Home (Not So Alone): Remodelling the Common Intention Constructive Trust

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Abstract— This article proposes a modification of the common intention constructive trust expounded by the courts in *Stack v Dowden* (*Stack*) and *Jones v Kernott* (*Jones*). It advances that the courts should adopt a unified legal regime for both 'joint names' and 'single name' cases, as the Supreme Court proposed in *Jones*. This is to be achieved by (i) basing the presumption of a beneficial joint tenancy on the intention of the parties to enter into a joint enterprise, and (ii) foregoing the quantification stage of analysis. This article identifies a number of issues plaguing the current case law, namely that in 'joint names' cases (i) it is unclear when severance occurs and whether the necessary formalities are actually met; and (ii) in practice when quantifying beneficial interest, the case law shows an over-reliance on financial contributions. Moreover, it outlines how in 'single name' cases there is considerable confusion and inconsistency in how the lower courts have applied the clashing decisions in *Lloyds Bank plc*

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v Rosset and *Jones*. It argues that the proposed model is to be preferred because it (i) better reflects the parties' intention of a joint enterprise, (ii) improves legal certainty and (iii) provides clarity for when severance of the joint tenancy occurs.

Introduction

How to address the division of the beneficial interest in the home upon the breakdown of a relationship is a challenging question. The present solution, the common intention constructive trust (CICT) approach, as adopted in *Stack v Dowden*[2] ("***Stack***") and *Jones v Kernott*[3] ("***Jones***"), leaves a lot to be desired. In joint names cases the presumption of joint beneficial ownership fails to afford effective protection to the family home, because it does not give due weight to the parties' intention to enter into a joint enterprise. Further, the quantification stage has led to undesirable results in that (i) it is unclear when severance occurs and whether the necessary formalities are actually met; and (ii) in practice when quantifying beneficial interest, the case law shows an over-reliance on financial contributions. Moreover, in single name cases there is considerable confusion and inconsistency in how lower courts have applied the clashing decisions in *Lloyds Bank plc v Rosset*[4] ("***Rosset***") and *Jones*. In order to remedy these issues, this article proposes a reformed CICT model, which, by foregoing the quantification stage and establishing a consistent approach between single and joint names cases: (i) better reflects the parties' intention of a *joint enterprise,* (ii) improves legal certainty and (iii) provides clarity for when severance of the joint tenancy occurs. Moreover, by focusing on the parties' intention at a *joint enterprise*, it achieves the 'single legal regime' Lord Walker and Baroness Hale alluded to in *Jones*.

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[2] *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

[3] *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.

[4] *Lloyds Bank plc v Rosset* [1991] 1 AC 107 (HL).

1. *Stack v Dowden*

A. *Stack v Dowden* Facts

In *Stack* the House of Lords (HL) was concerned with ascertaining the division of the beneficial interests in a home after the breakdown of Mr Stack (S) and Ms Dowden (D)'s relationship. The parties were joint legal owners of the property on Chatsworth Road.[5] In addition to the profits from the sale of Purves (their first property bought in D's sole name and with D's sole contributions), Chatsworth was bought using D's savings and a loan secured through a mortgage and two endowment policies (one in joint names and one in D's name alone).[6] S paid both the joint endowment and the mortgage interest, whereas D paid for the other endowment. The mortgage repayments were paid through lump payments by both parties, with D contributing more money.[7] The majority of the outgoings were paid by D, and it is unclear who was responsible for the improvements made to Chatsworth.[8] The relationship broke down nine years after the purchase of Chatsworth and S tried to sell the property and divide the proceeds equally.[9]

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[5] *Stack v Dowden* (n 2) [80] (Baroness Hale).
[6] *Stack v Dowden* (n 2) [81] (Baroness Hale).
[7] ibid.
[8] ibid.
[9] ibid [83] (Baroness Hale).

B. *Stack v Dowden* Decision

When this case reached the HL, Baroness Hale speaking for the majority held that the starting point in approaching the question of dividing the beneficial interest is that equity follows the law. Thus, beneficial interest should mirror legal ownership. Where the parties are in a joint tenancy, there should be a CICT of equal shares.[10] That is provided there is no strong evidence which would allow the Courts to find a tenancy in common. In such a case there would be a CICT of potentially unequal shares. Notably Baroness Hale distinguished the domestic context from commercial transactions, and thus held that there will be an unequal division of beneficial interest where 'the facts are very unusual'.[11] The presumption of a joint tenancy will be rebutted by evidence which demonstrates that the parties did not intend to divide beneficial interest equally. This can be an express agreement or inferred through conduct[12] (in *Jones* the imputation of intention was deemed inappropriate at this stage).[13] Where the presumption has been rebutted, the Courts can rely on an express agreement to quantify each parties' beneficial interest, or they can infer (and impute as a last resort)[14] the parties' intentions as to quantification by taking into consideration a range of facts, including the nature of the relationship, reasons for which the house was bought, the presence of children and how the

[10] ibid [54] (Baroness Hale).
[11] ibid [68] (Baroness Hale).
[12] ibid [49] and [60] (Baroness Hale).
[13] *Jones v Kernott* (n 3) [51] (Lady Hale and Lord Walker).
[14] *Jones v Kernott* (n 3) [51] (Lady Hale and Lord Walker), [71] (Lord Kerr).

outgoings of the home were met.[15] It is clear that 'how much was paid by each party is also likely to be less important'.[16]

