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Who Is Family: Cohabitation, Marriage, and the Redefinition of Family

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WHO IS A FAMILY: COHABITATION, MARRIAGE, AND THE REDEFINITION OF FAMILY

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The emergence of cohabitation as an alternative to the traditional form of the family has left the need for legislative reform. Currently, cohabitants must resort to equitable claims as they do not have access to the property sharing regime designated for married spouses. The definition of "family" requires reformulation to include cohabitation. This reformulation must then be reflected in Ontario's Family Law Act *through the adoption of an opt-out regime. This reform appropriately balances the values of autonomy and equality and creates certainty, predictability, and consistency in the law of Ontario. This paper addresses the possibility of reform through the discussion of family law policy.*

INTRODUCTION

Have you ever been told that whom you choose to marry is one of the most important decisions you will have to make? Marriage in Ontario continues to enjoy a "uniquely privileged status."[1] That is, by choosing to marry, an individual acquires specific legal rights and obligations.[2] The social perception of what constitutes a "family" has changed over the past fifty years as there has been a consistent rise in the rate of cohabitation. "Cohabitation," for the purposes of this paper, is defined as an intimate relationship involving two persons living together without being legally married. Some provinces, including Nova Scotia and, more recently, British Columbia, have adopted legislation to

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1 Winifred Holland, "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation" (2000) 17:1 Can J Fam L 114 at 125.

2 *Ibid* at 121.

reflect the changing structure of the family. Complete reform in Ontario, however, has yet to occur. The family should be redefined in Ontario to include cohabiting families, which may or may not involve children. This redefinition of family ought to be reflected in family policy and the *Family Law Act*[3] by adopting an opt-out regime similar to that adopted most recently in British Columbia.

Marriage was the only legally recognized family form in the 1960s.[4] Cohabitants were excluded from the rights and obligations that attached automatically upon marriage.[5] The exclusivity of particular legal rights and obligations within the area of family law has been, and continues to be, a source of frustration for "non-normative" family arrangements.[6] Courts, especially in Ontario, have been slow to extend legal recognition to cohabiting couples. Prior to the transformation of the institution of marriage, same-sex couples found it incredibly difficult to "assert the legitimacy of their families."[7] Although not the focus of this paper, this issue was clearly demonstrated by the difficulty same-sex partners faced when arguing for automatic parental status in terms of entitlement to birth registration.[8]

Over the past fifty years, legal scholars and policymakers have attempted to tackle the issue of extending the rights and obligations

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3 RSO 1990, c F-3 [*OFLA*].

4 *Supra* note 1 at para 127.

5 *Ibid*.

6 Fiona Kelly, *Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood* (Vancouver: UBC Press, 2011).

7 *Ibid* at 29.

8 Mary Jane Mossman, *Families and the Law: Cases and Commentary* (Concord: Captus Press Inc, 2012) [Mossman, *Commentary*].

associated with marriage to cohabitation.[9] In Ontario, many of these rights and obligations are still unique to married spouses, but support obligations under the *Family Law Act* have been imposed on cohabitants.[10] Policymakers have shifted the financial burden from the State to the family, a theme that recurs throughout family law legislation. Unfortunately, the definition of "spouse" for the purposes of property rights has not yet been extended to include cohabitants in Ontario. Cohabitants must resort to equitable claims, an area of law that is complex and lacks certainty. It is in this sense that these equitable claims have "serious limitations as a tool for the fair allocation of property between cohabiting spouses."[11]

The functional similarity between marriage and cohabitation is one of the main pillars supporting the argument for legislative reform. According to some scholars, the difference between marriage and cohabitation is minimal.[12] Marriage and cohabitation encompass "a range of relationships, some characterized by various forms of dependency, while others involve spouses who are quite independent, financially and otherwise."[13] In fact, similar needs arise for cohabitants and married spouses upon the breakdown of their respective relationships (i.e. support).

The definition of family has been historically synonymous with marriage. This view of the family is inherently flawed. When one considers who is a family, marriage ought not to be a necessary condition. The definition of the family should focus on what families

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9 Holland, *supra* note 1; Zheng Wu, *Cohabitation: An Alternative Form of Family Living* (Don Mills: Oxford University Press, 2000).

10 *OFLA supra* note 3, s 29.

11 Ontario Law Reform Commission (OLRC), *Report on Family Property Law* (Toronto: OLRC, 1993) at 39–40, [OLRC, *Family Property Law*].

12 Holland, *supra* note 1; OLRC, *Family Property Law*, *supra* note 11.

13 Holland, *supra* note 1 at 151.

do as opposed to what they look like. The family, or more specifically the nuclear family, is often referred to as the basic social unit. The nuclear family cannot be said to require marriage, as it is defined as being composed of two parents and their children. Cohabitation and marriage, therefore, are simply different forms of the nuclear family. As such, there is a need for legislative reform to recognize the variations of the nuclear family.

The Ontario legislative regime currently does not recognize the contribution made by cohabitants to their families as it does through the redistribution of economic resources upon the dissolution of a marriage. According to Justice L'Heureux-Dubé,

> Cohabitation is slowly but surely becoming a substitute for legal marriage as a social institution where children are born, raised, and socialized to become members of our society.[14]

It follows from this reasoning that cohabitation poses a greater threat to the institution of marriage than the high incidence of divorce.[15] This is because while both undermine the permanence of marriage, only cohabitation can provide an alternative to marriage.[16] That is, as noted earlier, cohabitation is simply a variation of what many view as the traditional nuclear family. If cohabitation is viewed as an alternative to marriage, or, rather, a different form of the nuclear family, as opposed to a precursor to marriage (i.e. "trial marriage"), then the extension of the legislative regime to cohabiting couples is required to protect the vulnerable people in such relationships.

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14 *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83 at para 125, 221 DLR (4th) 1 [*Walsh*].

15 Wu, *supra* note 9 at 4.

16 *Ibid*.

This paper aims to discuss cohabitation with a view towards the possibility of legislative reform in Ontario. First, statistics respecting cohabitation will confirm familial trends in Canadian society and provide a more accurate understanding of who exactly chooses to cohabit. Second, the factors that influence an individual's choice to cohabit will be explored. These factors will provide the framework to discuss policy rationales for extending rights and obligations of married spouses to cohabitants. Third, the current legislative scheme in Ontario as set out in the *Family Law Act* and the issues associated with this scheme will be reviewed. Fourth, possible resolutions will be proposed by focusing on alternative legislative schemes adopted in other provinces. After consideration of all the above, this paper will advocate for the adoption of an opt-out approach similar to that adopted in British Columbia. It is important to note that the terms "cohabitation" and "common-law" will be used interchangeably for the purposes of this paper.

WHO CHOOSES TO COHABIT: STATISTICS AND TRENDS

General Statistics

Approximately 16.7 per cent of all census families in Canada were common-law couples in 2011.[17] In comparison, common-law couples composed only 5.6 per cent of all census families in Canada in 1981 and 13.8 per cent in 2001.[18] The percentage of cohabiting couples has increased at least three-fold since Statistics Canada began gathering data in 1981 with respect to cohabitation/common-law unions.[19] This

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17 Statistics Canada, *Portrait of Families and Living Arrangements in Canada*, Catalogue No 98-312—X201101 (Ottawa: Statistics Canada, September 2012) at 5 [Statistics Canada, *Portrait of Families*].

