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University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

Succession and the Civil Partnership Bill 2009

Professor John Mee, Law Faculty, University College Cork

Introduction

The importance of the Civil Partnership Bill 2009 (the "Bill") is obvious.[1] Not only does it provide for a civil partnership scheme for same-sex couples but it also creates a "redress" scheme which will apply to cohabitants who live together outside marriage or civil partnership. Elsewhere, the current author has explained his serious reservations about the viability of the cohabitation scheme, particularly because of the fact that it makes the establishment of "financial dependency" by the claimant a prerequisite for obtaining orders against the other cohabitant on the termination of the relationship (although not, in fact, to obtaining orders for provision from the estate of the other cohabitant).[2] The present article focuses specifically on those aspects of the Bill which relate to the law of succession, addressing both the rules in relation to civil partnership and those applicable to cohabitants. It will be suggested that there are serious problems to be addressed in respect of the treatment of succession law issues in both areas of the Bill. In relation to civil partnership, the rules in relation to the legal right share of a civil partner, and in relation to his or her entitlement on intestacy, appear to involve an indefensible departure from the existing rules in relation to spouses. In relation to cohabitation, the approach in the relevant section of the Bill is incoherent, partly because it fails to distinguish between cases where a cohabitating relationship is ended by death and cases where the relationship broke down prior to death. Having identified the problems which exist in the context of civil partnership and of cohabitation, the article makes detailed suggestions as to how the relevant provisions can be improved.

Succession and Civil Partners

In many important respects, the Bill equates the rights of civil partners and spouses. As has been noted by other commentators, a notable set of exceptions relates to matters concerning the civil partners as parents.[3] Thus, there is no provision to make civil partners eligible to adopt as a couple. The reticence about the idea of civil partners as joint parents affects many areas of the legislative scheme. One illustration of this is the fact that Pt IV of the Bill creates a system of protection for civil partners against unauthorised conveyances of the family home, parallel to that created for spouses in the Family Home Protection Act 1976 (the "FHPA"). Oddly, however, the relevant provisions are all set out in full again in the Bill, with no reference at all to the FHPA in either the Bill or the explanatory memorandum—as if it were the merest of coincidences

[1] The Bill was published on June 26, 2009 and the discussion in this article refers to the Bill as initiated.
[2] See J. Mee, "A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009" (2009) 12 *Irish Journal of Family Law* (forthcoming). On a specific aspect of the Bill, see also J. Mee, "Marriage, Civil Partnership and the Prohibited Degrees of Relationship" [2009] *Irish Law Times* (forthcoming).
[3] See e.g. B. Barrington, "Civil Partnership in the United Kingdom and Ireland" in *The Civil Partnership Bill: Legal Consequences and Human Rights Implications* (ICCL Seminar Series, Volume 1, January 2009) pp.65–68.

that similar provisions exist elsewhere in the statute book.[4] The reason for not simply amending the FHPA to apply to civil partners as well as spouses appears to be the fact that the drafters of the Bill wished to extirpate all reference in the relevant provisions to "dependent children" of the relationship.[5] Interestingly, the succession provisions in relation to civil partners also contain a number of striking departures from equality which are related to children (and grandchildren) but not in a way which seems to have anything directly to do with concerns, felt by some, about the idea of same-sex couples bringing up children together.

The Legal Right Share of Civil Partners

A surviving civil partner is, like a surviving spouse, entitled to a legal right share: one-third of the estate if there are children of the deceased or one-half if there are no children.[6] However, the "legal right" given to civil partners, unlike that given to spouses, is not an absolute one. The Bill amends s.117 of the Succession Act 1965,[7] which permits a child to seek an order for provision from the estate where his or her deceased parent has failed in his or her moral duty to the child, by inserting the following subsection:

> (3A) An order under this section shall not affect the legal right of a surviving civil partner unless the court, after consideration of all the circumstances, including the testator's financial circumstances and his or her obligations to the surviving civil partner, is of the opinion that it would be unjust not to make the order.

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[4] Note that, in replicating the terms of the FHPA, the drafters of the Bill have made numerous minor changes to the wording of the relevant provisions, presumably with a view to improving the phrasing (but without tackling any of the more substantive defects in the, often shaky, drafting of the FHPA). To the cautious observer, it seems dangerous to create unnecessary divergences in the wording of the two parallel legal regimes—there is always the possibility of creating a difference in terms of how the two sets of provisions will be interpreted.