On the facts, S and D were joint tenants at law and therefore, following the maxim 'equity follows the law', they were also joint tenants in equity. Continuing Her Ladyship's analysis, Baroness Hale found the presumption of a joint tenancy in equity had been rebutted by evidence that there was no mutual intention of equal beneficial ownership, giving rise to a CICT of unequal shares. The relevant evidence was that the parties had kept their finances strictly separate.[17] Following this, the majority rejected the appeal and upheld the 65:35 split in beneficial interest in favour of D.[18]

Lord Neuberger dissented, arguing that adopting a CICT in this case was undesirable, as the resulting trust (RT) was the historically favoured approach, even in the family context.[19] His Lordship identified problems in applying the CICT. Firstly, it invokes the presumption of advancement between unmarried cohabitants which is a context that had never seen the presumption's application.[20] Traditionally, when a father or husband gives property to their children or wife it will be considered an outright transfer[21] (the *paterfamilias* is considered to be under a duty to provide for his child or wife, and equity

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[15] *Stack v Dowden* (n 2) [69] (Baroness Hale).
[16] ibid.
[17] *Stack v Dowden* (n 2) [92] (Baroness Hale).
[18] ibid [95] (Baroness Hale).
[19] ibid [111] (Lord Neuberger).
[20] ibid [112] (Lord Neuberger).
[21] Jamie Glister, 'The Presumption of Advancement' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 268.

assumes that a relevant gratuitous transfer of property is made in furtherance of that obligation)[22]. Lord Neuberger explained that the introduction of the presumption of advancement into the context of unmarried cohabitants is novel, and in doing so ignores the fact that the 'the court is increasingly unenthusiastic about the presumption'.[23] Thus, *Stack* indirectly expands the scope of the presumption of advancement's application in face of changing social beliefs concerning gender roles within the family.[24] In fact, the presumption of advancement has been deemed 'clearly discriminatory'.[25] His Lordship further identified that the registration into joint names does not necessarily elucidate the parties' intentions (couples do not often discuss beneficial interest)[26] and the RT approach offered greater consistency in single name cases.[27] Thus, Lord Neuberger stressed that in the 'absence of any relevant evidence other than the parties' respective contributions'[28] the RT analysis should be adopted. Despite taking this different route, His Lordship arrived at the same 65:35 split in beneficial interest as the majority.

C. *Stack v Dowden* Objective

In *Stack* Baroness Hale was concerned with how the context of a family home shapes the intention of the parties as to the beneficial interest in their property. Her Ladyship clearly distinguished the

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[22] ibid 271.
[23] *Stack v Dowden* (n 2) [112] (Lord Neuberger).
[24] *Pettitt v Pettitt* [1970] AC 777 (HL) 793F (Lord Reid).
[25] HL Deb 9 February 2010, vol 717, col 707.
[26] *Stack v Dowden* (n 2) [113] (Lord Neuberger).
[27] ibid [114] (Lord Neuberger).
[28] ibid [122] (Lord Neuberger).

family home from houses bought in commercial or other contexts, for example, by stating that the case concerned a 'dwelling house which was to become their home'[29] and further that 'the domestic context is very different from the commercial world [...] Many more factors than financial contributions may be relevant to divining the parties' true intentions'.[30] Lord Neuberger, extrajudicially, has said that '[f]amily law certainly won *Stack*'.[31]

As Dewar explained, property law is undergoing a process of familiarisation, 'the process by which both judges and the legislature have modified general principles of land law or trusts to accommodate the specific needs of family members'.[32] Hayward further suggested evidence of familiarisation includes how CICTs can now be inferred on grounds other than substantial financial contributions, which was not the case in *Rosset*.[33] In examining *Stack*, Hayward found two instances of familiarisation. The first is setting a strong presumption that equity will follow the law,[34] in fact, a joint tenancy will only be displaced where 'the facts are very unusual'.[35] Requiring such exceptional evidence affords substantial protection to the family

[29] *Stack v Dowden* (n 2) [40] (Baroness Hale) (emphasis added).
[30] ibid [69] (Baroness Hale).
[31] Lord Neuberger, 'The Plight of the Unmarried' ('At a Glance' Family Law conference, 21 June 2017) [16] <www.supremecourt.uk/docs/speech-170621.pdf> accessed 19 March 2023.
[32] John Dewar, 'Land, Law, and the Family Home', in Susan Bright and John Dewar (eds), *Land Law Themes and Perspectives* (OUP 1998) 327, 328.
[33] Andrew Hayward, 'Family Property and the Process of Familiarisation of Property Law' (2012) 24 Child & Fam L Q 284, 286.
[34] ibid 297.
[35] *Stack v Dowden* (n 2) [68] (Baroness Hale).

home.[36] The second is the emphasis on fact sensitivity in *Stack*.[37] Baroness Hale set out factors which future courts may consider when inferring intention, namely, '[the] purpose for which the home was acquired'[38] (including whether it was intended to be a family home), 'the nature of the parties' relationship'[39] and the personalities of the parties[40] (among other factors).[41] This cast the scope of analysis wider than mere financial contributions.

Whilst *Stack* is a clear example of the familiarisation of property law, nonetheless, as explained by Lady Hale, it is still fundamentally a property law, rather than family law, case.[42] This article proposes that the intention of the parties as to their interests in the property in question cannot be read outside the context of their relationship. This is because, as will be noted below, the way in which financial contributions are divided by couples in intimate relationships is much different than it is in other circumstances. In this essay we will argue it is important to "protect the family home", meaning that it is important to protect the party who has contributed less or not at all to the purchase price ("the weaker party") and the investments they have made into the property.