18 *Ibid*.

19 Statistics Canada, *Fifty Years of Families in Canada: 1961–2011*, by Anne Milan & Nora Bohnert, Catalogue No 98-312-X2011003 (Ottawa: Statistics Canada, September 2012) at 2 [Statistics Canada, *Fifty Years*].

trend signifies that the conception of the modern family ought to include cohabiting couples, as these unions are increasingly becoming an alternative to marriage, the traditional form of the family.

The rate of cohabitation varies across Canada's ten provinces and three territories.[20] Quebec has the highest rate of cohabitation relative to Canada's nine other provinces. In 2011, 31.5 per cent of all census families in Quebec were common-law couples.[21] The lowest rate of cohabitation, 10.9 per cent, was found in Ontario.[22] The great discrepancy between the rate of cohabitation in Quebec and the other nine provinces is often explained by the differences in values between Quebec and the English provinces.[23] In fact, the regional patterns among Canada's English provinces are less salient as there is only a 3.3 per cent deviation among the provinces with respect to the rate of cohabitation.[24]

The rate of cohabitation is considerably higher in Canada's three territories—Nunavut (32.7 per cent), Northwest Territories (28.7 per cent) and Yukon (25.1 per cent)—in comparison to the English provinces.[25] When interpreting these statistics, however, it is important to take into consideration that "the population base in the territories is relatively small."[26] Nonetheless, cohabitation seems to be a "popular lifestyle choice among Canada's indigenous populations."[27]

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20 *Supra* note 17 at 6.

21 *Ibid*.

22 *Ibid*.

23 Wu, *supra* note 9 at 48.

24 Statistics Canada, *Fifty Years, supra* note 19 at 6.

25 *Ibid*.

26 Wu, *supra* note 9 at 47.

27 *Ibid*.

Who Cohabits?

The regional patterns with respect to cohabitation reveal significant differences in Canadian society. First, it is apparent that cohabitation is more prevalent among Aboriginal people. Second, those residing in Quebec are also more open to cohabit in comparison to individuals in Canada's English provinces. Past these broad generalizations, however, it is important to further explore which segments of the population are more open to and have higher rates of cohabitation.

First, cohabitation is particularly prevalent among Canadians in their twenties and thirties.[28] Economic factors may play a significant role in the decision to cohabit during this period of time. In addition, some scholars suggest that the prevalence of cohabitation among those in their twenties and thirties can be partially explained by the fact that cohabitation is a precursor to marriage.[29] That is, cohabitation is viewed by these young adults as a "trial marriage" as opposed to an alternative to marriage.[30] This interpretation is supported by the fact that more than two-thirds of cohabitees have never been previously married.[31]

Second, "common-law relationships are also increasingly popular among people who enter a second union."[32] Over 25 per cent of cohabitants have been previously divorced.[33] In fact,

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28 *Ibid* at 1.

29 Holland, *supra* note 1 at 159.

30 *Ibid*.

31 Wu, *supra* note 9 at 1.

32 Berend Hovius, "Property Division for Unmarried Cohabitees in the Common Law Provinces" (2003) 21 Can Fam LQ 175 at 175.

33 Wu, *supra* note 9 at 1.

> while Statistics Canada estimated that barely 8 per cent of women ranging in age from 50 to 59 had chosen a common-law relationship as their first union, approximately 20 per cent of them had been or would eventually be involved in a common-law relationship.[34]

It follows that there are at least two entirely different segments of the population who choose to cohabit. These groups may have different values when entering into these new relationships given their past experiences or lack thereof.

Third, approximately half of cohabiting unions include children, "either born to the cohabiting couple or brought into the family from previous relationships."[35] The rise in non-marital fertility and the decline in teen fertility are consistent with the theory that much of the "increase in non-marital fertility in recent decades may have been largely a consequence of the increase in non-marital cohabitation."[36] The presence of children in a cohabiting relationship adds a different dimension to this discussion because another party must be considered upon the breakdown of that relationship. Furthermore, if a child is brought into a cohabiting union from a previous relationship, the relationship may become structured in a particular manner that protects the child's interests.

The above characteristics provide a general framework to discuss policy issues with a view toward legislative reform. There are other characteristics that may have a lesser impact on this discussion but remain significant. Studies have shown that men are more willing than women to consider cohabitation as a viable alternative to

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34 Hovius, *supra* note 32 at 175.

35 Wu, *supra* note 9 at 1.

36 *Ibid* at 88.

marriage.[37] In addition, higher levels of education and labour force participation are positively correlated with one's willingness to consider cohabitation.[38] These additional characteristics are relevant to policy issues such as autonomy, equality, and the protection of the vulnerable.

When considering the possibility of reform, it is crucial to take into consideration those affected by the reform and analyze the effect of such reform on these groups of individuals. It is clear from the above that there are two distinct groups of cohabitees that will be affected by legislative reform—those who have not been previously married (never-married cohabitants), and those who have been previously married (post-marital cohabitants). In addition, it is crucial to take into consideration whether there are children involved in the relationship and whether they are brought into the relationship or born to the cohabiting couple.

Breakdown of the Relationship

"Cohabitations are often short-lived."[39] In fact, over half of cohabiting relationships end within three years.[40] This, however, may be misinterpreted if the reasons for ending the cohabiting relationship are not considered. A cohabiting relationship may end due to separation, death of one of the cohabitees, or marriage. In fact,

> these unions are more likely to end in marriage than in separation: about one-third of cohabiting couples marry each other within three years of cohabitation, while

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37 Anne Milan, "Would You Live Common Law", *Canadian Social Trends* (9 September 2003) 2 at 2.

38 *Ibid* at 3.

39 Wu, *supra* note 9 at 1.

40 *Ibid*.

> another quarter dissolve their relationships through separation.[41]

These statistics have caused legal scholars to debate the meaning of cohabiting relationships. One position is that cohabitation is a precursor to marriage or a "trial marriage." The other position taken by legal academics is that cohabitation is a substitute for marriage. It follows from this latter position that those who choose to cohabit are fundamentally different from those who choose to marry.

There is evidence supporting each position, but the second position is more troubling legislatively. If two persons form a cohabiting relationship, one may wish to marry while the other does not. This power imbalance is not equalized by the current legislative regime in Ontario as the vulnerable cohabitee (the one who wishes to marry) is left unprotected by legislation. If both cohabitees see their union as a substitute to marriage, they are in a better position to structure their relationship accordingly, with the knowledge that they do not have the same rights and obligations as married spouses.

Wu points out that "[t]here is no doubt that cohabiting unions are more vulnerable and less stable than marital unions."[42] Given the fact that approximately 25 per cent of cohabiting relationships dissolve through separation within three years, the legal rights and obligations of cohabitees are increasingly significant. "Almost 90 per cent of first marriages last at least ten years, while only 12 per cent of common law relationships achieve a tenth anniversary."[43] The rise in cohabitation in combination with the above facts means that an increasing proportion of the population are left with little certainty upon the breakdown of their relationships.

