercised by the county court which, we pointed out, already has power to deal with applications under section 1 of the Matrimonial Homes Act 1967 and under section 17 of the Married Women's Property Act 1882[96]. Similarly, jurisdiction is conferred on the county court by the Domestic Violence and Matrimonial Proceedings Act 1976 to hear applications under section 4 of that Act[97]. It is clear that applications under the scheme we have recommended in this Book for protecting a spouse's use and enjoyment of the household goods would be cognate with applications under the 1882 Act and with those under the 1967 and 1976 Acts. On reconsideration we have accordingly formed the view that the same courts as have jurisdiction under those Acts should also have jurisdiction in applications under the scheme we recommend; and, as the High Court has concurrent jurisdiction with a county court in applications under those Acts[98], we consider that it should accordingly have concurrent jurisdiction under our proposed scheme.

Recommendation

3.146. *We accordingly recommend* that the Family Division of the High Court and a county court should have jurisdiction under the proposed scheme in terms similar to their existing jurisdiction in respect of applications under section 17 of the Married Women's Property Act 1882, under section 1 of the Matrimonial Homes Act 1967 and under section 4 of the Domestic Violence and Matrimonial Proceedings Act 1976.

Limits of county court jurisdiction

3.147. Under the Matrimonial Homes Act 1967[99] and the Domestic Violence and Matrimonial Proceedings Act 1976[100], the county court is given jurisdiction concurrently with the High Court to hear applications under those Acts in all cases, irrespective of the value of the property involved. Section 17 of the Married Women's Property Act 1882 provides that applications made under the section may be made in the county court "irrespectively of the value of the property in dispute".

3.148. Although in some cases applications under the scheme we recommend may relate to goods of considerable value, we believe that in view of the limited nature of the remedy conferred by the scheme and of general considerations of convenience, it would be right to follow the precedent of those three Acts and to impose no financial limits on the jurisdiction of the county court to make use and enjoyment orders.

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[96] Para. 2.40.
[97] Domestic Violence and Matrimonial Proceedings Act 1976, s. 4(2).
[98] Where matrimonial proceedings pending in the principal registry of the Family Division are treated as pending in a divorce county court, an application under section 17 of the 1882 Act by a spouse may be made to that registry as it it were a county court: Matrimonial Causes Rules 1977, rule 106(1).
[99] s. 1(6), as amended by the Domestic Violence and Matrimonial Proceedings Act 1976, s. 3(*b*).
[100] s. 4(2).

Recommendation

3.149. *We recommend* that the county court should have jurisdiction under the proposed scheme irrespective of the value of the goods in question or of the compensation awarded.

The county court in which proceedings may be commenced

3.150. The general rule as to the county court in which proceedings may be commenced by way of originating application is that an application may be commenced in the court for the district in which the respondent or one of the respondents resides or carries on business or the subject matter of the application is situated[101]. We consider that those courts are appropriate for commencing proceedings under the proposed scheme. However, there may be occasions when it would be convenient for another county court to have jurisdiction under the scheme.

3.151. We have borne in mind that section 17 of the Married Women's Property Act 1882 provides that proceedings may be commenced in the court of the district in which either the applicant or the respondent spouse resides, and it may be convenient for proceedings under the scheme to be joined with an application under that section. Again, there may be occasions when applications under the scheme could conveniently be joined with matrimonial proceedings, which may be commenced in any divorce county court[102]. We think that the designation of the county court in which proceedings under the scheme may be commenced should be left to be dealt with by rules of court. This accords with the general scheme of the County Courts Act 1959; it has the merit of flexibility; and it will allow provision to be made for the special cases mentioned earlier in this paragraph.

Recommendation

3.152. *We accordingly recommend* that the rules of court made pursuant to the power in section 102 of the County Courts Act 1959, specifying the county court in which proceedings under the scheme may be commenced, should include provisions enabling proceedings under the scheme to be commenced in the same courts as those in which matrimonial proceedings or proceedings under section 17 of the Married Women's Property Act 1882 may be initiated.

Transfer of proceedings: applications under section 17 of the Married Women's Property Act 1882

3.153. The High Court has a general statutory power to remove to itself any proceedings commenced in a county court[103]. In addition, there are the following provisions for removal or transfer which relate specifically to proceedings under section 17 of the Married Women's Property Act 1882.

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[101] County Court Rules, Order 2, rule 13. The power to make county court rules is contained in the County Courts Act 1959, s. 102 (as amended).

[102] Matrimonial Causes Rules 1977, rule 12(1). A similar rule applies to an application for an order for periodical payments on the ground of wilful neglect to maintain under section 27 of the Matrimonial Causes Act 1973: *ibid.*, rule 98(2).

[103] County Courts Act 1959, s. 115(1).

(a) Transfer from a county court to the High Court

3.154. (*a*) Section 17 of the 1882 Act provides that proceedings under that section which are pending in a county court may at the option of the defendant be removed as of right into the High Court in cases in which, by reason of the value of the property in dispute, the county court would not have had jurisdiction if that Act had not been passed.

(*b*) The Matrimonial Causes Rules 1977 empower a county court to order the transfer of proceedings to the High Court where the transfer appears to be desirable, the court being directed, in considering an application for transfer, to have regard to all the relevant considerations, including the nature and value of the property involved[104]. The court may order a transfer either of its own motion or on the application of a party[105].

(b) Transfer from the High Court to a divorce county court

3.155. The Matrimonial Causes Rules 1977 also provide along similar lines to those referred to in the preceding paragraph for an application pending in the High Court to be transferred by that court to a divorce county court[106].

Recommendation

3.156. *We recommend* that the Matrimonial Causes Rules 1977 should contain provisions similar to those referred to in paragraphs 3.154(*b*) and 3.155 above for the transfer of applications for orders under the scheme proposed in this Book; and, accordingly, *we further recommend* that the power under section 45(1) of the Courts Act 1971 to make rules as to the transfer of proceedings should be extended to enable such rules to be made.