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[36] Hayward (n 33) 296.
[37] ibid 296-297.
[38] *Stack v Dowden* (n 2) [69] (Baroness Hale).
[39] ibid.
[40] *Stack v Dowden* (n 2) [69] (Baroness Hale).
[41] Hayward (n 33) 297.
[42] Lady Hale, 'Legislation or Judicial Law Reform: Where Should Judges Fear to Tread?' (Society of Legal Scholars Conference, 7 September 2016) <www.supremecourt.uk/docs/speech-160907.pdf> accessed 19 March 2023.

I. The Strength of the Presumption in *Stack v Dowden*

Despite Baroness Hale's concern with giving effect to the joint enterprise between the parties in cases concerning the domestic context, on the facts of *Stack* itself the presumption of a beneficial joint tenancy is significantly weaker than Her Ladyship intended. Her Ladyship's contention that the facts were 'very unusual'[43] and that '[t]here cannot be many unmarried couples who have lived together for as long as this [...] and whose affairs have been kept as rigidly separate'[44] is misleading. For a case which aimed to develop the law to better reflect changing economic and social conditions,[45] it showed a limited understanding of how people in relationships approach finances. Firstly, a study by Vogler et. al. in 2006 identified that 21% of cohabitating partners kept their finances completely separate, as did 15% of cohabiting parents. A further 12% of cohabiting parents kept their finances partially independent (and partially pooled).[46] Thus, the facts of *Stack* were far from 'very unusual',[47] especially when considering that independent money management was more common (occurring in 21% of cases) in relationships where the woman earned more than the man.[48] Furthermore, a 2001 study by Elizabeth (which

[43] *Stack v Dowden* (n 2) [92] (Baroness Hale).
[44] ibid.
[45] ibid [60] (Baroness Hale).
[46] Carolyn Vogler, Michaela Brockmann and Richard D Wiggins 'Intimate Relationships and Changing Patterns of Money Management at the Beginning of the Twenty-First Century' (2006) 57 British Journal of Sociology 455, 465
[47] *Stack v Dowden* (n 2) [92] (Baroness Hale).
[48] Vogler, Brockmann and Wiggins (n 46) 474.

studied 13 cohabitating couples from New Zealand which made the conscious decision not to get married) identified that cohabiting couples treat their finances differently from married couples, and are more likely to keep their finances separate.[49] While the majority of the couples interviewed, which had children, used joint money management, they had been using it even before their decision to have children. In fact, only one couple changed from separate money management to joint money management upon having a child.[50] Thus, independent money management is not as unusual as Lady Hale suggested.

This, however, does not mean that *Stack* set a weak presumption. *Stack* appears to be an exception to its own rule. While the facts in *Stack* may in truth not have been highly unusual, future cases emphasised the degree to which the facts must be out of the ordinary to warrant an unequal division of the beneficial interest. For example, in *Solomon v McCarthy*, despite the defendant's claims of having made substantial improvements to the property, shares were found to be equal.[51] Furthermore, in *Pillmoor v Miah* the Court explicitly stated that the facts must be 'exceptional'.[52] The strength of the presumption is clear in *Rowland v Blades*, where the Court found that despite one party contributing the entire purchase price, the beneficial interest was

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[49] Vivienne Elizabeth 'Managing Money, Managing Coupledom: A Critical Examination of Cohabitants' Money Management Practices' (2001) 49 The Sociological Review 389.
[50] ibid 395.
[51] *Solomon v McCarthy* [2020] County Court (Bristol) C01BS923, [2020] 1 P. & C.R. DG22 [35] (HHJ Paul Matthews).
[52] *Pillmoor v Miah* [2019] EWHC 3696 (Ch) [27] (Judge Kramer).

shared equally.[53] These examples highlight how in practice *Stack* achieves the familiarisation of property law by setting a strong presumption that equity will follow the law.

D. *Stack v Dowden* Analysis

Unfortunately, *Stack* falls short of providing effective protection for the family home. This is so for two reasons: (i) it added confusion to the law of severance, and (ii) in cases following *Stack*, where the presumption of equality is rebutted, courts have moved away from considering the holistic factors Baroness Hale set out,[54] and, instead focused on financial contributions.

I. The Issue of Severance

It is still unclear when and how severance occurred in *Stack*. Following the decision in *Stack*, upon the rebuttal of the presumption of a joint tenancy, the right to survivorship will no longer subsist. There are four ways through which a party can sever a joint tenancy: (i) serving a written notice under section 36(2) of the Law of Property Act 1925 (LPA),[55] (ii) acting on one's own share (such as selling or mortgaging the property),[56] (iii) a

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[53] *Rowland v Blades* [2021] EWHC 426 (Ch) [145] (Deputy Master Hansen). It must be noted that the decision has since been successfully appealed; however, on a separate point concerning the amount the Respondent should pay for having excluded the Appellant from the use of a jointly-owned weekend home.

[54] *Stack v Dowden* (n 2) [69] (Baroness Hale).

[55] Law of Property Act 1925 (LPA 1925), s 36 (2).

[56] *Williams v Hensman* (1861) 1 J&H 546, 557.

course of dealings (this can be desire or tacit acceptance)[57] and (iv) mutual agreement.[58] Methods (i) and (ii) are unilateral.[59] While the exact actions which could amount to severance are unclear,[60] it is generally accepted that a sale, a gift, a mortgage[61] or an express trust[62] all amount to severance. Severance can also occur at an individual's whim as long as they 'give'[63] written notice (which communicates a desire that severance should take immediate effect)[64] to all of the joint tenants.[65] It is possible for severance to occur through mutual agreement and, *per* Browne LJ, mutual agreement can be inferred from the course of dealing, allowing for the joint tenancy to be severed without express communication.[66] There are two issues which remain unaddressed in *Stack*: (i) when, and (ii) how severance into unequal shares took place. Briggs highlights how the Supreme Court did not even mention the term severance in *Stack*.[67] This has the unfortunate consequence of muddying the current law on severance.