[5] A further point relates to the question of a right to reside in the shared home. A curious feature of the FHPA and of the parallel scheme in the Bill is that, unlike equivalent legislation in the UK (see Family Law Act 1996, ss.30–31; Matrimonial Homes (Scotland) (Family Protection) Act 1981, s.1) they do not actually create any "occupation rights" for a spouse or a civil partner in respect of a home which does not belong to him or her. The approach of the legislation is, instead, to render void any alienation of an interest in the home by the owning spouse. The implicit assumption is that keeping the home in the ownership of the owning spouse or civil partner will be sufficient to protect the position of the non-owning spouse or civil partner. In respect of wives, the issue of occupation rights is covered by the wife's common law right to reside in a family home belonging to her husband (see *Heavey v Heavey* (1974) 111 I.L.T.R. 1; *National Provincial Bank v Ainsworth* [1965] A.C. 1175; Shatter, *Family Law*, 3rd edn (Butterworths, 1997) pp.723–724). Historically, this right does not appear to have extended to a husband in respect of a house belonging to his wife but it is conceivable that constitutional principles of equality could lead to the extension of the common law right to all spouses (and see *Maskewycz v Maskewycz* (1973) 13 R.F.L. 210 (Ontario CA) which suggests that a husband does have such a right). The problem in the present context is that the Bill does not create any right of a civil partner to occupy a family home belonging to the other civil partner. There is a provision in s.30 of the Bill dealing with conduct "leading to the loss of any interest" in the shared home or which might "render it unsuitable for habitation as a shared home". However, the act of simply excluding one's civil partner from a home does not lead to the loss of any interest in the home nor does it render it unsuitable for habitation as a shared home. Thus, there appears to be a lacuna in the Bill as it stands, which might permit one civil partner to exclude another from the "shared home" notwithstanding the elaborate provisions in the Bill to restrict unauthorised alienations of any interest in that home.

[6] Section 78 of the Bill, inserting a new s.111A into the Succession Act 1965.

[7] See s.83 of the Bill.

The position in relation to spouses (unchanged by the Bill) is that an order under s.117 "shall not affect the legal right of a surviving spouse or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy."[8] This means that an order under s.117 in favour of a child cannot affect any entitlement of a surviving spouse if that spouse is the parent of the applicant child; on the other hand, if the surviving spouse is a step-parent of the applicant, an order in favour of the child can eat into a gift to the spouse or an entitlement under the intestacy rules in the context of a partial intestacy.[9] However, in no case can an order affect the guaranteed legal right share of the surviving spouse. Consider, then, the position of a civil partner who is, of necessity under the law both before and after the Bill, not the parent of an applicant child of the deceased. The obvious approach for the Bill to take would have been to treat the civil partner in the same way as a spouse who is not the parent of the applicant. An order in favour of the child could eat into a gift to the civil partner or an entitlement on partial intestacy but could not interfere with the minimum entitlement of one-third of the estate represented by the legal right share. The child would have been in precisely the same position as if his or her parent had remarried. Unfortunately, the Bill rejects this approach and provides that the civil partner is not guaranteed even one third of the estate. It is true that an order can only be made under this sub-section, as in relation to the jurisdiction on intestacy which is discussed in the next section, if it would be "unjust not to make the order". However, a rule that the court should make an order when it would be "unjust not to make the order" is not all that far away from the normal rule under s.117 that the court should make the order it "thinks just". As well as the symbolic impact of the legal right share not being guaranteed, and the nuisance value of possible litigation under the relevant provision, it also seems undesirable that the provision requires judges to make an assessment of the deceased's "obligations to the surviving civil partner". The essential point of a rule creating a legal right share is to obviate the need for such a difficult and value-laden inquiry by determining authoritatively, and for all cases, the minimum extent of the obligation of one civil partner to another upon death.

The Civil Partner's Share on Intestacy

An even more striking form of discrimination is to be seen in the intestacy provisions. On intestacy, a civil partner is, like a spouse, entitled to two-thirds of the estate if there are surviving issue, or to all the estate if no issue survives.[10] However, in the case where there is a surviving civil partner and issue, the Bill goes on to create a new jurisdiction whereby one of the surviving issue may apply for additional provision and the court can make an order "only if [it] is of the opinion that it would be unjust not to make the order, after considering all the circumstances".[11] The relevant circumstances include the provision made by the intestate for that issue during the intestate's lifetime, the "age and reasonable financial requirements of that issue", the intestate's "financial situation"[12] and

[8] Succession Act, s.117(3).
[9] Section 117 does not apply where a person dies fully intestate. See further fn.28 below.
[10] Section 70 of the Bill, inserting a new s.67A into the Succession Act 1965.
[11] Succession Act 1965, s.67A(3), to be inserted by s.70 of the Bill.
[12] This phrase is rather strange, given that it refers to someone who is dead, and appears to mean "the size of the intestate's estate".