The relation of applications under section 17 of the 1882 Act and those under the recommended scheme

3.157. We have said earlier that section 17 of the 1882 Act does not provide a remedy of a kind that meets the requirements with which we are concerned in this Book[107]. There may be occasions on which it will be convenient for an application for an order under the scheme to be heard together with an application under section 17. Nothing in our proposals would prevent this and it would be for the court to determine whether it is convenient in a particular case to deal with both applications together[108].

The relation of applications under the Matrimonial Homes Act 1967 (as amended and supplemented) and those under the recommended scheme

3.158. Similarly, a spouse who needs protection in regard to the use and enjoyment of the household goods will in many cases require also to invoke the powers of the court under the Matrimonial Homes Act 1967 or the Domestic Violence and Matrimonial Proceedings Act 1976[109]. The court will be able

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[104] Matrimonial Causes Rules 1977, rule 105(1) and (2).
[105] *Ibid.*, rule 105(3). In addition those rules empower the High Court in like circumstances to order the removal of the proceedings to itself: rule 128(4).
[106] Matrimonial Causes Rules 1977, rule 105(1), (2) and (3).
[107] See para. 3.15 above.
[108] In relation to applications in a county court, see also paras. 3.151–3.152.
[109] See paras. 3.16–3.18 above.

to hear an application under the recommended scheme at the same time as an application under either of those Acts.

Magistrates' courts

3.159. We observed in the working paper[110] that it would be ideal if applications for the use of the household goods could be dealt with by the court hearing applications for maintenance, since the use of the household goods is part of maintenance. However, our provisional conclusion was that "until such time as a fully integrated system of family courts is introduced, we think it will prove more convenient and less expensive for the jurisdiction to be exercised by the county court, which already has power to deal with applications under the Matrimonial Homes Act 1967 and under section 17 of the Married Women's Property Act 1882".

3.160. In arriving at our recommendations in this Book we have reconsidered whether a case can be made out for conferring jurisdiction on magistrates' courts to make orders under our proposed scheme. If magistrates' courts had such jurisdiction, they might in some cases have to adjudicate on questions affecting property rights, and we are reluctant to make a recommendation which would have that effect. Moreover, we have had regard to the fact that magistrates already have a heavy burden of work, and we do not wish to add to that burden unless it is essential that jurisdiction be conferred on them for the satisfactory operation of the scheme. We were told on consultation that quarrels between couples as to their possessions were rare. Many applications are made to magistrates' courts for maintenance orders and it would be unfortunate if applications for use and enjoyment orders regarding household goods were joined to maintenance applications as a matter of course, although not really necessary for the protection of a spouse's use and enjoyment of those goods. We have therefore come to the conclusion that we should make no recommendation to confer jurisdiction on magistrates' courts to deal with applications under the scheme.

[110] Para. 2.40.

PART VIII SUMMARY OF RECOMMENDATIONS

3.161. The following is a summary of our recommendations. References to paragraphs are to paragraphs of this Book, and references to clauses are to the clauses of our draft Matrimonial Goods Bill. To the extent that our recommendations are not directly implemented by the draft Bill we would envisage that they would be given effect by rules of court.

The scheme to protect the use and enjoyment of household goods

(1) At any time during the subsistence of a marriage a spouse may apply for an order concerning the use and enjoyment of any household goods (other than goods in which a third party has a beneficial interest) which are then owned by either or both spouses and are in the possession or control of either of them. However, the court should not have power to make an order after a decree of divorce or nullity, or while a decree of judicial separation is in force (para. 3.45 and see Clause 1(1) and 3(5)).

(2) The court should have a wide discretion to grant or withhold an order and in exercising that discretion should be required by a statutory guideline to have regard to all the circumstances of the case, and in particular to the extent to which the goods in question are needed by the applicant to meet the ordinary requirements of his or her daily life, including any requirements arising from any family responsibilities of the applicant (para. 3.42 and see Clause 1(4)).

(3) The court should have no power to make an order concerning goods in which a third party has a proprietary interest, whether that interest is held exclusively, or jointly with one or both spouses (para. 3.58 and see Clause 11(2)).

(4) The reference to proprietary interests in paragraph (3) above is to beneficial interests (para. 3.59).

(5) An order under the scheme should not affect the subsequent acquisition by a third party of proprietary rights in the goods (para. 3.61 and see Clause 11(2)).

(6) The court should have power to make the following orders:—

(i) an order that one spouse should be entitled to the use and enjoyment of such household goods in the possession or control of either party as may be specified in the order; and, in connection with any such order,

(ii) an order that

a) in so far as the order relates to goods already in the possession or control of the spouse in whose favour an order is made ("the applicant"), the other spouse ("the respondent") shall not remove such goods and

b) in so far as the order relates to items not in the possession or control of the applicant, the respondent shall deliver them to the applicant, and, in either case,

c) that the respondent shall not sell or otherwise dispose of any goods comprised in the order (para. 3.35 and see Clause 1(1) 1(3) and 3(1)).

(7) The court should be empowered to make a use and enjoyment order subject to such exceptions and conditions as may be specified in the order and to include in the order such incidental, supplementary and consequential provisions as may seem necessary (para. 3.36 and see Clause 3(3)).

(8) The court should be empowered to make orders "until further order", or for such period as it thinks right (para. 3.47 and see Clause 3(4)).

(9) A use and enjoyment order made under the scheme should automatically come to an end on the death of either spouse, or on termination of the marriage by a decree of divorce or nullity or on a decree of judicial separation (paras. 3.48–3.50 and see Clause 3(4)).

(10) The court should have power to vary or discharge its orders (para. 3.52 and see Clause 3(6)).