One issue with how the Court in *Stack* deployed the CICT is that it had the effect of severing the joint tenancy into

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[57] ibid.
[58] ibid.
[59] Ben McFarlane, Sarah Nield and Nicholas Hopkins, *Land Law: Text, Cases and Materials* (4th Edition, OUP 2018) 511.
[60] ibid 519-521.
[61] *First National Security v Hegerty* [1985] 1 QB 850 (CA).
[62] McFarlane, Nield and Hopkins, *Land Law: Text, Cases and Materials* (n 59) 521.
[63] LPA 1925, s 36(2)
[64] *Harris v Goddard* [1983] 1 WLR 1203 (CA) 1209B.
[65] LPA 1925, s 36(3).
[66] *Burgess v Rawnsley* [1975] Ch 429 (CA) 444A (Browne LJ).
[67]Adrian Briggs, 'Co-ownership and an Equitable Non Sequitur' (2012) 128 Law Quarterly Review 183, 183.

unequal shares. A further issue is how this severance occurred without signed writing, which is required under section 53(1)(c) LPA.[68] Mee explains how this may have happened through the ambulatory constructive trust,[69] which was described by Lord Hoffman[70] as a mechanism that operates when the intentions of the legal owners change, which causes their beneficial shares to change accordingly.[71] Mee suggests the reason there is no need for the agreement to be in signed writing *per* section 53(1)(c) LPA[72] is that 'each new division of the beneficial ownership occurs under a new, or (to put it a different way) newly refreshed, constructive trust'.[73] No writing is required for the creation of a constructive trust *per* section 53(2) LPA.[74] This explains how severance into unequal shares may occur. However, some uncertainty persists as noted by Pawlowski and Brown. Specifically, in *Stack* the Court was unclear as to whether subsequent common intentions work to merely alter the ambulatory trust already in existence or create a new constructive trust.[75] Dixon makes a further important point, stating that it is not evident whether behaviour giving rise to the common intention directly severs the joint tenancy into unequal shares, or whether it is first severed equally followed by

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[68] McFarlane, Nield and Hopkins, *Land Law: Text, Cases and Materials* (n 59) 526.
[69] John Mee, 'Ambulation, Severance, and the Common Intention Constructive Trust' (2012) Law Quarterly Review 500.
[70] *Stack v Dowden* (n 2) [62] (Baroness Hale, quoting Lord Hoffman).
[71] Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law* (2nd Edition, OUP 2020) 203.
[72] LPA 1925, s 53(1)(c).
[73] Mee (n 69) 501.
[74] LPA 1925, s 53(2).
[75] Mark Pawlowski and James Brown, 'Co-ownership and Severance after Stack' (2013) 27 Trusts Law International 59, 63.

a transfer of shares.[76] If severance works in the latter way, signed writing would in fact be required under section 53(1)(c) LPA.[77] All of these issues highlight the general lack of clarity as to how severance occurred under the CICT.

Putting the difficulties surrounding formalities aside, *Stack* set a curious precedent for what constitutes a common intention to sever. Can it truly be said that holding separate finances (which, as explained above, is not 'very unusual' in the context of cohabitation) is enough evidence to infer that the parties had a common intention to exclude survivorship? This would be a reach, as there are many valid reasons for the parties in question to keep their finances separate such as avoiding responsibility for each other's debts, not being impacted by each other's credit history and avoiding arguments about money where the parties have different spending habits.[78]

There is one more problem concerning severance, namely, when exactly does severance take place under the ambulatory constructive trust? If we accept Mee's explanation, the question as to the exact moment when the courts should deem that there has been severance remains. As Brown and Pawlowski explain, 'the acts of detriment relied on to support a new common intention to vary beneficial entitlement may take place over a period of time'.[79] The lack of clarity as to *when* severance occurs

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[76] Martin Dixon, 'The Still Not Ended, Never-ending Story' (2012) The Conveyancer and Property Lawyer 83, 84.
[77] Pawlowski and Brown (n 75) 63.
[78] 'Should you manage money jointly or separately' (Money Helper) <www.moneyhelper.org.uk/en/everyday-money/budgeting/should-we-manage-money-jointly-or-separately> accessed 22 March 2023.
[79] Pawlowski and Brown (n 75) 65.

can cause issues when one party dies during or before proceedings.[80] When this is examined alongside the fact that it is not evident *how* the severance happens and whether all necessary formalities under the LPA are complied with, it becomes clear that the issue of severance post-*Stack* is messy and requires clarification.

II. The Factual Over-Emphasis on Financial Contributions

There are three consequences of the factual overemphasis on financial contributions: (i) financial contributions are often prioritised at the expense of the other relevant factors set out by Baroness Hale,[81] (ii) this emphasis is misguided for it takes too narrow a view as to what may amount to a relevant contribution to the couple's joint enterprise and (iii) has the consequence of cementing the male as the norm.