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41 *Ibid*.

42 *Ibid* at 108.

43 Hovius, *supra* note 32 at 176.

The three-year mark in a cohabiting relationship can be said to be the defining point in the relationship. Approximately 60 per cent of cohabiting relationships have ended through separation or marriage by this point in time.[44] Thus, policymakers ought to keep this timeframe in mind when creating an opt-out regime whereby legal rights and obligations automatically attach to cohabitees at a particular point in their relationship.

WHY CHOOSE TO COHABIT: THEORETICAL PERSPECTIVES

The emergence of cohabitation as a form of family living has led many academics to theorize about why this has occurred. Changing public attitudes and values with respect to premarital sex and the social institution of marriage are a contributing factor to this change in the modern family.[45] Changing gender roles may have also contributed to the rise of cohabitation over the past thirty years.[46] The successful challenge to the opposite-sex requirement with respect to the validity of marriage may have slowed the process of extending legal rights and obligations associated with marriage to those who choose to cohabit, as same-sex couples are no longer limited to cohabitation. The following discussion outlines different perspectives on the rise of cohabitation. It is critical to understand the rise of cohabitation in Canadian society to determine whether these families ought to have the same rights and obligations as married spouses.

Cost-Benefit Analysis: An Economic Perspective on Cohabitation

Individuals are "faced with the necessity to make choices; and in making choices, they try as best they can to maximize welfare as they

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44 Wu, *supra* note 9 at 1.

45 *Ibid* at 2.

46 *Ibid*.

conceive it."[47] That is, these choices are made to maximize current and future benefits. This means that individuals attempt to "anticipate the uncertain consequences of their choices."[48] It is suggested by economists such as Gary Becker that individuals choose to marry only if they will gain from marriage.[49] Traditionally, individuals who chose to marry would have a two-fold benefit—at home and in the labour market.

Societal norms, attitudes, and values are constantly changing. Although gender barriers still exist within the labour market, these barriers are not as great as they once were. Gender roles have changed drastically, and such change can be traced back to World War II. In fact, women's economic independence has reduced the necessity of marriage:

> Increases in women's earning power and participation in the labour market would discourage individuals, particularly women, from entering into marriage because of reduced economic gain from the union.[50]

Cohabitation is an attractive alternative to marriage for those who seek to be partnered with another but wish to pursue their careers. It offers individuals the benefits of marriage, such as the pooling of resources and the sharing of residence, with less commitment.

Implicit in this theoretical perspective is the notion that individuals are consciously choosing to avoid the social institution of

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47 *Ibid* at 10.

48 *Ibid*.

49 Gary Becker, "A Theory of Marriage" in Theodore W Schulz, ed, *Economics of the Family: Marriage, Children, and Human Capital* (Chicago: University of Chicago Press, 1974) 299, online: The National Bureau of Economic Research <www.nber.org/chapters/c2970.pdf>.

50 Wu, *supra* note 9 at 13.

marriage and the legal consequences that flow from it. That is, they are actively avoiding long-term commitment and the legislative provisions that require the sharing of the "fruits of the relationship, which are the result of joint efforts during the relationship."[51] The question then becomes whether both parties are actively choosing not to marry. The *Family Law Act* must create a fair compromise that both allows individuals to structure their relationships to fall within or outside its scope and to protect a vulnerable party from being exploited by the other.

Changing Societal Norms and Values: The Sociological Perspective

The sociological perspective takes a more macro-level approach with respect to the family. According to this perspective, norms, values, and beliefs play a significant role in regulating social behaviour.[52] These norms, values, and beliefs do not remain static, as they adapt to various social and structural changes within society.[53]

> Marriage and cohabitation are social behaviours to which socially defined values are attached. Thus, the values and norms concerning union behaviour may vary across cultures and historical periods.[54]

This variance across cultures is demonstrated by the aforementioned difference in the rate of cohabitation between Quebec and the English provinces. However, this difference does not explain the general emergence of cohabitation as a form of family living.

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51 Holland, *supra* note 1 at 151.

52 Wu, *supra* note 9 at 20.

53 *Ibid* at 16.

54 *Ibid*.

Over the past fifty years there has been a significant ideological shift in Western societies that is often referred to as the rise of individualism.[55] This shift has "gradually shifted the norms from family-centred orientations to relatively more self-oriented pursuits."[56] These changes have significantly contributed to the changes in the traditional form of the family. Cohabitation offers those in search of "self-fulfillment" a less permanent and committed relationship, while still offering some of the benefits of marriage, such as the pooling of resources and the sharing of a residence.

This perspective seems to advance the position against reform. That is, if those who enter cohabiting relationships do so to further themselves while avoiding the legal rights and obligations that automatically attach upon marriage, then the autonomy of cohabitees ought to be respected. However, it is neither fair nor responsible to generalize to all cohabitants. In fact, many individuals believe that cohabitation offers the same legal protection as marriage after a certain period of time. If the intention of the cohabitees is to form a family, then there ought to be no difference between marriage and cohabitation after the three-year mark. If this is not their intention, one may argue that the onus must be placed on the party attempting to avoid inclusion in the legislative regime—an opt-out approach.

THE CURRENT REGIME IN ONTARIO: THE *FAMILY LAW ACT*

The Two Definitions of "Spouse"

Ontario's *Family Law Act* provides two separate definitions of "spouse." The first, which I will refer to as the "standard definition," excludes cohabiting individuals.[57] The second, which I will refer to as

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55 *Ibid* at 17.

56 *Ibid*.

57 *OFLA*, *supra* note 3, s 1(1).

the "expanded definition," includes both married individuals and those who have cohabited "continuously for a period of not less than three years" or "are in a relationship of some permanence, if they are the natural or adoptive parents of a child."[58]

The standard definition of "spouse" is largely self-explanatory. In contrast, case law is required to interpret the expanded definition. First, the term "continuously" has been interpreted by the court flexibly. It is not only a question of geography but a question of intent.[59] One of the cohabitees must intend to permanently sever the relationship or the court may interpret the relationship as one with some degree of continuity.[60] Second, "of some permanence" has also been interpreted flexibly by the courts. The court held in *Hazlewood v. Kent*:

> One of the strongest indicia of an intention to be treated as a family is the existence of children born to the couple. When this is combined with an element of financial support by one party to the other, an altering of the roles in the relationship as a result of the birth of the children and some time spent together on a regular basis, this relationship should be considered to be 'cohabitation.'[61]

It is clear that the legislature and courts attempt to cast a wide net with respect to the expanded definition of "spouse."

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58 *Ibid*, s 29.

59 *Sullivan v Letnik*, 5 RFL (4th) 313, 1994 CarswellOnt 420 (Ont UFC) at para 24.

60 *Ibid*.

61 *Hazlewood v Kent*, [2000] OJ No 5263 (Sup Ct J) at para 38, [*Hazlewood*].