(11) Where a spouse disobeys a use and enjoyment order the court should be empowered, in addition to the penalties which it can impose for disobedience of its orders under the existing law, to order the defaulting spouse to make a lump sum payment to the other spouse by way of compensation. A similar power should be available against a third party who has knowingly accepted a disposition of goods in breach of a use and enjoyment order (para. 3.66 and see Clause 4(3) and 4(4)).

(12) A disposal of goods by a respondent spouse without the written consent of the applicant or the leave of the court between the date of the service upon him of an application for a use and enjoyment order and of the hearing of the application should be prohibited, and such a disposal should be treated as disobedience of an order of the court (para. 3.68 and see Clause 7(1)).

(13) The court should have power to award a lump sum by way of compensation (additional to its powers to impose a penalty for disobedience) to be paid by the respondent spouse to the other, where the respondent spouse has disposed of any of the household goods in breach of the prohibition referred to in sub-paragraph (12) above and the court considers that, if the respondent had not disposed of the goods, it would have made a use and enjoyment order in respect of those goods. A similar power to award compensation should be available against a third party who has knowingly accepted a disposition in breach of such prohibition (para. 3.71 and see Clause 4(1) and 4(2)).

(14) A spouse should be entitled to apply only for compensation in respect of goods which have been disposed of by the respondent spouse without the consent of the applicant spouse within the period of three months immediately preceding the making of the application. The court should have power to award compensation where it considers that, if the respondent had not disposed of the goods, it would have made a use and enjoyment order in respect of those goods (para. 3.74 and see Clause 5(1) and 5(2)).

(15) The court should be empowered to treat an application for a use and enjoyment order as an application for compensation (paras. 3.75–3.76 and see Clause 5(3)).

(16) Any lump sum paid by the respondent spouse or a third party by way of compensation and any property acquired with it should belong beneficially to the applicant (para. 3.78 and see Clause 6(3)).

(17) In deciding whether to award a lump sum by way of compensation under sub-paragraphs (13), (14) and (15) above, and, if so, the amount of such lump sum which it would be fair and reasonable to order, the court should have regard to all the circumstances of the case. In determining the amount of any compensation, the court may take into account any expenditure incurred or to be incurred by the applicant including any expenditure in providing a substitute or replacement for the goods (para. 3.83 and see Clause 6(1) and 6(2)).

(18) Rules of court should provide that, where an application for a use and enjoyment order has been made, the court should have power to make an interim order for the use and enjoyment by the applicant of any of the goods specified in the application. The power to make an interim order should be exercisable *ex parte* if the court thinks fit. The legislation giving effect to our scheme should expressly authorise the making of rules of court such as we propose (para. 3.85 and see Clause 9(1) and 9(2)).

(19) The scheme should apply to all marriages which are regarded as valid marriages in English law, including voidable marriages which have not been annulled, but should not apply to marriages which are void from the beginning (paras. 3.87–3.88 and see Clause 11(3)).

(20) The scheme should apply to all potentially and actually polygamous marriages which are recognised as valid in English law (paras. 3.90 and 3.99 and see Clause 10).

Definition

(21) The definition of household goods should be formulated as follows:—

"Household goods" means any goods, including a vehicle, which are or were available for use or enjoyment in or in connection with any home which the spouses are occupying or have at any time during their marriage occupied as their matrimonial home (para. 3.104 and see Clause 11(1)).

Caravans and houseboats

(22) Our scheme should extend to any caravan other than a caravan which is part of the realty. The scheme should be applied specifically to all such caravans and such caravans should be expressly excluded from the definition of household goods. The guideline to which the court should have regard should be simply the needs of the applicant (including needs arising from the applicant's family responsibilities) and all the other circumstances of the case (para. 3.132 and see Clause 2).

(23) Our scheme should extend to any houseboats. The scheme should be applied specifically to all houseboats and houseboats should be expressly excluded from the definition of household goods. The guideline to which the court should have regard should be simply the needs of the applicant (including needs arising from the applicant's family responsibilities) and all the other circumstances of the case (para. 3.134 and see Clause 2).

Goods on hire, hire-purchase or conditional sale

(24) The court should not have power to make an order under the scheme proposed in this Book in respect of household goods, caravans or houseboats which are the subject of a hiring, hire-purchase or conditional sale agreement (para. 3.144 and see Clause 11(2)).

Jurisdiction and procedure

(25) The Family Division of the High Court, and a county court, should have jurisdiction under the proposed scheme in terms similar to their existing jurisdiction in respect of applications under section 17 of the Married Women's Property Act 1882, under section 1 of the Matrimonial Homes Act 1967 and under section 4 of the Domestic Violence and Matrimonial Proceedings Act 1976 (para. 3.146 and see Clause 8(1)).

(26) The county court should have jurisdiction under the proposed scheme irrespective of the value of the goods in question or of the compensation awarded (para. 3.149 and see Clause 8(2)).

(27) The rules of court made pursuant to the power in section 102 of the County Courts Act 1959, specifying the county court in which proceedings under the scheme may be commenced, should include provisions enabling proceedings under the scheme to be commenced in the same courts as those in which matrimonial proceedings or proceedings under section 17 of the Married Women's Property Act 1882 may be initiated (para. 3.152).

(28) The Matrimonial Causes Rules 1977 should contain provisions for the transfer of applications for orders under the scheme proposed in this Book from the High Court to a divorce county court and from a county court to the High Court. Accordingly, the power under section 45(1) of the Courts Act 1971 to make rules as to the transfer of proceedings should be extended to enable such rules to be made (para. 3.156 and see Clause 8(3)).

(*Signed*) SAMUEL COOKE, *Chairman*
STEPHEN EDELL
W. A. B. FORBES
NORMAN S. MARSH
PETER M. NORTH

J. M. CARTWRIGHT SHARP, *Secretary*

23 *February* 1978.