"the intestate's obligations to the civil partner".[13] Although the explanatory memorandum to the Bill refers to this provision giving a right of application to a "child" of the intestate,[14] this is not accurate. The right is given to any one of the issue of the deceased, and so extends to a grandchild (or even a great-grandchild). A grandchild would be entitled to take a share on intestacy if his or her parent, the child of the intestate, had predeceased the intestate.[15] Thus, the section gives the right to apply for discretionary provision to persons who would have had no recourse if the deceased had made a will leaving all his or her property to the civil partner or, indeed, to some entirely undeserving stranger (because the right to apply under s.117 of the Succession Act is available only to children).[16]

It should be remembered that the emphasis in the intestacy rules in the Succession Act is on certainty. Section 117 does not apply upon intestacy, so that there is no way of adjusting a perceived unfairness in the fact that children of the intestate are treated equally on intestacy. The proposed new s.67A would not alter that position and, in fact, makes clear that there can be no adjustment of entitlement as between the issue.[17] Nor is there any provision for the civil partner to apply for a share greater than two-thirds (on the basis, e.g. that, during his or her lifetime,[18] the intestate had provided very large benefits to the issue which greatly exceed the total value of the estate). Also, the section includes the stipulation that a claimant cannot end up with a greater share than he or she would have obtained if the intestate had been survived by neither a spouse nor a civil partner. Combined with the fact that the only adjustment possible is at the expense of the civil partner (in cases of full intestacy at any rate),[19] this leads to rather arbitrary results in terms of the value of the section to an applicant. If the deceased is survived by one child and a civil partner, the child could conceivably be granted all the estate (since the civil partner is guaranteed no minimum level of benefit, not even the amount which would have represented the legal right share in the testate context). However, if there are four surviving children and a civil partner, the applicant can only be moved up (at the expense of the civil partner) from a one-twelfth share to a one-quarter share, since the child would only have been entitled to one quarter if there had been no surviving spouse or civil partner.

The proposed new discretionary regime would also apply in the case of partial intestacy, since it applies to the estate of "an intestate" and this is defined in the Succession Act to mean "a person who leaves no will or leaves a will but leaves undisposed of some

[13] Section 67A(3).
[14] Explanatory Memorandum, pp.11–12.
[15] Section 67A(3) does not restrict eligibility to apply for additional provision to those issue who would, in the absence of any application, stand to take some share on intestacy. However, this is the practical effect of s.67A(4)(b) which provides that the applicant issue cannot end up with a greater share than he or she would have obtained if the intestate had died leaving no civil partner or spouse.
[16] Compare *E.B. v S.S.* [1998] 4 I.R. 527, 561 per Keane J (emphasising that the protection offered by s.117 does not extend to grandchildren).
[17] See s.67A(4)(a) which provides that an order cannot reduce the share of any of the issue.
[18] But more than three years before death, so as not to come within the anti-avoidance rule in Succession Act 1965, s.121 (which s.85 of the Bill proposes to amend to include reference to civil partners).
[19] The issue of partial intestacy is discussed in the next paragraph of text.

beneficial interest in his estate".[20] This leads to complications which do not appear to have been considered by the drafters of the Bill. Section 117 applies in cases of partial intestacy,[21] so that if there happens to be a surviving civil partner the Bill allows for two different discretionary regimes under which a child could apply upon partial intestacy, with different scope and different criteria for a remedy. Strange consequences also follow in respect of grandchildren in the partial testacy context. Consider a case where a person's will leaves half of her property to a charity and does not deal with the remainder of her property, so that she dies partially intestate. The deceased is survived by a civil partner and two grandchildren but by no children. It seems that the share of a grandchild who applied under s.67A could potentially be increased from one-twelfth of the total estate (under the intestacy rules as applied to half of the estate) up to one quarter of the estate *at the expense of the charity*. This would appear to be permissible as the section is currently worded because, as required by the section,[22] the applicant would not thereby end up obtaining a greater share than he or she would have obtained if the deceased had been survived by no spouse or civil partner (in which case the applicant grandchild would have shared the intestate half of the estate equally with the other grandchild, taking a one quarter share).[23] Since grandchildren are not entitled to apply under s.117, it appears entirely arbitrary that they could sometimes obtain an increased share at the expense of other beneficiaries, merely because there was a surviving civil partner.

Conclusion on the Civil Partner's Legal Right Share and Share on Intestacy

There has been a somewhat mixed reaction to the discriminatory provisions of the Bill in relation to the legal right share and the civil partner's share on intestacy. Although commenting only on the basis of the General Scheme of the Bill, in which the relevant provisions were not fully spelt out, Brian Barrington noted the potential for unfairness if civil partners were to be treated less favourably than spouses in respect of the legal right share.[24] On the other hand, after the publication of the Bill, Dr Fergus Ryan commented that the provision in relation to intestacy "clearly provides important protection to children living with civil partners, and in this regard is to be welcomed in its own right."[25] Similarly, the fact that the one-third legal right share in the testate context is not guaranteed "arguably protects the interests of children and thus is generally to be welcomed."[26] Dr Ryan presents the discriminatory aspect of the relevant provisions primarily in terms of discrimination in favour of the children of civil partners as

[20] Section 3(1).
[21] See Succession Act 1965, s.74 and s 117 and see also *RG* v *PSG*, unreported, High Court, November 20, 1980.
[22] Section 67A(4).
[23] There is no stipulation in the section that an adjustment in the share of the issue must come from the share of the civil partner, probably because the drafters overlooked the question of partial intestacy in this context.
[24] Note 1 above, p.58.
[25] "Civil Partnership: Your Questions Answered: A comprehensive analysis of the Civil Partnership Bill" (GLEN, 2008), pp.43–44 (available at *www.glen.ie/civil_partnership/Civil_Partnership.pdf*).
[26] "Civil Partnership: Your Questions Answered: A comprehensive analysis of the Civil Partnership Bill" (GLEN, 2008) p.46.