When Are the Definitions Applicable: Support Obligations and the Exclusion of Cohabiting Couples from the Property Sharing Regime

The standard definition of "spouse" is used for the entirety of the *Act* except for Part III, support obligations. Thus, those who cohabit will fall within the scope of Part III of the *Act* if they have either cohabited continuously for at least three years or are in a relationship of some permanence and have children. Cohabitees do not have access to the property sharing regime that is available to married spouses upon the breakdown of their relationship or the rights to possession of the matrimonial home. Ontario's *Family Law Act*, in its current form, forces the financially vulnerable party to resort to equitable claims upon the breakdown of their relationship. Thus, Ontario adopts an opt-in approach as cohabiting couples may enter into a cohabitation agreement that addresses all the issues that would otherwise be addressed if married.

RATIONALIZING THE TWO DEFINITIONS OF "SPOUSE": HIDDEN POLICIES

The use of two distinctly different definitions of "spouse" within the same *Act* is complex and may be confusing to cohabiting couples. On the one hand, policymakers are claiming that cohabitees and married spouses are equivalent, at least for the purposes of support obligations. On the other hand, policymakers differentiate between married spouses and cohabitees for all other purposes, including property sharing. The State's financial interest at stake in this decision plays a decisive role in these different definitions. The rationale that underlies the use of the expanded definition for support obligations is two-fold. First, and foremost, the State places the financial burden of ongoing support on former family members as opposed to the "public purse." Second, the State protects the more vulnerable party of the cohabiting relationship

from exploitation by entitling them to support, if they meet the criteria as set out in the *Act*.[62]

It is the first of these rationales, the State's financial interests, that is more disconcerting. The legislature prefers to place the financial obligation for support on former family members as opposed to the State. This desire to lessen the pull on the public's purse strings is often referred to as a "hidden policy," as it often falls outside the articulated reasoning behind legislative decisions. In *Nova Scotia (Attorney General) v. Walsh*, Justice L'Heureux-Dubé identifies the "desire to avoid diverting funds from the public purse in order to support separated individuals."[63] As a consequence, former family members often have "significant ongoing responsibilities to alleviate vulnerability among some family members after separation."[64]

The ongoing responsibility to alleviate economic vulnerability of former family members ensures that contact between former family members is maintained. This ongoing responsibility to former family members has led to the "post-separation" family.[65] The statistics regarding the post-separation family are alarming. In fact,

> . . . the end of a marriage or common-law relationship increased the likelihood of poverty substantially. For those who were married and had children, the risk of poverty rose from 3.1 per cent to 37.6 per cent after divorce or separation. . . . In 1982–86, the family income of women (adjusted for changes in family size)

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62 *OFLA*, *supra* note 3, s 29.

63 *Supra* note 14 at para 116.

64 Mossman, *Commentary*, *supra* note 8 at 339.

65 *Ibid*.

> dropped by an average of about 30 per cent in the year after their marriage ended.[66]

These financially vulnerable family members emerge after separation, as one household has now been split into two and the cost of living nearly doubles. The dependency, which was once hidden under the cover of an intact family, emerges upon the dissolution of the family unit.[67] "Separation or divorce thus 'unmasks' the dependency for which intact families provide support."[68]

The use of the expanded definition of "spouse" for the purposes of Part III of the *Family Law Act* thereby expands the number of "post-separation" family units. The question is whether the policy decision to place the burden so heavily on the family is justified. This is the point at which the distinction in legislation between cohabitants and married spouses becomes questionable. That is, if cohabitants and married spouses are equivalent with respect to support obligations, it is difficult to justify the differentiation when it comes to other sections of the *Act*, particularly property. Put simply, if cohabitants are functionally similar to married spouses for the purposes of support, then they must be considered functionally similar for all purposes.

THE MARRIAGE-COHABITATION DEBATE: THEMES, ISSUES, AND POLICY

Legal scholars have advocated for the extension of the legal regime that deals with the economic consequences of marriage to those who cohabit. Careful consideration must be given to the various themes, issues, and general policies that underlie this marriage-cohabitation

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66 T Lempriere, "A New Look at Poverty" (1992) 16 Perception 18 at 19–20, cited in Mary Jane Mossman, "Running Hard to Stand Still: The Paradox of Family Law Reform" (1994) 17 Dal LJ 5 at 6 [Mossman, "Running Hard"].

67 Mossman, *Commentary*, *supra* note 8 at 339.

68 *Ibid* at 338–339.

debate. The Supreme Court of Canada has provided its divided view on the marriage-cohabitation debate in two significant cases: *Nova Scotia (Attorney General) v. Walsh* and, more recently, *Quebec (Attorney General) v. A*.[69] The division of the Court in both cases has provided scholars with a valuable perspective on the themes and issues that are involved in the marriage-cohabitation debate. These themes and issues will be dealt with in turn.

Functional Similarity

Family law ought to be viewed from a functionalist perspective. That is, policymakers must focus on what families do and take account of the functions of families.[70] This is in sharp contrast to the familialism approach, which focuses on how families should look or behave.[71] The familialism approach has been used by courts to "preclude some households from being regarded as 'families' even when their members wish to be so defined."[72] The functionalist perspective is proactive. It adapts to changes in the form of the family by considering the functions performed by households that wish to be considered "families." By contrast, the familialist perspective is reactive and the perception of what the family ought to look like will change only after legislative reform.

When focusing on what families do and how they behave, it must be concluded that cohabitation and marriage are functionally similar. This argument only becomes more persuasive the "longer the

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69 2013 SCC 5, 354 DLR (4th) 191 [*Quebec*].

70 Mossman, *Commentary*, supra note 8 at 11.

71 *Ibid*.

72 *Ibid*.

cohabiting relationship lasts, especially where children are involved."[73] As noted by Kuffner,

> Common-law couples often share many of the same characteristics as married couples: shared accommodations, pooling resources, emotional and financial interdependence, and the raising of children. Some cohabitants have become financially dependent on their spouse, similar to some married spouses. Consequently, cohabitants often suffer similar hardships upon breakdown of such relationships.[74]

If cohabitation is functionally similar to marriage, it seems reasonable that cohabitees have access to the same rights and remedies available to married spouses upon the breakdown of their respective relationships.

The above argument was addressed by Justice Bastarache, speaking for the majority in *Walsh*. He held that although there is a great deal of similarity between marriage and cohabitation, one cannot ignore the heterogeneity that exists within the latter group.[75] This reasoning is flawed. Although there is considerable heterogeneity among cohabiting individuals, a similar level of heterogeneity exists among married spouses. Thus, it seems illogical to differentiate between cohabitation and marriage because "[w]hen we compare cohabitation and modern-day marriage there are few distinctions."[76]

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73 Heather Conway and Philip Girard, "No Place like Home: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain" (2005) 30 Queen's LJ 715 at para 21.

74 KL Kuffner, "Common-Law and Same-Sex Relationships under *The Matrimonial Property Act*" (2000) 63 Sask L Rev 237 at 239.

75 *Walsh*, *supra* note 14 at para 39.