Matrimonial Goods Bill

ARRANGEMENT OF CLAUSES

Clause

EXPLANATORY NOTES

The Bill generally

1. The objective of the Bill, as explained in paragraph 3.31 of Book III, is to afford a husband and wife protection in the use and enjoyment of the household goods: the Bill provides for a procedural remedy enabling the aggrieved spouse, when the need arises, to apply to the court for an order conferring a right of user.

2. The Bill also contains provisions under which the court may, as explained in paragraphs 3.64–3.83, grant additional relief by awarding money compensation.

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A.D. 1978. Enable the court to make orders for the use and enjoyment by one party to a marriage of goods used as or in connection with a matrimonial home and for the payment of a sum of money by one party to a marriage to the other in respect of the loss of the use and enjoyment of such goods; and for purposes connected therewith.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Orders for use and enjoyment of household goods.

1.—(1) Either party to a marriage may at any time during the marriage apply to the court for an order under this section in respect of such household goods as the applicant may specify in the application, being goods which are on the date of the making of the application in the possession or control of either the applicant or the other party to the marriage (in this Act referred to as "the respondent") and are on that date owned by the applicant or the respondent or by both.

(2) After the service on the respondent of an application under subsection (1) above in respect of any goods, the respondent shall not while the application is pending sell or otherwise dispose of any goods specified in the application unless the consent in writing of the applicant or the leave of the court has been obtained.

(3) Where an application is made under subsection (1) above in respect of any household goods, the court may order that, as between the applicant and the respondent, the applicant shall be entitled to the use and enjoyment of the goods to which the application relates or to such of those goods as the court may specify.

(4) In determining whether to exercise its powers under subsection (3) above in respect of any goods, the court shall have regard to the extent to which the goods are needed by the applicant for the purpose of the ordinary requirements of his daily life (including any requirements arising from the family responsibilities of the applicant) and to all the other circumstances of the case.

EXPLANATORY NOTES

Clause 1(1)

1. This subsection implements the recommendation in paragraph 3.161(1) that at any time during the subsistence of a marriage either spouse may apply for an order concerning the use and enjoyment of the household goods (for the definition of which see clause 11 and Note 2 thereon). Clause 3(5) below deals with the qualification to the recommendation in paragraph 3.102(a) that an application for a use and enjoyment order shall not be made where a decree of judicial separation is in force.

2. The subsection also implements the recommendation in paragraph 3.161(6) that the court's power to make a use and enjoyment order is related to household goods which are in the possession or control of either party at the date when the application is made, and which are owned by either party at that date: for what is meant by "owned" see clause 11(2).

Clause 1(2)

3. This subsection implements the recommendation in paragraph 3.161(12), the reason for which is explained in paragraph 3.68.

Clause 1(3)

4. This subsection implements the recommendation in paragraph 3.161(6)(i). The use of the words "the court may order" reflects the recommendation in paragraph 3.161(2) by giving the court a wide discretionary power to grant or withhold an order.

5. By the use of the words "as between the applicant and the respondent" the subsection implements the recommendation in paragraph 3.161(5) that the order shall not affect the subsequent acquisition of proprietary rights in the goods by a third party. (But such a third party might render himself liable to pay compensation to the applicant by virtue of the provisions in clause 4 below.)

Clause 1(4)

6. This subsection specifically provides for the guideline for the exercise of the court's discretion: it thus implements the details of the recommendation in paragraph 3.161(2).

Orders for use and enjoyment of caravans and house-boats.

2.—(1) Either party to a marriage may at any time during the marriage apply to the court for an order under this section in respect of a caravan or houseboat which is on the date of the application in the possession or control of either the applicant or the respondent and is on that date owned by the applicant or the respondent or by both.

(2) After the service on the respondent of an application under subsection (1) above in respect of any caravan or houseboat, the respondent shall not while the application is pending sell or otherwise dispose of that caravan or houseboat unless the consent in writing of the applicant or the leave of the court has been obtained.

(3) Where an application is made under subsection (1) above in respect of any caravan or houseboat, the court may order that, as between the applicant and the respondent, the applicant shall be entitled to the use and enjoyment of that caravan or, as the case may be, that houseboat.

(4) In determining whether to exercise its power under subsection (3) above, the court shall have regard to the needs of the applicant (including any needs arising from the family responsibilities of the applicant) and to all the other circumstances of the case.

Clause 2

1. This clause extends to caravans and houseboats the scheme under clause 1, whereby the court is empowered to make use and enjoyment orders in respect of household goods. The terms "caravan" and "houseboat" are defined in clause 11(1) below.

Clause 2(1), (2) and (3)

2. These subsections implement the recommendations in paragraphs 3.132 and 3.134. They correspond to the provisions of clause 1(1), (2) and (3) above which apply to items falling within the definition of household goods.

Clause 2(4)

3. This subsection sets out the guideline to which the court shall have regard in determining whether to make a use and enjoyment order in respect of a caravan or houseboat. It implements the recommendations in paragraphs 3.132 and 3.134 and differs from the guideline set out in clause 1(4) above (which relates to household goods) for the reasons stated in paragraph 3.131.

Supplementary provisions as to orders under ss. 1 and 2.

3.—(1) Where the court makes an order under section 1 or 2 of this Act, the order may provide that the respondent shall not sell or otherwise dispose of any goods to which the order relates and—

(*a*) in so far as the order relates to goods which are in the possession or control of the applicant, the order may provide that the respondent shall not remove those goods from the possession or control of the applicant, and

(*b*) in so far as the order relates to goods which are in the possession or control of the respondent, the order may provide that the respondent shall deliver those goods to the applicant and shall not thereafter remove them from the possession or control of the applicant.