compared with the children of married couples, which could be rectified by extending the new rules to spouses as well as civil partners.[27]

On this issue, the current author respectfully differs from Dr Ryan's approach. Not every proposal which purports to give greater rights to "children" is welcome (especially since the "children" in this context may be adults with their own separate lives). Our current scheme of succession law draws on the civil law model and puts the emphasis on certainty rather than discretion, requiring the provision of a minimum entitlement to spouses and civil partners. In the context of testate succession, one-third of the estate is not an excessive fraction to ring-fence against the claim of anyone else, including children.[28] The proposals in the Bill represent a highly selective approach to doing justice to children (and grandchildren and great-grandchildren in the intestacy context) since there is no provision to adjust entitlements as between the children or other issue themselves. It should be remembered that the children of the deceased partner may have been regarded by the civil partners as "their" children, so that the surviving civil partner may have every intention of providing for the children in his or her will, with the result that, as much as a biological parent, the civil partner may serve as a "conduit" to ensure that the children ultimately inherit the property. It is not necessarily desirable to encourage hostile litigation to be brought on behalf of children against a surviving civil partner who may have been acting as a parent to them. Overall, the relevant provisions appear to demean the institution of civil partnership in comparison to marriage and, in this author's view, should be strongly resisted. The position of civil partners should, in the relevant respect, be equated to that of spouses, with the result that children would be in no worse a position as against a deceased parent's civil partner than they would be in relation to a step-parent.[29]

Section 125 and Provision from the Estate of a Deceased Civil Partner

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[27] "Civil Partnership: Your Questions Answered: A comprehensive analysis of the Civil Partnership Bill" (GLEN, 2008) pp.46–47; 97–98; 119–120.

[28] There is a case for extending the application of s.117 to the intestacy context, as recommended by the LRC in 1989 (*Report on Land Law and Conveyancing Law (1): General Proposals* (LRC 30-1989) pp.23–24). In this context, it could be argued that an application by a child should be allowed to reduce the two-thirds entitlement of a spouse or civil partner, although not below the level of the legal right share (one-third of the estate) currently guaranteed for spouses in the testacy context. However, now may not be the time to undertake a major reconsideration of this aspect of succession law, given the extent of the work which is already necessary to rectify problems with the succession-related aspects of the Bill.

[29] It should be noted that there is an apparent anomaly in the provisions as they are currently drafted. The time limit for a child to seek provision under Succession Act, s.117(6) (as amended by Family Law (Divorce) Act 1996, s.46) is six months from the time when representation is first taken out on the estate. However, the time limit for a civil partner to elect for his or her legal right share is "six months from the receipt by the spouse or civil partner of [written notification from the personal representatives as to the right to elect] or one year from the first taking out of representation of the deceased's estate, whichever is the later": Succession Act, s.115(4) as it is to be amended by s.82 of the Bill. Thus, a civil partner could elect to take his or her legal right share after the deadline for a child to make a section 117 application. Consider a case where the deceased leaves all his property to a child, who thus would seem to have no basis for a section 117 application. Then, more than six months after representation is taken out, the other civil partner can elect in favour of his or her legal right share, with no danger of an order in favour of the child under section 117 which might eat into that share.

Another, more technical, set of issues concerns s.125 of the Bill, which creates a right for a civil partner to apply for provision from his or her partner's "net estate"[30] on the basis that "proper provision in the circumstances was not made for the applicant during the lifetime of the deceased for any reason other than conduct by the applicant that, in the opinion of the court, it would in all the circumstances be unjust to disregard." The provision closely resembles s.18 of the Family Law (Divorce) Act 1996 (the "1996 Act"). However, the current wording of s.125(1) does not limit the availability of the right to apply for provision from the deceased civil partner's estate to applicants whose civil partnership has been dissolved (and the normal succession rights of a civil partner thereby extinguished), unlike the parallel provision in the 1996 Act in the marriage context. Where the civil partnership was still in existence at the time of death, the surviving civil partner would normally stand to gain nothing from an application under s.125(1); the surviving civil partner would normally be entitled to the legal right share or share on intestacy of a civil partner and s.125(5), though incoherently drafted as will be discussed shortly, appears to rule out an applicant gaining a share greater than he or she would have been entitled to if the civil partnership had not been dissolved. However, a civil partner who is not entitled to the normal succession rights of a spouse because of desertion[31] or because of having renounced his or her entitlement to the legal right share[32] would still be entitled to bring a claim under s.125 and could benefit from such an application. This appears quite unjustifiable and the failure to limit the availability of the right to apply to cases where the civil partnership has been dissolved seems to represent an error.[33] This should be corrected.