76 Holland, *supra* note 1 at 151–52.

The above-mentioned argument seems to commence its analysis from an illogical starting point. That is, it commences its analysis by differentiating between marriage and cohabitation, rather than analyzing what constitutes a family. If the Court had commenced its analysis by answering this question, the reasoning of the Court might have been significantly different. That is, when one looks at the family, it is the functions performed by the family that define its existence. In order to consider the functions of the family it is important to consider its basic form—commonly referred to as the "nuclear family"—which is comprised of parents and their children, if any.

Marriage and cohabitation are simply variations of this basic family unit. As such, the same rights and obligations should be imposed on those who choose to cohabit and those who choose to marry. The relevant question then becomes when to impose these rights and obligations on the parties who cohabit and those who marry. This is where the distinction between marriage and cohabitation ought to be made. Where the community may view the date of marriage as symbolizing the formation of a new family, there is no similar date for a cohabiting couple. Thus, the question becomes when does the cohabiting couple become viewed as a family. The issue of determining when this event occurs and, therefore, when the legal rights and obligations ought to be extended to a cohabiting couple is explored later in this paper. The reasoning of Justice Bastarache fails to recognize that not only is there heterogeneity among those who cohabit and those who are married, but there is also heterogeneity among the *forms* of the family, i.e., cohabitation and marriage.

Autonomy: Whose Choice Is It?

Personal autonomy is a value that underlies the equality guarantee in section 15 of the *Charter*.[77] Thus, courts must respect the choices

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[77] *Quebec*, *supra* note 69 at para 276; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

"made by individuals in the exercise of that autonomy."[78] The Supreme Court of Canada has emphasized the importance of personal autonomy in both *Nova Scotia (Attorney General) v. Walsh* and *Quebec (Attorney General) v. A*. In fact, the Court has gone so far as to hold that "[w]here the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount."[79]

The Supreme Court of Canada has taken the position that those who choose to marry are simultaneously deciding to adopt the legal rights and obligations associated with marriage.[80] To cast the net so wide as to capture individuals who do not make this conscious choice and impose the same obligations on these individuals would be unfair. It "would be to intrude into the most personal and intimate of life choices by imposing a system of obligations on people who never consented to such a system."[81]

The above reasoning of the Court, in my opinion, is flawed in one respect—choice in terms of the family can be paramount only if the decision is made consciously and if it is mutual. Thus, the first question that must be posed is whether the decision to cohabit is a mutual decision. Furthermore, the choice must be a conscious one in which the parties are aware of the consequences that flow from that decision. Thus, it must also be asked whether cohabitees actually know their legal rights.

First, the decision to cohabit is not always a mutual one. In some circumstances, only one of the parties may wish to avoid marriage due to the matrimonial obligations that automatically

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78 *Quebec*, *supra* note 69 at para 276.

79 *Walsh*, *supra* note 14 at para 43.

80 Hovius, *supra* note 32 at 192.

81 *Ibid*.

attach."[I]t is dangerous to assume that this motivation applies to both partners."[82] In this case, a power imbalance exists between the parties and the dependent party becomes financially vulnerable. Justice Abella in *Quebec (Attorney General) v. A*. notes the flaws of an opt-in regime:

> A further weakness of the current opt-in system is its failure to recognize that the choice to formally marry is a mutual decision. One member of a couple can decide to refuse to marry or enter a civil union and thereby deprive the other of the benefit of needed spousal support when the relationship ends. In her dissenting reasons in *Walsh*, L'Heureux-Dubé J. observed that "[t]his results in a situation where one of the parties to the cohabitation relationship preserves his or her autonomy at the expense of the other: 'The flip side of one person's autonomy is often another's exploitation.'"[83]

In this case, it is up to the "legislature to intervene if it believes that the consequences of such autonomous choices give rise to social problems that need to be remedied."[84] Where only one party desires to avoid the matrimonial obligations by continuing to remain in a cohabiting relationship, a social problem arises as the vulnerable party requires protection.

Second, "couples often . . . are mistaken about the rights of unmarried cohabitants."[85] Many individuals are under the false impression that they have similar rights and obligations to married

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82 Wu, *supra* note 9 at 166.

83 *Supra* note 69 at para 375.

84 *Ibid* at para 276.

85 Anne Saunders, "Cohabitants in Private Law: Trust, Frustration and Unjust Enrichment in England, Germany and Canada" (2013) 62 ICLQ 629 at 662.

individuals if they are in a cohabiting relationship of some duration.[86] That is, they believe that as far as the law is concerned they are actually married. "The term 'common-law marriage' compounds this confusion."[87] In *Quebec (Attorney General) v. A.*, Justice Abella echoes these concerns as she states that those who cohabit do not always "turn their minds to the eventuality of separation" or are ignorant of the law that applies to them.[88] Instead, many cohabitees "will just drift along, in blissful ignorance, believing that they have property rights, until they talk to a lawyer at the end of their relationship and learn the harsh truth."[89]

Thus, it is crucial that the legislature adopt a scheme that protects vulnerable individuals from both their ignorance and their exploitation. An opt-out regime will protect these individuals who do not turn their minds to their legal rights and obligations when entering into such a relationship. One may argue that such legislation casts too wide a net, capturing individuals in a scheme that they did not voluntarily accept. Implicit in this argument is the conviction that these individuals know their legal rights and can therefore mutually opt-out. In providing an opt-out scheme, the onus is placed on the more powerful party. Moreover, if an opt-out scheme is adopted as the default regime, the opportunity for exploitation is minimized.

Knowledge and Exploitation: Finding the Delicate Balance Between Autonomy and the Need to Protect the Vulnerable

There are three situations that may occur within a cohabiting relationship with respect to the couple's knowledge of their legal rights

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86 Wu, *supra* note 9 at 166.

87 *Ibid*.

88 *Supra* note 69 at para 374.

89 DA Rollie Thompson, "Annotation of *Walsh v Bona*" (2003) 32 RFL (5th) 87 at 87.

and obligations: (1) both individuals are familiar with their legal rights and obligations; (2) only one partner understands their legal rights and obligations; and (3) neither partner is familiar with their legal rights and obligations. It is important to weigh the values of autonomy and the need to protect the weaker party within the contexts of these three situations. A delicate balance can only be struck between these competing values if the contexts in which the concerns arise are addressed.

First, if both parties are familiar with the legal rights and obligations of unmarried cohabitants, the parties *may* stand on equal ground. If one party wishes to marry and the other does not, a power imbalance will still exist. Thus, the vulnerable party will be left unprotected unless the couple agrees to enter into a cohabitation agreement. This scenario demonstrates the concerns regarding exploitation. Some may contest that an individual's choice to remain with a partner who refuses to marry is the same as a spouse who gives in to insistent demands for marriage.[90] Policymakers, however, must place the onus on the party who wishes to avoid such obligations. In fact, in *Quebec (Attorney General) v. A.*, Justice Abella found that although the current opt-in regime may well be adequate for some cohabiting couples who enter their relationship with "sufficient financial security, legal information, and the deliberate intent to avoid the consequences of a more formal union . . . their ability to exercise freedom of choice can be equally protected under . . . an opt *out*" regime.[91] The vulnerable party, however, requires "presumptive protection no less in *de facto* unions than in more formal ones."[92]

Second, the chance of exploitation is maximized in a scenario in which only one partner in a cohabiting relationship is familiar with the rights and obligations of unmarried cohabitants. Placing the onus

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90 *Quebec*, *supra* note 69 at para 260.

