

### **Chapter 23: Guidance on answering the self-test questions**

**Question 1: Ellie moved in with her girlfriend Lucy into Lucy's flat. Lucy is having difficulties paying her mortgage and asks Ellie to pay off her mortgage arrears of £7,000. Lucy says that banks discriminate against lesbians and so Ellie cannot put her name on the deeds. Lucy and Ellie live together for ten years with Ellie making more than half of the total mortgage payments. The house was bought by Lucy for £100,000 with Lucy paying £20,000 as a deposit and sells for £200,000 with Ellie contributing £30,000 to the repayments. Advise Ellie on whether she would be able to recover any of her money if she and Lucy separated.**

Ellie does not have her name on the deeds and so is not a legal owner. Ellie will have to establish that she has a beneficial entitlement. Ellie did not make a contribution to the purchase price and so there will not be a resulting trust. There may be a constructive trust and Ellie would have to show a common intention between the parties and a detrimental reliance. Common intention can probably be found in Ellie's payments and Lucy's explanation about not placing her name on the deeds as this shows that there was a discussion about Ellie having some share in the house. The detriment which Ellie must prove is the payment of £30,000, which she would (presumably) not have made without some form of common intention between the parties. Ellie would probably be able to establish a constructive trust. If Lucy did not agree to give Ellie a share in the property, Ellie would have to use the Trusts of Land and Appointment of Trustees Act 1996.

**Question 2: Martin and Luke buy a house together. Luke contributes 25% of the deposit and pays only 25% of the mortgage payments as he is in a low-paid job. A deed of trust was not executed and the property is held as joint tenants. Luke and Martin separate. Martin wishes to know if he can claim 75% of the sale proceeds of the house. Advise Martin.**

As the parties are joint tenants and hold the property jointly, the principles stated by the House of Lords in *Stack v Dowden* [2007] will apply. As there is no declaration of trust between the parties, the courts will have to apply the following principles:

- each case will turn on its own facts;
- advice or discussions at the time of transfer that cast light on parties' intentions;
- the reasons why the home was acquired in joint names;
- the purpose for which the home was acquired and the nature of the parties' relationship;
- how the purchase was financed both initially and subsequently;
- how the parties arranged their finances.

In this case, Martin will have the burden of showing that the shares of the property should differ from that of the legal ownership. Martin will have to demonstrate that he should gain more than 50% of the property.

**Question 3: Henrik meets Abri during a business trip. Henrik is a very wealthy businessman whose personal wealth runs into many millions of pounds. They meet up for drinks and have a brief relationship. Henrik thinks of their relationship as a**

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**'fling' and does not plan to see Abri again. Four months later, Abri contacts Henrik to tell him that she is pregnant with his child and that she wants him to support her and the child. Advise Henrik on the claims, if any, that Abri can make on behalf of the child and for herself.**

Henrik must be aware that S15(1), Sch 1 to the CA 1989 gives the courts the power to make orders for financial provision for children. If Henrik is the natural father of the child, the court can make a financial award for the benefit of the child and in the case of *Re P (Financial Provision)* [2003] the court stated that:

- children should not suffer just because their parents had (for whatever reason) not been married to one another;
- the child's welfare should come before that of the adults;
- no great significance should be attached to whether or not the pregnancy was planned;
- the child in question was entitled to be brought up in circumstances that bore some sort of relationship to the father's current resources and standard of living, although the court should guard against unreasonable claims;
- the child's home should be set up on the basis of a settlement of property during the child's minority.

Once the child reaches 18, any property settled on the child will revert back to Henrik.

**Question 4: Describe the proposals made by the Law Commission to reform the law on cohabitation.**

An executive summary of the Law Commission's proposals:

The Law Commission does not think that all cohabitants should be able to obtain financial relief in the event of separation. The Law Commission recommended that a remedy should only be available where:

- the couple satisfied certain eligibility requirements;
- the couple had not agreed to disapply the scheme; and
- the applicant had made qualifying contributions to the relationship giving rise to certain enduring consequences at the point of separation.

**Eligibility requirements**

The recommended scheme would apply only to cohabitants who had had a child together or who had lived together for a specified number of years (a 'minimum duration requirement'). The Report does not make a specific recommendation as to what the minimum duration requirement should be, but suggests that a period of between two and five years would be appropriate.

**Disapplying the scheme**

The Law Commission reject an 'opt-in' scheme, which couples would be required to sign up to in order to be able to claim financial remedies on separation. Consultation confirmed their view that an opt-in scheme would not deal effectively with the problems of hardship

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created by the current law. Vulnerable individuals would be no more likely to protect themselves by registering than they are currently to marry. An opt-in scheme would effectively create a new status of 'registered cohabitant'.

Instead, as a default position, the scheme should be available between all eligible cohabitants. However, we understand the strongly held view that it is wrong to force cohabitants who have not chosen to marry or form a civil partnership into a particular legal regime against their will. We agree that it is very important to respect the autonomy of couples who wish to determine for themselves the legal consequences of their personal relationships.

We therefore recommend that a new scheme should allow couples, subject to necessary protections, to disapply the statute by means of an opt-out agreement, leaving them free to make their own financial arrangements.

### **Qualifying contributions and their consequences: the basis for remedies**

It would not be sufficient for applicants simply to demonstrate that they were eligible for financial relief and that the couple had not made a valid opt-out agreement disapplying the scheme. In order to obtain a remedy, applicants would have to prove that they had made qualifying contributions to the parties' relationship which had given rise to certain enduring consequences at the point of separation.

The scheme would therefore be very different from that which applies between spouses on divorce. Simply cohabiting, for however long, would not give rise to any presumed entitlement to share in any pool of property. Nor would the scheme grant remedies simply on the basis of a party's needs following separation, whether by making orders for maintenance or otherwise.

In broad terms, the scheme would seek to ensure that the pluses and minuses of the relationship were fairly shared between the couple. The applicant would have to show that the respondent retained a benefit, or that the applicant had a continuing economic disadvantage, as a result of contributions made to the relationship. The value of any award would depend on the extent of the retained benefit or continuing economic disadvantage. The court would have discretion to grant such financial relief as might be appropriate to deal with these matters, and in doing so would be required to give first consideration to the welfare of any dependent children.

We consider that a scheme based on these principles would provide a sound basis on which to address the hardship and other economic unfairness that can arise when a cohabiting relationship ends. It would respond, more comprehensively than the current law can, to the economic impact of the contributions made by parties to their relationship, and so to needs which arise in consequence. Where there are dependent children, the scheme would enable a remedy to be provided for the benefit of the primary carer, and so better protect those children who share their primary carer's standard of living. By making adequate provision for the adult parties, the scheme would give more leeway to the court than it currently has to apply Schedule 1 to the Children Act 1989 for the benefit of the parties' children.