(2) The court shall not make an order under section 1 or 2 of this Act in respect of any goods unless on the date of the order the goods are in the possession or control of either the applicant or the respondent and are on that date owned by the applicant or the respondent or by both.

(3) An order under section 1 or 2 of this Act may be made subject to such exceptions or conditions as may be specified in the order and may contain such incidental, supplementary and consequential provisions as the court may consider necessary or expedient.

(4) An order under section 1 or 2 of this Act may be limited so as to have effect for a period specified in the order or until further order, but any such order shall cease to have effect—

(*a*) on the death of either party to the marriage in question, or

(*b*) on the grant of a decree of divorce, nullity of marriage or judicial separation in respect of that marriage.

(5) The court shall not make an order under section 1 or 2 of this Act in respect of any goods—

(*a*) if the marriage in question has been dissolved or annulled by a decree of divorce or of nullity of marriage, or

(*b*) if a decree of judicial separation is in force in relation to that marriage.

(6) Where the court makes an order under section 1 or 2 of this Act in respect of any goods, the court shall have power to vary or discharge that order in relation to those goods.

EXPLANATORY NOTES

Clause 3

1. This clause confers additional powers on the court when making orders for the use and enjoyment of household goods, caravans or houseboats under clauses 1 and 2 above.

Clause 3(1)

2. This subsection implements the recommendation in paragraph 3.161(6)(ii).

Clause 3(2)

3. This subsection makes clear that the goods must be in the possession or control of either the applicant or the respondent and also owned by one or both of them at the date the order is made (as well as the date on which the application is made: see clauses 1(1) and 2(1) above). If the goods have been disposed of before the hearing of the application, a claim for compensation would be the appropriate remedy: see clauses 4 and 5 below.

Clause 3(3)

4. This subsection implements the recommendation in paragraph 3.161(7).

Clause 3(4)

5. This subsection implements the recommendations in paragraphs 3.161(8) and 3.161(9).

Clause 3(5)

6. This subsection reflects the recommendation in paragraph 3.161(1) by specifically providing that no use and enjoyment order shall be made while a decree of judicial separation is in force in relation to the marriage of the spouses concerned. It also makes clear that no such order shall be made after the marriage has been terminated by a decree of divorce or nullity.

Clause 3(6)

7. This subsection implements the recommendation in paragraph 3.161(10).

Compensation in respect of goods disposed of in contravention of Act.

4.—(1) Where any goods in respect of which an application is made under section 1 or 2 of this Act are sold or otherwise disposed of by the respondent in contravention of the provisions of section 1(2) or 2(2) of this Act, then, if on hearing that application the court is of the opinion that but for that sale or other disposition it would have made an order under section 1 or 2 of this Act in respect of those goods, the court may order the respondent to pay to the applicant in respect of the loss of the use and enjoyment of the goods such lump sum as the court thinks fair and reasonable.

(2) Where any goods in respect of which the court has power to make an order under subsection (1) above are sold or otherwise disposed of by the respondent to some other person who knows that they are being sold or disposed of in contravention of the provisions of section 1(2) or 2(2) of this Act, the court, on an application made by the person who applied for an order under the said section 1 or, as the case may be, the said section 2, may order that other person to pay to the applicant in respect of the loss of the use and enjoyment of those goods such lump sum as the court thinks fair and reasonable.

(3) Where an order is made under section 1 or 2 of this Act in respect of any goods then, if the person who was the respondent to the proceedings in which the order was made contravenes the provisions of that order, the court, on an application made by the person who was the applicant in those proceedings, may order the respondent to pay to the applicant in respect of any loss of the use and enjoyment of those goods suffered by the applicant by reason of that contravention such lump sum as the court thinks fair and reasonable.

(4) Where the respondent to proceedings in which an order is made under section 1 or 2 of this Act sells or otherwise disposes of any goods to any other person in contravention of the provisions of that order and that other person knows that the goods are being sold or disposed of in contravention of those provisions, the court, on an application made by the person who was the applicant in those proceedings, may order that other person to pay to the applicant in respect of the loss of the use and enjoyment of those goods such lump sum as the court thinks fair and reasonable.

Clause 4

1. The report recommends conferring on the court a discretionary power to award money compensation to a spouse seeking protection under the scheme. Compensation may be awarded in the following situations:—

(*a*) in respect of the sale or other disposal of household goods, caravans or houseboats by the respondent between the date of service of an application in respect of such items and the hearing of the application;

(*b*) in respect of the contravention by the respondent of the provisions of an order;

(*c*) in respect of the sale or other disposal of items before the date of service of the application. (This is dealt with separately in clause 5 below.)

2. Clause 4 gives effect to the recommendation as to the award of compensation referred to in paragraphs 1(a) and 1(b) above.

Clause 4(1) and (2)

3. These two subsections implement the recommendation in paragraph 3.161(13) the reasons for which are discussed in paragraphs 3.68-3.71. Subsection (1) confers on the court a discretionary power in the circumstances specified to order the respondent spouse to pay a lump sum by way of compensation in cases where the respondent has not complied with the prohibition in clauses 1(2) or 2(2) against disposing of any goods comprised in the application. Subsection (2) extends this power to the case of third parties who knowingly receive goods in breach of that prohibition.

4. The powers are additional to any other remedy available for breach of the prohibition in clauses 1(2) or 2(2), which, by virtue of clause 7(1), is treated as a contravention of a court order.

Clause 4(3) and (4)

5. These two subsections implement the recommendation in paragraph 3.161(11) as to the discretionary award of compensation against a respondent spouse who is in breach of an order, and against a third party who, knowing of the order, takes a disposition of the goods from such a spouse. The reasons for conferring this power on the court are in paragraphs 3.64-3.66.

6. As in the case of disposals made after service of an application for an order but before the hearing (see Note 4 above), the power to award compensation is additional to any other remedy available for breach of an order.