91 *Ibid* at para 372.

92 *Ibid*.

on the party who seeks to avoid the legal obligations by means of an opt-out regime protects the vulnerable party and minimizes exploitation. Autonomy ought not to be synonymous with exploitation. One cannot stand behind the veil of autonomy to justify one's exploitation of the weaker party.

Third, if both parties are unaware of the rights and obligations of unmarried cohabitants, the vulnerable party will emerge only after the breakdown of the relationship. Scholars suggest that this scenario may be the most common among cohabitees. This is because:

> most couples do not engage in "crystal-ball" gazing at the inception of the relationship and do not have a clear idea which obligations they are consciously choosing to avoid. If they did, one would expect such couples to have entered into a domestic contract rather than risking subsequent claims based on support or unjust enrichment.[93]

Many are "not aware of the distinction between Part III of the *Family Law Act* and the rights under Parts I and II until they are faced with the breakup of the relationships."[94] The use of the standard definition of "spouse" for Parts I and II of the *Act*, and the use of the expanded definition for Part III creates this confusing distinction. The creation of an opt-out regime would eliminate the above distinction and the use of two definitions of "spouse" within the same *Act*. Adopting an opt-out regime would decrease the amount of "public confusion about the difference between marriage and cohabitation."[95] Furthermore, the adoption of an opt-out regime would protect cohabitees whether they

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93 Holland, *supra* note 1 at 152.

94 *Ibid* at 158.

95 Wu, *supra* note 9 at 166.

are "aware of their legal rights or not," leaving cohabitees "the freedom to choose not to be protected."[96]

Complexity and Uncertainty: Cohabitees Must Resort to Equitable Claims

Under Ontario's *Family Law Act*, cohabitees do not have access to the property-sharing regime included in Part I of the *Act*. Cohabitees must resort to equitable claims for the redistribution of property after the breakdown of their relationship. These claims of unjust enrichment are unpredictable, creating a sense of uncertainty in the law.

> It is clear that the doctrine of unjust enrichment has serious limitations as a tool for the fair allocation of property between cohabiting spouses. . . . The uncertainties that have appeared in the application of the doctrine of unjust enrichment may reflect a poor fit between its requirements and the realities of domestic relationships.[97]

These equitable claims do not provide cohabitants with an effective alternative to the property sharing regime accorded to married spouses under Part I of the *Family Law Act*.

Equitable claims in the context of cohabiting relationships is an area of the law that continues to develop. For example, the *Kerr v. Baranow* decision in 2011 established the joint family venture and gave new direction to this area of law.[98] This development may further complicate equitable claims made by unmarried cohabitants. This complexity increases the level of uncertainty in the law and, consequently, fosters litigation. Given the cost of litigation, some

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96 *Quebec*, *supra* note 69 at para 374.

97 OLRC, *Family Property Law*, *supra* note 11 at 39–40.

98 2011 SCC 10, 328 DLR (4th) 577.

cohabitees refuse to pursue what they would otherwise be entitled to if the property sharing regime accorded to married spouses was extended to include cohabitees.

Courts may be attempting to fill a legislative void by providing cohabitees with a "substitute for [the] non-existence of a family law regime for cohabitants."[99] If an opt-out approach were to be adopted in Ontario, cohabitees would no longer have to navigate through the complex area of equitable claims. Such reform would do away with the current piecemeal approach and provide cohabitants with a more comprehensive regime. Cohabitants would be able to enter and exit relationships aware of their rights and obligations. An opt-out regime would provide cohabitants with certainty and predictability in the law.

REFORM IN OTHER PROVINCES: THE APPROACHES ADOPTED IN NOVA SCOTIA AND BRITISH COLUMBIA

Other provinces have been quicker to address the recent emergence of cohabitation, as these unions are increasingly becoming an alternative to the traditional family form. It is important to take into consideration the approaches adopted in other provinces, such as Nova Scotia and British Columbia, and the reasoning behind such reform. The approaches taken in the two provinces are fundamentally different, as Nova Scotia adopted an opt-in approach, while British Columbia chose an opt-out approach. Each province attempts to balance the competing goals of autonomy and equality (i.e. the protection of the vulnerable). While autonomy is given greater emphasis in the opt-in approach taken by Nova Scotia, the reform in British Columbia tends to emphasize the protection of the vulnerable. It is important to note that reform in Nova Scotia took place approximately a decade prior to the reform in British Columbia.

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99 Saunders, *supra* note 85 at 648.

Registered Partnerships: The Approach Adopted in Nova Scotia

In *Nova Scotia (Attorney General) v. Walsh*, Justice Bastarache makes note of the "alternative choices and remedies" available to unmarried cohabitants.[100] He states that "these couples are also capable of accessing all of the benefits of the *MPA* through the joint registration of a domestic partnership under the *LRA*."[101] Part II of the *Law Reform (2000) Act*, which addresses the scheme for cohabiting couples for the purposes of property sharing, came into effect on June 4, 2001.[102] Through this legislation, Nova Scotia adopted an opt-in regime whereby an unmarried cohabiting couple could register their domestic partnership.[103] Upon registration, the cohabitants would have the same rights and obligations as "a spouse under the *Matrimonial Property Act*."[104]

The adoption of an opt-in regime in the form of registered partnerships was a step in the right direction, but it fell short of properly recognizing "a diversity of family forms."[105] The shape of the reform was surprising, considering the *Discussion Paper* and *Final Report* released by the Law Reform Commission of Nova Scotia.[106] The Commission noted that if the government wished "to encourage and

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100 *Walsh*, *supra* note 14 at para 58.

101 *Ibid*.

102 *Law Reform (2000) Act*, SNS 2000, c 29, s 46(1).

103 *Ibid*, s 54(1).

104 *Ibid*, s 54(2)(g).

105 Law Reform Commission of Nova Scotia, *Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act* (Discussion Paper) (Halifax: Law Reform Commission of Nova Scotia, April 1996) at iii [*Discussion Paper*].

106 *Ibid*; Law Reform Commission of Nova Scotia, *Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (Final Report) (Halifax: Law Reform Commission of Nova Scotia, March 1997) at 22 [*Final Report*].

support family life, it must assure a basic level of fairness on the termination of marriage and marriage-like relationships."[107] In its final report, the Commission took the view "that the existing law regarding cohabiting couples is neither clear nor fair, and altering the law to provide for only optional coverage of such couples would simply perpetuate the existing situation."[108] The Commission expressed the notion that an opt-out approach would still respect the value of autonomy because "if both parties in a relationship value autonomy from legal regulation strongly and equally, they will undoubtedly contract out of the Act."[109] In short, the Commission strongly preferred an opt-out approach and was of the view that an opt-in approach, such as that taken by Nova Scotia, would not resolve the issues faced by cohabiting couples after separation.