As was mentioned in passing in the previous paragraph, the wording of s.125(5) of the Bill is garbled and essentially makes no sense. It is as follows:

> "The total value for the applicant of the provision made by an order referred to in *subsection (4)(a)* [i.e. a lump sum order or a property adjustment order, made following a dissolution of the civil partnership] on the date on which that order was made and an order made under this section shall not exceed any share of the applicant in the estate of the deceased civil partner to which the applicant was entitled or, if the deceased civil partner died intestate as to the whole or part of his or her estate, would have been entitled, if the civil partnership had not been dissolved, under the Succession Act 1965 as amended by *Part 8*."

[30] There is no definition in s.125 of the term "net estate", a term which is not employed in the Succession Act 1965 and does not appear either in the provisions analogous to s.125 in the Family Law Act 1995, s.15A and Family Law (Divorce) Act 1996, s.18. In s.192(9), dealing with applications for provision from the estate of a deceased cohabitant, "net" estate is defined as the estate which remains after provision for the satisfaction of any rights under the Succession Act 1965 of any surviving spouse or civil partner (and other liabilities having priority over such rights). This definition is, however, stated to be "[f]or the purposes of this section". It is unsatisfactory that s.125 leaves undefined a term which is defined elsewhere in the Bill but only for the purposes of another section. It is not possible to guess what was really intended by the drafters but it would create a significant distinction between the rights of civil partners and spouses if the term "net estate" were intended to bear the same meaning in s.125 as in s.192(9). For discussion of the relevant aspect of s.192, see text following fn.54 below.

[31] See s.84 of the Bill, amending s.120 of the Succession Act.

[32] See s.80 of the Bill, inserting a new s.113A into the Succession Act.

[33] Contrast General Scheme of the Civil Partnership Bill (June 2008), Head 68(1).

This subsection closely follows the wording of the Family Law Act 1995 (the "1995 Act"), s.15A(4) and the 1996 Act, s.18(4), provisions which Shatter explains as meaning that the claimant cannot obtain more, in total, than he or she would have been entitled to if his or her succession rights had not been extinguished by divorce or by the court upon judicial separation.[34] This would suggest that the intention of s.125(5) is to ensure that provision for the claimant does not exceed what the claimant would have obtained if the civil partnership had not been dissolved – not, as the section unaccountably states, the share to which "the applicant *was* entitled, or if the deceased civil partner died intestate [wholly or in part], *would have been* entitled". However, it seems that it would be preferable to implement a different rule here, which would ensure that the claimant would be unable to obtain more, in total,[35] than a civil partner with normal succession rights would have been entitled to as a legal right share if the deceased had died testate. It does not seem to make sense to allow the claimant a higher maximum share in a case where the deceased happens to have died intestate. The fact that the deceased died without a will would, leaving aside the possibility of an order under s.125, serve to disinherit the surviving civil partner completely, since his or her succession rights (including on intestacy) have *ex hypothesi* been extinguished. Why, then, should the applicant be in a better position on intestacy than if the deceased had taken another route to giving him or her nothing, by leaving all of his or her property by will to other people? It hardly can be argued that, by dying intestate, the deceased somehow showed a greater intention to benefit his or her estranged civil partner whose succession rights had been extinguished. In any event, s.125(5) of the Bill (and s.15A(4) of the 1995 Act and s.18(4) of the 1996 Act) should be redrafted so that they make sense and coherently state whatever legal rule is regarded as appropriate.

Provision on Death for Cohabitants

The Bill provides for a "redress scheme" for qualified cohabitants.[36] A cohabitant is defined as "one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship" and satisfy certain other conditions,[37] while a qualified cohabitant must have lived as a couple with his or her partner for at least three years, or for at least two years if the parties have one or more dependent

[34] Note 5 above, p.928.

[35] In terms of this idea of the claimant's total entitlement, what should be considered is not merely the extent of the provision for the claimant which the court has ordered in the past or under s.125 but rather the total amount which the claimant will end up with—this means that s.125(5) is defective in failing to include in the total any devise or bequest which the claimant is to receive under the deceased's will. It also excludes the sum of any periodical maintenance payments which have been made to the civil partner, though this exclusion may be more reasonable. Contrast the approach in s.192(4) of the Bill, in the different context of provision from the estate of a deceased cohabitant, which does include the value of such payments (though, like s.125, it fails to take into account any devise or bequest to the surviving cohabitant in the deceased cohabitant's will). Note that the wording of s.192(4) requires the court to look at the value of an order made in favour of the claimant cohabitant "on the date on which that order was made". This formulation does not seem appropriate in the case of an open-ended order for periodical maintenance, the total value of which could only be discerned in retrospect by adding up the total payments made until the death of the defendant.

[36] For detailed analysis, Mee, "A Critique of the Cohabitation Provisions of the Civil Partnership Bill" fn.2 above.