7. Whereas clause 4(1) and (2) relate only to a "sale or other disposition", subsection (3) extends not only to disposals in breach of a provision in an order but also to the breach of any other provision in an order e.g. one ordering the respondent to deliver goods to the applicant. The definition in clause 11(1) makes clear that the term "contravention" extends to a failure to comply with any provision in an order.

Compensation in respect of certain goods disposed of otherwise than in contravention of Act.

5.—(1) Where one party to a marriage at any time during the marriage sells or otherwise disposes of any household goods without the consent of the other party, not being goods in respect of which an application for an order under section 1 of this Act made by that other party is pending or in respect of which an order made under that section is in force, that other party may, within the period of three months from the date of the sale or other disposal of the goods, apply to the court for an order under subsection (2) below in respect of the loss of the use and enjoyment of such of those goods as may be specified in the application.

(2) Where on an application under subsection (1) above the court is of the opinion, as respects any household goods specified in the application, that if the goods had not been sold or otherwise disposed of and the applicant had applied for an order under section 1 of this Act in respect of the goods it would have made an order under that section in favour of the applicant, the court may order the respondent to pay to the applicant in respect of the loss of the use and enjoyment of those goods such lump sum as the court thinks fair and reasonable.

(3) Where on an application for an order under section 1 of this Act it appears to the court that any household goods specified in the application have without the consent of the applicant been sold or otherwise disposed of by the respondent—

(*a*) within the period of three months immediately before the date of the application, or

(*b*) on or after the date of the application but before the service of the application on the respondent,

then, if the court is of the opinion that but for that sale or other disposition it would have made an order under that section in respect of those goods, the court may order the respondent to pay to the applicant in respect of the loss of the use and enjoyment of those goods such lump sum as the court thinks fair and reasonable.

(4) Subsections (1) to (3) above shall apply in relation to a caravan or houseboat as they apply in relation to household goods, but with the modification that for any reference to section 1 of this Act there shall be substituted a reference to section 2 of this Act.

EXPLANATORY NOTES

Clause 5

1. This clause confers the recommended discretionary power upon the court to award compensation against a respondent spouse where he has disposed of items within three months before an application is made, or after an application has been made but before it has been served.

Clause 5(1) and (2)

2. These subsections give effect to the recommendation in paragraph 3.161(14), the reasons for which are set out in paragraphs 3.72-3.74.

3. Subsection (1) makes clear that an award of compensation under clause 5 does not extend to disposals of two classes of goods, namely:—

(*a*) goods in respect of which a use and enjoyment order is in force pursuant to clause 1;

(*b*) goods in respect of which there is a pending application by one spouse for a use and enjoyment order.

These two cases are covered by clause 4.

Clause 5(3)

4. This subsection implements the recommendation in paragraph 3.161(15). The recommendation was made in order to deal with a procedural difficulty which might arise in certain cases. The need for this provision is explained in paragraphs 3.75-3.76.

Clause 5(4)

5. This subsection states that the provisions of this clause shall apply in relation to caravans and houseboats as well as to household goods.

Provisions supplementary to ss. 4 and 5.

6.—(1) In determining whether to exercise its powers under section 4 or 5 of this Act and, if so, in determining the amount of the lump sum which it would be fair and reasonable to order to be paid in respect of the loss of the use and enjoyment of any goods, the court shall have regard to all the circumstances of the case.

(2) Without prejudice to the generality of subsection (1) above, the court in making any such determination as is mentioned in that subsection in respect of the loss of the use and enjoyment of any goods may, if it thinks it appropriate to do so, have regard to any expenditure incurred or to be incurred by the applicant by reason of that loss, including expenditure incurred or to be incurred in providing a substitute or replacement for those goods.

(3) Any lump sum paid to a party to a marriage by virtue of section 4 or 5 of this Act shall belong to that person absolutely and may be used by him in any way he thinks fit.

Clause 6

1. This clause contains provisions relating to the payment of compensation under clauses 4 and 5 above.

Clause 6(1) and 6(2)

2. These two subsections set out the guideline to which the court is to have regard in determining whether to award compensation under clauses 4 and 5 above, and, if so, how much compensation to award. They give effect to the recommendation in paragraph 3.161(17).

Clause 6(3)

3. This provision has been included to give effect to the proposal in paragraph 3.78 and formally recommended in paragraph 3.161(16).

Enforcement.

7.—(1) Any person who, pending the hearing of an application for an order under section 1 or 2 of this Act, contravenes the provisions of section 1(2) or 2(2) of this Act shall, for the purposes of the enforcement of those provisions, be treated as if he had contravened a provision of an order made by the court by which that application is to be heard.

(2) The provisions of section 4 of this Act shall not prejudice any other remedy which may be available in respect of the contravention of the provisions of an order made under section 1 or 2 of this Act or which may, by virtue of subsection (1) above, be available in respect of the contravention of the provisions of section 1(2) or 2(2) of this Act.

Clause 7

1. Subsection (1) makes clear that a breach of the provision in clauses 1(2) and 2(2) (which prohibits the respondent from disposing of the goods after service of the application) shall be enforceable in the same manner as the breach of a substantive court order conferring a right to use the goods.

2. Subsection (2) makes clear that, as recommended in paragraph 3.161(12) and explained in paragraph 3.62, a use and enjoyment order may be enforced by the ordinary proceedings for civil contempt. It follows from subsection (1) that breach of the provision in clause 1(2) or 2(2) may also be treated as civil contempt. Enforcement of the order or of the provision in clause 1(2) or 2(2) in this manner is not prejudiced by the power conferred on the court by clause 4 to award compensation.

Courts having jurisdiction under Act.

8.—(1) The jurisdiction conferred on the court to hear and determine an application for an order under this Act shall be exercisable by the High Court or by a county court.