Extending the Rights and Obligations of Married Spouses to Unmarried Cohabitants: The Opt-out Regime of British Columbia

Reform has more recently taken place in British Columbia with the enactment of the *Family Law Act*.[110] The *Act*, which has been in force since March 18, 2013, adopts an opt-out approach.[111] That is, the *Act* defines "spouse" to include both married individuals and unmarried cohabitants who have either lived together in a "marriage-like" relationship for two years or who have lived together in a "marriage-like" relationship and have a child together.[112] It is important to note here that cohabitants must have lived together in a "marriage-like" relationship for two years to fall within the scope of the provisions

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107 *Discussion Paper*, *supra* note 105 at 26.

108 *Final Report*, *supra* note 106 at 22.

109 *Ibid*.

110 SBC 2011, c 25 [*FLABC*].

111 BC Reg 131/2012.

112 *FLABC*, *supra* note 110, s 3.

dealing with property and pension division.[113] Nonetheless, this approach "recognizes the similarities between married and unmarried relationships" and "promotes committed family relationships regardless of marital status."[114]

First, the Civil and Family Law Policy Office recognized that "not everyone has a choice about whether or not to marry."[115] The example that "a couple may stay together even though one spouse wants to marry and the other does not" is used to illustrate this point.[116] An opt-out regime responds to such concerns as it presumptively protects the vulnerable party in a relationship where there is a clear power imbalance. Second, the standardizing of the expanded definition of "spouse" creates "greater consistency in the treatment of unmarried spouses in family law generally and across related laws."[117] Lastly, the inclusion of cohabitants

> in the property division scheme recognizes that the number of common-law relationships is on the rise and that common-law remedy of constructive trusts inadequately protects the interests of this growing number of unmarried spouses.[118]

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113 *Ibid*.

114 Ministry of Attorney General, *Family Relations Act Review, ch 2* (Discussion Paper), by the Civil and Family Law Policy Office (British Columbia: Ministry of Attorney General Justice Services Branch, February 2007) at 5.

115 *Ibid*.

116 *Ibid*.

117 Ministry of Justice, "Discussion of the Family Law Act", Part 5 at 1, online: Ministry of Attorney General <www.ag.gov.bc.ca/legislation/family-law/pdf/part5.pdf>.

118 *Ibid*.

REFORM IN ONTARIO: THE ADOPTION OF AN OPT-OUT REGIME

It is interesting to note that 10.9 per cent of all census families in Ontario were common-law couples in 2011.[119] Although Ontario has the lowest rate of cohabitation among Canada's ten provinces, this number will continue to rise. Legislative reform is needed to address this emerging family form. Legislation is one of the primary references that inform how individuals structure their relationships, both in business and in family. Thus, the question now becomes whether Ontario should adopt an opt-in approach similar to Nova Scotia's scheme or an opt-out approach similar to recent reform in British Columbia.

In 1993, the Ontario Law Reform Commission (OLRC) released its *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act*.[120] The OLRC "concluded that the preferred approach was to extend the legislative regime to cohabiting couples, requiring those who wished to avoid the legislative regime to opt out."[121] The OLRC identified four policy rationales to support its conclusion: (1) the functional similarity between marriage and cohabitation; (2) "reasonable expectations of family members"; (3) "the need to compensate economic contributions to family well-being"; and (4) "relationships between family law and social assistance law."[122] The last of these rationales—relationships between family law and social assistance law—is synonymous with the hidden policies underlying family law decisions discussed earlier. That is, the OLRC identifies the desire to "avoid diverting funds from the public purse in

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119 Statistics Canada, *Portrait of Families*, *supra* note 17 at 6.

120 Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto: OLRC, 1993) at 27.

121 Mossman, *Commentary*, *supra* note 8 at 417.

122 *Ibid*.

order to support separated individuals" as an opt-out regime would provide significant relief for Ontario's social assistance regime.[123]

In my view, an opt-out approach should be adopted, as an opt-in approach, similar to that adopted in Nova Scotia, would "simply perpetuate the existing situation."[124] An opt-out regime ensures protection of the vulnerable party, or, at the very least, ensures that both parties must agree to avoid such obligations. That is, "only an opt-out scheme would ensure protection in the absence of positive action by the parties."[125] The gap between marriage and cohabitation has narrowed over the past fifty years. Cohabitation is a new form of family living that should be recognized by policymakers. These policy concerns all suggest that an opt-out approach is preferable for future reform in Ontario.

The question now is how the term "spouse" would be defined in this new approach in Ontario. The definition of spouse included in British Columbia's *Family Law Act* provides a strong framework and a good starting point. The three-year mark in a cohabiting relationship seems to be of great significance. "Social science evidence indicates that less than half of cohabiting relationships reach this point."[126] In fact, approximately one-third will marry and another quarter will separate within this time period.[127] A three-year threshold will therefore provide reasonable grounds to believe that the "trial period" has passed.[128] Alternatively, and more accurately, this three-year mark

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123 *Walsh*, *supra* note 14 at para 116.

124 Law Reform Commission of Nova Scotia, *Final Report*, *supra* note 106 at 22.

125 The Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (London: The Law Commission, July 2007) at 41–42.

126 Conway & Girard, *supra* note 73 at para 21.

127 Wu, *supra* note 9 at 1.

128 Conway & Girard, *supra* note 73 at para 21.

can be defined as the point in time in which the community views the cohabiting couple as a "family." This is unless, of course, the cohabiting couple have children together prior to this time, thereby causing such legal rights and obligations to be extended at an earlier date. Accordingly, I propose the following definition of spouse:

> 1(1) In this Act,
> "spouse" means either of two persons who
> (a) are married to each other,
> (b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right, or
> (c) have lived together in a marriage-like relationship, and
> i. have done so for a continuous period of at least 3 years, or
> ii. except in Part 1 [Family Property], have a child together.

TESTING THE NEW APPROACH: THE EFFECT OF REFORM ON NEVER-MARRIED AND POST-MARITAL COHABITANTS

It is important to test the proposed definition of spouse to ensure that it establishes a fair regime and strikes the appropriate balance between autonomy and the protection of the vulnerable. Given the statistics discussed earlier, for the purposes of this paper the effects of the proposed reform will be analyzed in the context of four different cohabiting relationships: (1) never-married cohabitants without children; (2) never-married cohabitants with a mutual child; (3) post-marital cohabitants without children; (4) post-marital cohabitants who have brought children into the relationship. Two groups have not been included for the purposes of this paper—never-married cohabitants who have brought children into the relationship, and post-marital cohabitants with a mutual child. The former is uncommon and the effect of reform will be similar to that on group 4. The inclusion of the

latter would be redundant as the effect of reform would be identical to the effect on group 2. The possibility of having both a mutual child and a child brought into the relationship will not be considered, as the existence of a mutual child is viewed as determinative.