The majority in *Stack* accepted that a home has significance beyond its financial value. Pallasmaa suggests that the home is an expression of the life and personality of its inhabitants.[82] Fox O'Mahoney identifies values that can be held by a home, including the home as a financial investment, as a territory, as a physical structure, as identity and as a socio-cultural

[80] ibid 59.
[81] *Stack v Dowden* (n 2) [69] (Baroness Hale).
[82] Juhani Pallasmaa, 'Identity, Intimacy and Domicile - Notes on the Phenomenology of Home' in David N. Benjamin, David Stea and Eje Arén (eds), *The Home: Words, Interpretations, Meanings and Environments* (Avebury 1995) 132.

unit.[83] Specifically, it 'provides the locus for family life, a place of safety, a place of privacy, continuity and a sense of permanence'.[84] Pallasmaa explains that the home is a projection of an individual's identity but also of a family.[85] These less tangible attributes of the home were not explored by the courts, both on the factual consideration in *Stack* itself and in subsequent case law.[86] Focusing on financial contributions as opposed to the other factors set out by Baroness Hale is a gross oversimplification of the complicated interplay between financial and non-financial contributions within cohabiting couples. This risks misrepresenting their intentions in a way that unduly benefits the financially dominant party.

Probert explores what may have made the facts of *Stack* so exceptional that it required the majority of the factual analysis made by the Court to be focused on financial contributions. One reason may be that S could have contributed more to family finances. However, as Probert identifies, this would suggest that D's contributions to household expenses were relevant and

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[83] Lorna Fox O'Mahoney, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29 Journal of Law and Society, 580.

[84] ibid 592.

[85] Pallasmaa (n 82)135.

[86] For an example see *Abbott v Abbott* [2008] 1 FLR 1451 (HL) [17]-[18] (Baroness Hale): While a 50:50 division of the beneficial interest was found despite one of the parties' negligible financial contributions, the Court focused on (besides the intention of the Respondent's mother in giving financial assistance to the couple) the financial arrangement between the parties, specifically their joint bank account and joint liability for the mortgage.

considered by the Court, which they were not.[87] Another reason suggested by Probert may be that S did not contribute as much as he could have (Baroness Hale states 'it might have been possible to deduce some sort of commitment that each would do what they could')[88]. However, as Probert states, this 'leaves non-financial contributions out of account'.[89] Thus, Probert outlines how, despite Baroness Hale setting out a myriad of non-financial considerations at [69], the Court focused extensively on financial considerations and, in doing so, did not accord sufficient weight to non-financial contributions. This had consequences in subsequent case law. Greer and Pawlowski suggest that any contributions other than the 'Herculean activities of the claimant in *Eves v Eves*' are unlikely to help claimants who focused on contributions such as housework or childcare.[90] This can be seen, for example, in both *Morris v Morris*[91] and *Solomon v McCarthy*[92] where shares were found to be unequal despite significant contributions to the property through farming or property improvements. Thus, in practice, the post-*Stack* case law fails to achieve the second form of familiarisation identified by Hayward in *Stack* itself, namely, putting emphasis on fact specificity in the context of family homes.

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[87] Rebecca Probert, 'Equality in the Family Home: *Stack v. Dowden* [2007] U.K.H.L. 17' (2007) Feminist Legal Studies 341, 348.
[88] *Stack v Dowden* (n 2) [91] (Baroness Hale).
[89] Probert 'Equality in the Family Home: *Stack v. Dowden* [2007] U.K.H.L. 17' (n 87) 349.
[90] Sarah Greer and Mark Pawlowski, 'Imputation, Fairness and the Family Home Graham-York v York [2015] EWCA Civ 72; [2015] H.L.R. 26' (2015) Conveyancer and Property Lawyer 512, 519.
[91] *Morris v Morris* [2008] EWCA Civ 257, [2008] Fam. Law 521 [23] (Sir Peter Gibson).
[92] *Solomon v McCarthy* (n 51) [35] (HHJ Paul Matthews).

Moreover, in focusing on financial contributions, and failing to give weight to indirect financial or non-financial contributions, the courts are taking an overly stringent view of what could constitute a relevant contribution to the couple's joint enterprise. In reality, one half of a cohabiting couple performing domestic duties (i.e. cooking, cleaning etc.) or paying for non-purchase related expenses (i.e. children's clothing, trips, food etc.) will free up the other's finances, enabling them to directly contribute to the purchase of the house. Although such seemingly legally irrelevant conduct does not directly contribute towards the purchase sum, in reality, it does enable the purchase of the house by freeing up capital that would have otherwise been used on domestic duties and expenses. This has been recognised by the Law Commission in its 2002 Report, which stated that 'in the same way as the indirect financial contribution by one sharer would enable another to make the direct payment towards the acquisition of a home (in other words, if B met the utility bills, and thereby enabled A to pay the mortgage), non-financial contributions by one sharer might enable another to pay for the home.'[93] Moreover, this has also been recognised by Lord Reid in *Pettitt v Pettitt*, where His Lordship stated that 'the wife who wants to contribute pays all the household bills thus enabling the husband who holds the title to the house to pay the instalments. [...] The wife may not be able to make any financial contribution but by good management and co-operation she may make it possible for the husband to pay the instalments regularly.'.[94]

Further, focusing the analysis on monetary contributions poses the risk of recognising the significance of the home as the

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[93] Law Commission, *Sharing Homes* (Law Com No 278, 2002) para 3.38.
[94] *Pettitt v Pettitt* (n 24) 794F (Lord Reid).