(2) A county court shall not be precluded from hearing and determining any application made in respect of any goods under this Act by reason of the value of the goods to which the application relates or the amount claimed in respect of the loss of the use and enjoyment of those goods.

1971 c. 23.

(3) In subsection (1) of section 45 of the Courts Act 1971 (which relates to the transfer of proceedings between the High Court and a county court) after paragraph (*c*) there shall be inserted the following paragraph—

"(*d*) the Matrimonial Goods Act 1978",

and in subsection (5) of that section for the words "and (*c*)" there shall be substituted the words "(*c*) and (*d*)".

1973 c. 18.

(4) In subsection (1) of section 50 of the Matrimonial Causes Act 1973 (which relates to matrimonial causes rules) in paragraph (*c*)(i) for the words "not being" there shall be substituted the words "or under the Matrimonial Goods Act 1978 not being, in either case,".

Clause 8

1. This clause provides for the courts which are to have jurisdiction under the Bill. As is explained in paragraphs 3.159-3.160, no jurisdiction is conferred upon magistrates' courts.

Clause 8(1)

2. This subsection implements the recommendations in paragraph 3.146 that both the High Court and a county court should have jurisdiction under the Bill. The venue of the county court will, as recommended in paragraph 3.152, be provided by rules of court.

Clause 8(2)

3. This subsection implements the recommendation in paragraph 3.149 that the county court should, for the reasons explained in paragraphs 3.147-3.148, have jurisdiction irrespective of the value of the goods in question or of the amount claimed by way of compensation.

Clause 8(3)

4. Section 45 of the Courts Act 1971 applies to, amongst other proceedings, those brought under section 17 of the Married Women's Property Act 1882 and confers power for rules of court to provide for the transfer of such proceedings from a county court to the High Court or from the High Court to a divorce county court.

5. The amendments to section 45 contained in this subsection have been made in order to implement the recommendation in paragraph 3.156 as to the transfer of proceedings under this Bill.

Clause 8(4)

6. Section 50(1)(*c*) of the Matrimonial Causes Act 1973 confers power on the authority specified in that section to make rules of court, concerning, among other matters, proceedings in the High Court under section 17 of the Married Women's Property Act 1882, with the express exception of certain proceedings pending in the divorce registry.

7. The purpose of the amendment in this subsection is to extend the power to make rules of court in section 50(1)(c) of the 1973 Act to this Bill, so that in this regard this Bill is in the same position as section 17 of the 1882 Act.

Interim orders.
1925 c. 49.
1959 c. 22.

9.—(1) The power to make rules of court under section 99 of the Judicature Act 1925 and the power to make county court rules under section 102 of the County Court Act 1959 shall each include power by any such rules to make provision for enabling the court in which an application for an order under section 1 or 2 of this Act is pending, in such circumstances as may be specified in the rules, to make an interim order containing any provision which the court would have power to include in an order made under the said section 1 or, as the case may be, the said section 2 on that application.

(2) Any rules made by virtue of this section may provide for the making of an interim order before the application for an order under section 1 or 2 of this Act or the application for the interim order has been served on the respondent and may include such incidental, supplementary and consequential provisions as the authority making the rules may consider necessary or expedient.

Clause 9(1) and 9(2)

1. These two subsections implement the recommendation in paragraph 3.161(18). They provide that rules of court shall be made empowering the court to make an interim order when an application has been made under clause 1 or 2 for an order for the use and enjoyment of any household goods or a caravan or houseboat.

2. An interim order may be made *ex parte* but, as explained in paragraph 3.86, the automatic prohibition contained in clauses 1(2) and 2(2) that the respondent shall not sell or otherwise dispose of the goods comprised in the application for an order under those clauses will not come into effect on service of the application for the interim order only.

Polygamous marriages.

10. A court shall not be precluded from making an order under this Act by reason only that the marriage in question was entered into under a law which permits polygamy (whether or not either party to the marriage in question has for the time being any spouse additional to the other party).

Clause 10

This clause implements the recommendation in paragraph 3.161(20) that the scheme should apply to all potentially and actually polygamous marriages which are recognised as valid in English law.

Interpretation.

11.—(1) In this Act—

"caravan" means any structure designed or adapted for use for human habitation which is capable of being moved from one place to another (whether by being towed or by being transported on a motor vehicle or trailer) and any motor vehicle so designed or adapted, but does not include a tent;

"contravention" in relation to any provision of this Act or of any order made thereunder includes a failure to comply with the provision; and "contravene" shall be construed accordingly;

"disposal", in relation to any goods in respect of which an application is made under this Act, includes any act by which the applicant or the other party to the marriage is or may be deprived of the possession or control of the goods; and "dispose of" shall be construed accordingly;

"houseboat" means any vessel which is normally used for residential purposes and is normally kept at moorings;

"household goods", in relation to any marriage, means any goods, including a vehicle, which are or were available for use and enjoyment in or in connection with any home which the parties to the marriage have at any time during the marriage occupied as their matrimonial home, but does not include a caravan or houseboat;

"use", in relation to consumable goods, includes consumption.

(2) For the purposes of this Act goods shall be treated as owned by one or both of the parties to a marriage on any date only if on that date—

(*a*) one of the parties has, or both the parties have, a beneficial interest in the goods, and

(*b*) no other person has a beneficial interest in the goods.

(3) For the purposes of this Act any reference to a party to a marriage does not include a reference to a party to a marriage which is by law void.

(4) Any reference in this Act to an enactment is a reference to that enactment as amended by any other enactment.

Clause 11(1)

1. This subsection defines certain terms used in the Bill.

2. The definition of "household goods" implements the recommendation in paragraph 3.104. The reasons for including a "vehicle" in the definition are set out in paragraphs 3.117-3.121, which explain how the family car or other vehicle is intended to be covered by the scheme for a use and enjoyment order.