Group 1: Never-married Cohabitants without Children

This situation creates the greatest amount of concern for the opt-out approach suggested above. This relationship may be the least permanent of the four groups in consideration and the period of cohabitation may have the greatest chance of being conceived as a "trial marriage." Furthermore, the cohabitants may have the greatest chance of being unfamiliar with the law and the legal obligations and rights that would automatically attach upon reaching the three-year mark. One may suggest that an opt-in approach may be best suited for this group of cohabitants. The three-year mark, however, prevents the net from being cast too far.

The similarities between cohabitants and married persons only becomes stronger with the passage of time. The intentions of cohabitants may change over the duration of their relationship. Furthermore, a dependency may develop over time. This is why an opt-out approach appropriately prevents such vulnerabilities from being left unprotected. An opt-out approach considers the needs at the end of a relationship more important than the intentions at the beginning.

Never-married cohabitants without children will fall within the definition of spouse only if either (a) they choose to marry, or (b) they continue to cohabit for more than three years. It is at this three-year mark that the law would deem never-married cohabitants without children to be living as a family even though they remain unmarried. The consequences of not adopting such an approach appear to be much more severe than the consequences of adopting this approach. If both of the cohabitants wish to avoid such obligations, they are free to contract out of such a regime. Not much is lost by providing protection for a vulnerable party, especially starting from the presumption that the

unaware public believes after three years they are considered to be married according to the law.

Group 2: Never-married Cohabitants with a Mutual Child

The purpose of an opt-out approach is to appropriately recognize the diversity of family forms. Ontario's *Family Law Act* intends to provide a legal regime for individuals to consider when structuring their significant relationships. There is no better an indicator of a family than the presence of a mutual child. That is, "one of the strongest indicia of an intention to be treated as a family is the existence of children born to the couple."[129] Thus, it is a fair presumption that those who cohabit and have a child together intend to appear as, and wish to be treated as, a family.

A power imbalance is likely to exist in a situation where never-married cohabitants have a child together. A balance must be struck between the wishes of a party to avoid obligations under the *Family Law Act* and equality. This begs the question of what equality actually means in the context of a family. One possible explanation is that equality within the family begins from the presumption that the spouses have contributed equally to the family. The dissolution of an intact family unit often unmasks the existence of dependency. Without the presumption of equal contribution, the dependent party is vulnerable and often exploited.

The Supreme Court of Canada took judicial notice of the phenomenon of the "feminization of poverty" for post-separation women and children.[130] There is no reason to suggest that this phenomenon applies only to married women. In fact, scholars have found that the end of a marriage *or* a common-law relationship increases the likelihood of poverty, especially when children are

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129 *Hazlewood*, *supra* note 61.

130 *Moge v Moge*, [1992] 3 SCR 813 at para 55.

involved.[131] This group of cohabitants is best served and protected by an opt-out approach.

Group 3: Post-marital Cohabitants without Children

Post-marital cohabitants are the most likely to be familiar with their rights and obligations that arise from Ontario's *Family Law Act*. Accordingly, this group of individuals can appropriately structure their relationships in a manner that is consistent with their intentions. These unmarried couples may contract out of the obligations that arise at the three-year mark if they wish to do so.

The idea that not everyone has a choice about whether or not to marry may be most applicable to this group of cohabitants. This is because a cohabitant may refuse to marry because of their previous marital experience. Vulnerability is maximized in an opt-in regime whereby a couple remains together even though one spouse wishes to marry and the other refuses to. The suggested opt-out approach overcomes this issue by appropriately placing the onus on the more powerful party. At the very least, an opt-out approach provides the financially vulnerable spouse with more bargaining power.

Group 4: Post-marital Cohabitants Who Have Brought Children into the Relationship

This group of cohabitants is the most complex of the four because of the existence of "two families" in one household. That is, at least one of the cohabitants is a part of two families. The question then becomes whose interests should the approach protect: the current or former family. In considering this question, policymakers must balance not only autonomy and equality but also the interests of the children brought into the relationship and those of the financially vulnerable spouse.

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131 Mossman, "Running Hard", *supra* note 66 at 6.

Children are among the most vulnerable individuals within Canadian society. Thus, balancing the interests of the children and the vulnerable spouse is a difficult task. One possible resolution is to provide the courts with a great deal of discretion when there are children brought into the relationship. This, however, adds a layer of complexity to the law and would make the law more difficult to navigate. Furthermore, giving the courts such discretion creates some sense of unpredictability in the law. Thus, if one of the cohabitants brings children into the relationship and wishes to protect their interests, the onus should rest on that individual to structure their relationship accordingly. A cohabitation agreement would provide sufficient protection for the interests of the children brought into the relationship.

CONCLUSION

Marriage may no longer enjoy a "uniquely privileged status" in Ontario. The social perception of what constitutes a family has changed over the past fifty years with the emergence of cohabitation. This marked departure from the traditional perception of the family and legislative reform are necessary due to the misconception that marriage ought to be synonymous with family and the lack of security provided to the vulnerable parties in a cohabiting relationship. While marriage may signify the formation of a family, married spouses and their children are only one variation of the nuclear family. Defined as the basic social unit composed of two parents and their children, the nuclear family need not be confined to married spouses but should also include those who choose to cohabit.

The functional similarity between marriage and cohabitation is one of the main pillars supporting the argument for legislative reform. Legislative reform has already taken place in many of Canada's other provinces. The family must be redefined in order to reflect changes that have occurred to the family over the past fifty years and the new variations on the nuclear family. Moreover, this redefinition must be reflected in family law policy and the *Family Law Act*.

One of the many purposes of the law is to regulate social behaviour and create a framework within which individuals may structure their relationships. The steady rise in the rate of cohabitation indicates that cohabitation poses a greater threat to the institution of marriage than the high incidence of divorce.[132] Without reform, cohabitants are left without clear direction as to their legal rights and obligations under Ontario's *Family Law Act*. An opt-out regime eliminates the guesswork that exists currently.

When crafting the new legislation, the Ontario government should consider the recent reform in British Columbia. Furthermore, policymakers should acknowledge social science evidence and the work of legal scholars. Although Nova Scotia chose to adopt an opt-in regime, it is important to pay close attention to the findings of the Law Reform Commission of Nova Scotia in their *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*.[133] The amalgamation of all this information leads to the simple conclusion that an opt-out regime is preferable.

An opt-out approach also finds an effective balance between the competing values of autonomy and equality entrenched in the *Charter*. By adopting the expanded definition of "spouse" and the three-year benchmark for cohabitants, an opt-out approach provides cohabitants with much-needed certainty, predictability, fairness, and consistency in the law. Through their inclusion in the property sharing regime, cohabitants would no longer have to resort to navigating the minefield of equitable claims. Instead, an opt-out approach appropriately places the burden on the more powerful party, thereby providing the vulnerable party with more bargaining power.

Lastly, it is important to educate the public about such reform if it is to take place. This will ease the transition into the new regime

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132 Wu, *supra* note 9 at 4.

133 *Supra* note 106.

by allowing cohabitants to become accustomed to their new legal rights and obligations. Familiarity with such reform also has the effect of minimizing exploitation and vulnerability. This reform will appropriately address the most relevant question in family law—who is a family—and recognize that the modern family is no longer limited to those who marry.