significance more generally afforded by men than by women. This has the effect of centring the male as the norm,[95] meaning that, it sets "the man's" experiences and behaviours (specifically in relation to how men value property) as the standard that women have to conform to in order to get legal protection. Those women who do not meet this standard remain unprotected by the law. This can be seen in Csikszentmihalyi and Halton's study, which found that, for fathers, the home 'becomes a concrete embodiment of all the psychic energy they have invested in the form of money',[96] while mothers find it significant how the home is a site for relationships and interactions.[97] Furthermore, Csikszentmihalyi and Halton identified that the 'most salient tie' between a man and his home is the work he put into the home, such as through renovations.[98] While women also take pride in work they do to the home, this work tends to be less structural, such as decorating.[99] Yet, in *Stack* Lord Neuberger agreed with Lord Walker that beneficial interest may shift where one party carries out serious improvements, but 'any work must be substantial: decoration or repairs (at least unless they were very significant) would not do'.[100] This clearly shows how the significance of the home as recognised by the courts favours male parties and leaves the interests of female parties less protected. This is because, since the contributions considered legally relevant align with the way men value the home, they are more likely to

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[95] Sandra L. Bem, *The Lenses of Gender: Transforming the Debate on Sexual Inequality* (Yale University Press 1993) 2.
[96] Mihaly Csikszentmihalyi and Eugene Halton, *The meaning of things: Domestic symbols and the self* (CUP 1981) 130.
[97] ibid.
[98] ibid 131.
[99] ibid 132-133.
[100] *Stack v Dowden* (n 2) [139] (Lord Neuberger).

have made such contributions and thus benefit from judicial protection. Beresford explains that when women perform their gender role - 'performing their femininity as expected'[101] - the courts fail to recognise their contributions. An example of this is Valerie Burns in *Burns v Burns* who undertook caring responsibility for the home and the couple's children. In doing so she was unable to undertake consistent paid employment, and the financial contributions she did make were deemed insufficient to meet the bar of being 'substantial'.[102] Fox LJ gave examples of what would amount to 'substantial contributions', these would be: 'substantial financial contributions' to household expenses or direct contributions to the purchase price or mortgage.[103] This shows a limited appreciation for domestic work, for example, undertaking child rearing responsibilities frees up money in cases where a babysitter would otherwise have to be employed. Thus, courts should extend their understanding of legally relevant conduct.[104] It is conceded that the courts must be careful when examining the holistic significance of the home to avoid confining women to the private sphere and entrenching the stereotype that the home is a woman's only place.[105] However, it is also important that the family home be valued in a manner, which reflects how all residents ascribe significance to their home.

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[101] Sarah Beresford, 'It's Not Me, It's You: Law's Performance Anxiety over Gender Identity and Cohabitation' (2012) 63 N Ir Legal Q 187, 198.
[102] *Burns v Burns* [1984] 2 WLR 582 (CA) 592C (Fox LJ).
[103] ibid 592E (Fox LJ).
[104] Beresford, (n 101) 200.
[105] Lorna Fox O'Mahony, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, 2007) 361.

Thus, a solution will have to mitigate the issues identified. It must address the issue of severance and ensure a clear, consistent approach to quantification. It will be shown how a revised CICT model ameliorates these problems and establishes a clear and coherent framework for the courts to apply and consequently make the law more predictable.

E. Single Name Cases

Single name cases concern situations where A and B, an unmarried couple, have purchased a family home together, and said property was registered in B's sole name. The current state of the law with respect to such cases is in a state of considerable confusion. Since *Rosset* remains the binding authority, the starting point is that equity follows the law, which can only be rebutted by direct contributions to the purchase price or express agreement between the parties.[106] However, *Rosset* has been criticised in *Stack* with Lord Walker suggesting the law has 'moved on'.[107] The implications of the decision in *Jones* for single name cases are even more confusing. On the one hand, Baroness Hale and Lord Walker seemed to confirm that the presumption that equity follows the law continues to apply and avoided explicitly disapplying *Rosset*.[108] On the other hand, Her Ladyship and His Lordship nonetheless held that, at a high level of generality, the CICT should apply to both single and joint names cases.[109]

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[106] *Lloyds Bank plc v Rosset* (n 4) 132-133 (Lord Bridge).
[107] *Stack v Dowden* (n 2) [26] (Lord Walker).
[108] *Jones v Kernott* (n 3) [16] (Lord Walker and Baroness Hale)
[109] *Jones v Kernott* (n 3) [17] (Lord Walker and Baroness Hale); Brian Sloan, 'Keeping Up with the Jones Case: Establishing Constructive Trusts in 'Sole Legal Ownership' Scenarios' (2015) 35 LS 226, 232.

Further departing from *Rosset*, Baroness Hale and Lord Walker held that such common intention of the parties had to be deduced objectively from their conduct.[110] Thus, there is a clear clash between the binding authority *Rosset* and the more recent obiter comments of the Court in *Stack* and *Jones*.

Considering the confused state of authorities on how single name cases should be approached, it is no wonder that the application of the law in lower courts has been inconsistent. As Sloan argues, lower court decisions post-*Jones* can be divided into three categories: (i) where the possible impact of *Jones* in moving beyond *Rosset* was ignored; (ii) where the influence of *Jones* was recognised but the outcome (in establishing rather than quantifying the relevant beneficial interest) would have been permissible following *Rosset*; and (iii) where *Jones* produced a novel result in a 'sole name' case.[111] *Jones* has been recognised and correctly applied in cases such as *Geary v Rankine*.[112] However, in cases like *Rezaeipoor v Arabhalvai*, *Jones* was ignored completely, with the judge failing to distinguish between resulting and constructive trusts and applying *Rosset*.[113] Even where it was not ignored, *Jones* has sometimes been fully distinguished or misapplied. In *Re Ali* Dobbs J held that 'the "whole course of dealing" between the parties, in order to ascertain their intentions, or, if necessary, to impute them' was relevant only to

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[110] *Jones v Kernott* (n 3) [52] (Lord Walker and Baroness Hale).