[37] Section 170(1)-(4).

children.[38] Section 192 of the Bill provides for the possibility of a qualified cohabitant making an application for provision from the estate of a deceased cohabitant, within 6 months of the grant of representation in relation to the estate. Unlike in respect of other orders under the relevant part of the Bill (i.e. property adjustment orders, maintenance orders and pension adjustment orders),[39] it is not a prerequisite for relief that the claimant show "that he or she is financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship".[40] Section 192(2) allows the court "to make the provision for the applicant that the court considers appropriate having regard to the rights of any other person having an interest in the matter, if the court is satisfied that proper provision in the circumstances was not made for the applicant during the lifetime of the deceased for any reason other than conduct by the applicant that, in the opinion of the court, it would in all the circumstances be unjust to disregard." The section, unfortunately, is most unsatisfactory. Serious practical problems arise from the fact that it fails to take account of the fundamental distinction between, on the one hand, cases where a relationship is brought to an end by death and, on the other hand, cases where the relationship broke down prior to the death of one of the parties. This means that it is overly broad in terms of the circumstances in which it allows a claim to be made and it also fails to apply limitations appropriate to the particular circumstances in which a claim is being made. The two different categories of case, and the proper treatment of them, will now be discussed.

Cases where the Relationship Ended Prior to Death

Section 192 clearly envisages the possibility of an application by a claimant in circumstances where the relationship terminated prior to the death of one of the cohabitants.[41] Although the claim must be brought within six months of the taking out of representation on the estate, there is no time limit in terms of how long prior to death the relationship terminated.[42] Therefore, it is possible for a claimant to apply for provision from the estate even though he or she missed the two-year deadline after the termination of the relationship for making an application for relief under the other provisions of the Bill (with no exceptional circumstances being present).[43] This is not sensible—it allows a claimant from a long extinct relationship who never pursued a claim during the lifetime of the deceased to re-emerge many years later and seek provision on the basis of factual circumstances which could have been put forward during the lifetime of the deceased but were not. It is necessary to limit the circumstances in which a claim can be made where the relationship ended prior to death.

It seems clear that a claim for provision from the estate should be possible if the claimant had already made an application for a property adjustment or maintenance or pension adjustment order under the Bill prior to the defendant's death but the application had not

[38] Section 170(5). See also s.170(6) which creates a partial exclusion in respect of relationships where one or both of the cohabitants is or was married to a third party.
[39] See ss.172, 173 and 185 respectively.
[40] Section 171(2).
[41] See e.g. the terms of s.192(3)(a).
[42] Note that s.193 of the Bill excludes applications under s.192 from the two-year time limit, subject to exceptional circumstances, which applies to other applications by cohabitants.
[43] See s.193 of the Bill.

yet been determined when the defendant died or if, at the time of death, the time limit for such an application had not yet elapsed (as usual, taking into account the possibility of an extension due to exceptional circumstances).[44] The question is whether, in addition, a claim should be permitted where the claimant had obtained orders under the Bill following the termination of the relationship during the lifetime of both the parties and now, upon the subsequent death of his or her partner, wishes to argue that the provision which was previously made for him or her is insufficient to constitute "proper provision". It is possible for the court to entertain applications in analogous circumstances in the context of judicial separation and divorce.[45] However, it is questionable whether, in the context of the rather limited overall scheme in the Bill, it is really necessary to allow a cohabitant, in whose favour orders have already been made, to return to seek further provision upon the death of the defendant. It is admittedly possible, as in the matrimonial/civil partnership situation, to imagine some circumstances where the unexpected death of the defendant (and consequent termination of maintenance payments)[46] might lead to a lesser degree of relief being available to the claimant than originally envisaged. However, increasing the protection for the claimant by permitting an application in the circumstances under discussion is purchased at the cost of allowing the defendant's liability to follow him or her beyond the grave, in a way clearly inconsistent with the idea of ensuring a clean break between the parties.

If it were decided to permit applications for further provision upon death, in the situation which has just been discussed, it should be remembered that, in practice in the matrimonial context, blocking orders are frequently granted to preclude a divorced claimant, or a judicially separated claimant whose succession rights have been extinguished by the court, from subsequently making an application for provision from the estate of their spouse.[47] It seems clearly inappropriate that, in the context of the Bill as it currently stands, there is no possibility of a defendant applying for such a blocking order from the court at the time of the claimant's application for relief—why should a cohabitant be less able to protect his or her estate from future applications than a spouse?
A different point is that it seems clearly wrong that s.199 of the Bill does not allow the parties to contract out of the availability of a remedy upon death, in circumstances where the relationship between the parties terminated prior to death.[48] Such a remedy is clearly an extension of those available during the lifetime of the cohabitants, which can be excluded by a cohabitants' agreement which complies with the specified formalities, subject to the possibility of exceptional circumstances in which such an agreement could be varied or set aside. The current wording of the Bill would mean that a cohabitation agreement could exclude any remedy during the lifetime of the cohabitants but would not prevent a claimant from bringing up all the same issues upon the subsequent death of his