3. By defining "household goods" in relation to any "home" rather than any "dwelling house" occupied as the matrimonial home, the definition enables a use and enjoyment order to be made in respect of the goods, where the married couple made their home in any kind of dwelling, including a caravan or houseboat.

4. Caravans and houseboats are expressly excluded from the expression "household goods", and are separately defined. Applications for the use and enjoyment of these items are to be made expressly under clause 2: see the Notes to that clause.

5. The definition of "use" reflects the conclusion in paragraph 3.115 that consumables are included in the class of households goods in respect of which a use and enjoyment order may be made.

6. "Disposal" is defined so as to include, for example, a letting of a caravan by the respondent to a third party, thus depriving both the respondent and the applicant of its possession.

7. The definition of "contravention" and "contravene" relates to the use of those expressions in clauses 4 and 7 and makes clear that a breach of the court's order will be committed both by disobedience of the order and failure to comply with a provision thereof.

Clause 11(2)

8. Paragraphs (*a*) and (*b*) of this subsection make clear that, as recommended in paragraph 3.161(3), the goods in respect of which a use and enjoyment order may be made are limited to goods in which the husband or wife have a beneficial interest and in which no other person has a beneficial interest, whether that interest is held exclusively or jointly with one or both of the spouses.

9. Paragraph (*b*) also gives effect to the recommendation in paragraph 3.144 that no use and enjoyment order should be made in respect of goods which are the subject of a hiring, hire-purchase or conditional sale agreement.

Clause 11(3)

10. This subsection gives effect to the recommendation in paragraph 3.161(19) that the scheme should apply to all marriages which are regarded as valid marriages in English law, including voidable marriages which have not been annulled.

Clause 11(4)

11. This formal provision is self-explanatory.

Short title and extent.

12.—(1) This Act may be cited as the Matrimonial Goods Act 1978.

(2) This Act does not extend to Scotland or Northern Ireland.

Clause 12

This clause makes formal provision as to the short title of the Act and provides that the Act does not extend to Scotland or Northern Ireland.

GENERAL APPENDIX

List of those who assisted us with comments on the subject matter of this report.

The following made comments on those parts of Working Paper No. 42 which fall within the ambit of this report

Chancery Bar Association
General Council of the Bar
Institute of Conveyancers
Institute of Legal Executives
The Law Society
The Law Society Young Solicitors' Group
Society of Conservative Lawyers
University College Law Reform Group

Cambridge National Housewives' Register
Certified Accountants' Women's Society
Council of Married Women
The Fawcett Society
Married Women's Association
National Council for the Single Woman and her Dependants (supported by Age Concern)
National Council of Women of Great Britain
National Federation of Business and Professional Women's Clubs of Great Britain and Northern Ireland
National Federation of Clubs for the Divorced and Separated
National Joint Committee of Working Women's Organisations
National Union of Townswomen's Guilds
National Women Citizens' Association
Open Door Council
Parliamentary Sub-Committee of the Women's National Advisory Committee of the Conservative Party
Six Point Group
Soroptimist International Association
Status of Women Committee (supported by Mr. Edward Bishop M.P.)
Women's Liberation Workshop
Women's National Commission

General Synod of the Church of England: Board for Social Responsibility

Building Societies Association
Country Landowners' Association
National Association of Property Owners

Department of Inland Revenue
H.M. Land Registry
Law Officers' Department

The Rt. Hon. Lord Gardiner
The Hon. Mrs. Justice Lane
His Hon. Judge D. C. L. Potter

Master R. E. Ball, M.B.E., Chief Chancery Master
Mr. Registrar W. D. S. Caird, Principal Registry of the Family Division

The Revd. Canon G. B. Bentley and Mr. J. M. Rix, Solicitor
Messrs. Boyce Evans and Sheppard, Solicitors
Mr. D. A. R. Green, Solicitor
Mr. R. J. P. Humphrey, Tax and Estate Duty Adviser
Mrs. Dinah Hutchinson, Barrister
Mr. Q. J. Iwi, Barrister
Mr. M. H. Kraemer, Chartered Patent Agent
Miss P. J. Messer, Barrister
Mr. D. E. Morris, Solicitor
Mr. A. L. Polak, Solicitor
Mr. Jonathan Sofer, Barrister

Mr. A. Bissett-Johnson (University of Leicester)
Mr. J. A. Borkowski (University of Bristol)
Professor L. Neville Brown (University of Birmingham)
Mr. J. M. Eekelaar (Pembroke College, Oxford)
Professor W. V. Horton Rogers (University of Nottingham; now University of Leeds)
Professor Sir Otto Kahn-Freund, Q.C.
Professor A. K. R. Kiralfy (King's College, London)
Dr. G. W. Miller (London: Institute of Education)
Dr. R. E. A. Poole (University of Kent)
Mr. P. E. M. Robertshaw (Newcastle Polytechnic; now University of Leeds)
Mr. Alec Samuels (University of Southampton)
Mr. P. J. Schofield (University of Leeds)
Dr. C. H. Sherrin (University of Bristol)
Miss R. S. Trost (Trent Polytechnic; now University of Southampton)
Mr. A. Wharam (Leeds Polytechnic)

We also reiterate our thanks to the many members of the public who made comments on the working paper.

The following have assisted us, since the publication of the working paper, with their comments upon particular aspects of the subject matter of the report

Household Goods: scope:

Department of the Environment
Finance Houses Association
Hire Purchase Trade Association

Registered land and land charges:

H. M. Land Registry

Private International Law:

Mr. M. D. A. Freeman (University College London)

Polygamy:

Mr. Riadh El Droubie
Federation of Bangladesh Associations (U.K. & Europe)
Mrs. Tajunnisa Hasnain
The Standing Conference of Asian Organisations
The Standing Conference of Pakistani Organisations in U.K.
Union of Muslim Organisations of U.K. and Eire

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