[111] Brian Sloan, 'Keeping Up with the Jones Case: Establishing Constructive Trusts in 'Sole Legal Ownership' Scenarios' (2015) 35 LS 226, 232.

[112] *Geary v Rankine* [2012] EWCA Civ 555, [2012] 2 F.L.R. 1409 [21]-[22] (Lewison LJ).

[113] *Rezaeipoor v Arabhalvai Jones* [2012] EWHC 146 (Ch) [15] (Kevin Prosser QC).

quantification, citing *Rosset*.[114] Similarly, in *Ullah v Ullah*, the judge, while considering *Jones* as relevant and failing to cite *Rosset*, held that the claimant could not establish a CICT.[115] The claimant would in principle be able to establish a purchase money resulting trust (PMRT) if he could show he had made direct contributions to the purchase price.[116] In rejecting the claims, the deputy judge focused on discussions and financial contributions.[117] Thus, since there is clear confusion amongst the lower courts as to how *Jones* and *Rosset* should be applied, the law governing single name cases is in dire need of clarification.

2. Proposed Solution

This article proposes a reformed CICT model, which, by focusing on the parties' intention of a *joint enterprise*, achieves the 'single legal regime', which Lord Walker and Baroness Hale alluded to in *Jones*. The Court would be justified in taking this approach since (i) differentiating between the two types of cases puts too much emphasis on the way the estate is registered and (ii) the parties' commitment to a joint enterprise should take precedence. Further, it will be argued that the fact that the CICT would give effect to the joint enterprise entered into by the parties calls for doing away with the quantification stage of analysis of the CICT.

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[114] *Re Ali* [2012] EWHC 2302 (Admin), [2013] 1 F.L.R. 1061 [105] (Dobbs J).
[115] *Ullah v Ullah* [2013] EWHC 2296 (Ch), [2013] B.P.I.R. 928 [6] (John Martin QC).
[116] ibid.
[117] Sloan (n 111) 238.

A. A Single Legal Regime

Lord Walker and Baroness Hale insisted in *Jones* that there was a 'single regime' governing single and joint names cases, in that a CICT is of central importance to both.[118] However, as the above analysis of recent case law on single name cases shows, said single regime has not materialised.

The reason for this may lie in the fact that His Lordship and Her Ladyship chose to maintain a stark division between the two types of cases, having held that 'the starting point for analysis is different'[119] depending on the way the property was registered. Where it is registered in a single name, the claimant has no interest in the property unless he can show a common intention to the contrary.[120] Conversely, where property is registered in joint names, the parties are presumed to be joint beneficial owners unless the contrary is shown.[121] This appears to be in line with the long-standing maxim that 'equity follows the law'. However, the Court then proceeded to state that the presumption in joint names cases is not based on that principle, but rather on the parties' commitment to a joint enterprise and the practical difficulty of accounting for the individual contributions of the parties during their relationship.[122] The Court omitted to explicitly state what the presumption in single name cases is based on.

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[118] *Jones v Kernott* (n 3) [16] (Lord Walker and Baroness Hale).
[119] ibid.
[120] ibid [17] (Lord Walker and Baroness Hale).
[121] ibid.
[122] ibid [19], [22] (Lord Walker and Baroness Hale).

In our view, if the Court wishes to implement a single regime that gives effect to the parties' commitment to a joint enterprise, then the Court should clearly break from the current approach which puts too much emphasis on the way the estate is registered. This is because, where there is a joint enterprise, the choice whether to put property into sole or joint names is often governed by considerations which have nothing to do with how the beneficial interest is to be held. For instance, in *Sandhu v Sandhu*, property was transferred into a party's sole name because the other party was too old to take out a mortgage.[123] More importantly, as the Court recognised in *O'Neill v Holland* and *Thompson v Hurst*, where one of the parties has a poor credit history, the best, or only, way to obtain a mortgage is to register the property in the sole name of the party with the stronger credit score.[124] It must be acknowledged that Etherton LJ in *Thompson* stated that a proposition that a presumption of joint beneficial ownership should apply, where there is evidence that they would have liked to be joint legal owners but registering as such was neither practical nor desirable, as it is 'neither consistent with principle nor sound policy'.[125] While it is indeed inconsistent with principle, since *Jones* failed to establish that the presumption should apply equally to single and joint names cases, we submit that it would be sound policy. Contrary to what Etherton LJ was concerned with in *Thompson,*[126] we do not propose that in every case where mortgage considerations influenced parties to register

[123] *Sandhu v Sandhu* [2016] EWCA Civ 1050 [7] (Floyd LJ).
[124] *O'Neill v Holland* [2020] EWCA Civ 1583, [2021] 2 F.L.R. 1016 [61] (Henderson LJ); *Thompson v Hurst* [2012] EWCA Civ 1752, [2014] 1 F.L.R. 238 [8], [21], [23] (Etherton LJ).
[125] *Thompson v Hurst* (n 124) [20] (Etherton LJ).
[126] ibid [21] (Etherton LJ).

the property in a single name, they would (were it not for mortgage considerations) inevitably have registered it in joint names. Rather we simply aim to show that, if the Court is truly concerned with giving effect to the parties' intention, then there is too much weight attributed to the way in which the property was registered. Mortgages are an increasingly popular way of financing property purchases, especially for younger generations. According to UK mortgage statistics amongst British homeowners 22.5% of those aged 25-34, 29.3% aged 35-44 and 28.7% aged 45-54 were buying property with a mortgage in 2023, as opposed to 1.5%, 3.3% and 9.5% respectively owning property outright.[127] Long gone are the days when property would be purchased with a lump sum payment. Thus, decisions regarding the registration of purchased property are becoming more likely to be influenced by the respective credit scores of the parties. Thus, if the Court is truly concerned with giving effect to the parties' intention, it should recognise this shift. This should be done by recognising their commitment to enter into a joint enterprise, regardless of how the property was registered.