[44] Note the terms of the recommendation by the English Law Commission in its Report on *Cohabitation: The Financial Consequences of Relationship Breakdown* (LC 307, 2007), p.125.
[45] See s.18 of the Family Law (Divorce) Act and s.15A of the Family Law Act 1995 (as inserted by s.52(g) of the 1996 Act).
[46] See s.173(4).
[47] Family Law Act 1995, s.15A(10); Family Law (Divorce) Act, s.18(10); Shatter fn.5 above, p.929.
[48] See s.199(3) providing that, subject to s.199(4), a cohabitants' agreement may exclude the possibility of an application for an order for redress referred to in s.171, which makes no reference to an order under s 192.

or her partner and obtaining a remedy notwithstanding the terms of the cohabitants' agreement.

It is also illogical that s.192 disapplies the "financial dependence" filter (applicable to applications by qualified cohabitants for other orders under the Bill) in the context of claims on death where the relationship ended prior to death. In general terms, it makes sense to apply a more generous set of criteria, as compared to those which apply to claims inter vivos, in cases where the parties' relationship was still in existence when one of the cohabitants died (see the discussion of such cases below). However, where a claim for provision from the estate of the deceased is permitted in circumstances where the parties' relationship terminated prior to the death, it is appropriate that the same general criteria should apply as apply inter vivos. This demonstrates the problems caused by the failure of s.192 to deal separately with cases where the relationship was terminated only by death and cases where the relationship ended and subsequently one of the cohabitants died. It should be clarified that it is not intended by the preceding argument to defend the "financial dependence" filter, which the author regards as an extremely unsatisfactory aspect of the scheme of the Bill for cohabitants.[49] The point is rather that there is no justification for applying more generous criteria in the situation under discussion than whatever criteria apply to claims inter vivos.

Cases where the Relationship is Ended by Death

In the context of the scheme of the Bill, it clearly makes sense to allow a claim to be made where the parties' relationship was still in existence at the time of the death of one of the cohabitants. Indeed, as the English Law Commission has noted, the fact that neither party has withdrawn his or her commitment to the relationship arguably represents a "qualitative difference" between this situation and the one where a relationship ends in acrimony, a difference which arguably would justify a wider eligibility to apply on death or more generous criteria for determining a remedy.[50] The Bill takes this qualitative difference into account by dropping the "financial dependency" requirement; as mentioned earlier, this is defensible in the context under discussion but not in the different case where the relationship ended prior to death. In relation to the question of contracting out, although the issues are somewhat different to those which arise when the relationship terminated prior to death, it appears that (contrary to the current position under the Bill in relation to all applications by cohabitants for provision upon death) the possibility of contracting out should apply here as in relation to other orders under the Bill—a spouse (and, under the Bill, a civil partner) can renounce his or her legal right under the Succession Act,[51] so it seems difficult to defend the idea that a mere cohabitant should be unable to contract out of the right to apply for provision upon death.

Space does not permit a detailed discussion of the interesting issues surrounding the proper operation of a discretionary system to deal with claims for provision from the estate of the other cohabitant in circumstances where the relationship was subsisting at

[49] See Mee, "A Critique of the Cohabitation Provisions of the Civil Partnership Bill" fn.2 above.
[50] See Law Commission fn.44 above, p.120.
[51] Succession Act 1965, s.113; s.113A (to be inserted by s.80 of the Bill).

the time of death. One point which will be made, however, is that there is a significant distinction between cases of testacy and cases of intestacy, which arguably should dictate different treatment of the two situations. Under the current regime of succession law, the rules are set up to ensure simplicity and certainty. Section 117 of the Succession Act does not apply in the context of intestacy, so that a child, however deserving of greater provision, must be content with his or her fractional share (which may be very small if there is a spouse, who takes two-thirds of the estate, and other children).[52] The provisions of the Bill eliminate the overall certainty on intestacy by providing for discretionary provision for cohabitants. It may be that, in light of this, the question of extending s.117 to the intestacy context should be revisited.[53] Alternatively, it is arguable that the Bill should develop the law in sympathy with the current intestacy rules and provide for a fixed share on intestacy for a qualifying cohabitant where the relationship ended in death, upon an application and proof by the cohabitant that he or she fits the relevant definition. The amount of the fixed share might be (say) half of the share to which a spouse or civil partner would be entitled in the circumstances; the details of such a proposal would obviously need to be carefully considered. The different proposal in the Bill creates a high likelihood of contentious and unpredictable litigation in every case where a qualified cohabitant dies intestate.[54]

Orders Only Possible from "Net Estate"

A final, more general, issue about s.192 concerns the manner in which it attempts to protect the position of a surviving spouse or civil partner in the context of an application by a qualified cohabitant. Section 192(8) provides that "[a]n order under this section shall not affect the legal right of a surviving spouse." For no obvious reason, this provision omits any reference to the legal right of a surviving civil partner. In any case, the purpose of s.192(8) is difficult to discern because of other provisions in the section. Section 192(1) provides that any provision under the section must be made from the "net estate" of the deceased cohabitant, which is defined as the estate which remains after provision for the satisfaction of any rights under the Succession Act 1965 of any surviving spouse or civil partner (and other liabilities having priority over such rights).[55] The "rights" of a surviving spouse or civil partner would seem to include rights arising under the intestacy rules, as well as the entitlement of a spouse or civil partner to claim the legal right share. It seems reasonable to argue that a spouse or civil partner has "a right under the Succession Act 1965" to any gift in his or her favour in a will which complies with the requirements of that Act, although one guesses that the drafters did not actually intend that such gifts would be excluded from the net estate. It is also unclear whether there must also be excluded from the net estate any provision made for a surviving spouse

[52] See Succession Act, s.67. See also s.67A and s.67B, which s.70 of the Bill proposes to add.

[53] See the discussion in fn.28 above.

[54] Whether one favours an entitlement to a fixed share or to apply for discretionary provision, it is arguable that this should apply only where the intestate is survived by a spouse/civil partner and/or by close family relations and that the qualified cohabitant should be entitled to take the entire estate if the intestate is survived only by more distant relations. It could e.g. be provided that (upon making an application and demonstrating that he or she fits the relevant definition) a qualified cohabitant would take outright ahead of next of kin as defined in s.70 of the Succession Act (grand-parents, uncles, aunts, cousins etc) and ahead of the State.

[55] Section 192(9). For discussion of another occurrence of the term "net estate" in the Bill, see fn.30 above.

under the Family Law Act 1995, s.15A (discretionary provision from the estate for a judicially separated spouse whose automatic succession rights have been extinguished). Provision for a former spouse under the similar terms of Family Law (Divorce) Act 1996 would, on the wording of s.192(9), clearly not be excluded from the net estate since a former spouse is no longer a spouse, and therefore cannot constitute a "surviving spouse". The same would apply to provision for a former civil partner under s.125 of the Bill.

It is difficult to understand the logic of this artificial concept of the "net estate", whatever its exact parameters. Restricting orders under s.192 to the "net estate" appears to exclude relief under the section in unjustifiable ways. For example, if the defendant cohabitant had a surviving spouse or civil partner with succession rights but had no issue and died intestate, no order at all could be made in favour of the claimant cohabitant since the surviving spouse or civil partner would have a right to all of the estate under the intestacy rules, leaving no "net estate". It would appear to be preferable to provide that an order under the section could not reduce the entitlement of a surviving spouse or civil partner (whose succession rights had not previously been extinguished by desertion[56] or by order of the court upon judicial separation,[57] or renounced by the spouse or civil partner[58]) below one third of the estate if there are surviving children or below one half of the estate if there are no surviving children, these fractions coinciding with the extent of the legal right share. The surviving spouse or civil partner could not have objected if the deceased had chosen to die testate, leaving only this fraction of the estate to him or her; the remainder of the estate could have been disposed as the deceased wished and, therefore, it is reasonable that the maximum extent of the court's power should be to require that all of this remainder be given to the applicant cohabitant.[59]

Conclusion

The analysis in this article suggests that extensive work remains to be done on the succession law aspects of the Civil Partnership Bill. In the context of the civil partnership scheme in the Bill, what is required is to retreat from the attempt to discriminate against civil partners, as compared to spouses, in respect of the legal right share and the question of entitlement on intestacy. In making the argument in favour of such a retreat, attention has also been drawn to a number of more technical failings in the relevant provisions. In respect of the scheme for cohabitants, the approach taken in s.192 of the Bill is particularly unsatisfactory from the point of view of coherence, consistency and technical

[56] See s.120 of the Succession Act, to be amended by s.84 of the Bill.
[57] See Family Law Act 1995, s.14.
[58] Succession Act s.113 and s.113A (to be inserted by s.80 of the Bill).
[59] A court could be faced with an application by a cohabitant under s.192 alongside an application of a similar nature by a former spouse, a spouse whose succession rights have been extinguished upon judicial separation, or a former civil partner. It would not appear appropriate to provide that the claim of the spouse or former spouse or former civil partner should automatically take priority; the legislation creating the right to make such claims requires that the court should take into account "all the circumstances of the case" and "the rights of any other person having an interest in the matter" (Family Law Act 1995, s.15A(1) and (3); Family Law Divorce Act, s.18(1) and (3); s.125(2) and (4) of the Bill) and the potential entitlements of a cohabitant would therefore need to be taken into account when deciding on whether to grant an order making provision for the spouse or former spouse or civil partner.

efficacy. A key problem is the failure to distinguish between claims where the cohabiting relationship was ended by death and claims where the relationship terminated prior to death and a claim is subsequently being made for provision from the estate of the deceased cohabitant. As has been mentioned, the Civil Partnership Bill is a particularly significant piece of legislation and it is vital to ensure that issues in relation to the law of succession, which are of considerable importance in the scheme of the Bill, are dealt with in a satisfactory manner.