Naturally, if either of the parties can clearly show that the decision to register into a single name was made because the property was intended to be owned by that party alone, this would show that the parties did not intend a joint enterprise, and that line of analysis would no longer apply.

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[127] Claire Flynn, 'UK Mortgage Statistics 2023' (*U Switch*, 1 February 2023) <https://www.uswitch.com/ mortgages/mortgage-statistics/> accessed 17 April 2023.

B. The Importance of a Joint Enterprise

It is submitted that the Court would be justified in basing the single legal regime on the finding of an intention to enter into a joint enterprise. This is because, as Baroness Hale stated, where an inference, that parties intended that each should contribute as much to the household as they reasonably could, can be drawn, their commitment to running their household as a joint enterprise should take precedence over mercenary considerations.[128] (Though it must be noted that Her Ladyship was speaking in the context of joint names cases only). There is no good reason for not extending this approach to single name cases, especially because, as argued above, decisions as to registration are often distinct from the parties' genuinely held intentions. If the parties both act in the same manner with regards to the property and hold a mutual intention of equal beneficial ownership, why should the way they are treated be based completely on how the property is registered?

By responding to the intention of a joint enterprise, the CICT better protects a party contributing through non-financial means. Many of the considerations set out by Baroness Hale at [69] of *Stack* are generally made by a cohabiting partner without any thought as to beneficial interest. Consequently, the courts have sometimes found that these actions cannot be relied upon as evidence as to a common intention of shared beneficial interest. For example, in *James v Thomas* Ms. James' work for the parties' business was found to be 'explicable on other grounds'

[128] *Stack v Dowden* (n 2) [69] (Baroness Hale).

from an agreement that she would have beneficial interest in the property.[129] Sir John Chadwich explained '[i]t is a mistake to think that the motives which lead parties in such a relationship to act as they do are necessarily attributable to pecuniary self-interest'.[130] Similar reasoning is present in other decisions. In *Williams v Lawrence*, the Court found that contributions to household expenses and outgoings were 'simply the ordinary cost of living' and could not be attributed to an intention related to the beneficial interest.[131] In *Morris v Morris*, the claimant's participation in the farming business did not grant her an interest in the land,[132] and Sir Peter Gibson highlighted that 'court[s] should be cautious before finding that the activities of a wife or a cohabitant can only be explained on the footing that she believes that she was acquiring an interest in land'.[133] Finally, in *Pillmoor v Miah*, the Court emphasised that a long marriage provides no evidence as to how a couple intends to hold their assets,[134] and is only relevant to the question of quantification, and not the parties' intentions.[135] In *James*, the Court conceded that the current principles of law and equity are 'inadequate to meet the circumstances in which parties live together in the twenty-first century'.[136] By responding to the intention of a joint enterprise, our model solves this issue, for while domestic duties and child

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[129] *James v Thomas* [2007] EWCA Civ 1212, [2008] 1 F.L.R. 1598 [27] (Sir John Chadwick).
[130] ibid [36] (Sir John Chadwick).
[131] *Williams v Lawrence* [2011] EWHC 2001 (Ch), [2011] B.P.I.R. 1761 [61] (HHJ David Cooke).
[132] *Morris v Morris* (n 91) [23] (Sir Peter Gibson).
[133] ibid [25] (Sir Peter Gibson).
[134] *Pillmoor v Miah* (n 52) [32] (Judge Kramer).
[135] ibid [37] (Judge Kramer).
[136] *James v Thomas* (n 129) [38] (Sir John Chadwick).

rearing may not be done in pursuit of beneficiary interest, they *do* provide evidence of an intention to create a joint enterprise.

Moreover, such an approach will better reflect the expectations of lay persons. Probert explains how there is 'empirical evidence that many cohabitants believe that they in fact have the same rights as if they were married'.[137] More specifically, Barlow's study reveals that 66% of participants believe a woman (an unmarried and childless cohabitant of two years, whose partner has bought the house) should have 'the same financial rights she would have done were they married'.[138] It was also found that participants had different opinions on how similar rights should be to marriage based on: individual circumstances, the existence of children, 'investment' in the relationship and the duration of the relationship.[139] Interviewees were more likely to find that legal treatment of the dissolution of a cohabiting relationship should be treated similarly to the end of a marriage in cases, where there was a long period of cohabitation, there were children and earning/caring responsibilities were shared or one partner's career was prioritised.[140] This demonstrates that participants believe that in cases where there is evidence of a *joint enterprise*, with both partners contributing what they can (in terms of money or caring responsibilities), the financial rights should be

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[137] Rebecca Probert, 'Trusts and the Modern Woman - Establishing an Interest in the Family Home' (2001) 13 Child and Family Law Quarterly 275, 285.

[138] Anne Barlow, Carole Burgoyne, Elizabeth Clery and Janet Smithson, 'Cohabitation and the law: myths, money and the media' in *The 24th British Social Attitudes Report 2008* (Sage, 2008) 46.

[139] ibid.

[140] ibid.

the same as, or similar, to those available at the dissolution of a marriage.

Furthermore, in view of the multidimensional nature of contributions and the gender-specific views on the value of the home, the law should be careful not to set the male as the norm.

C. Foregoing Quantification

The fact that the CICT would give effect to the joint enterprise entered into by the parties calls for doing away with the quantification stage of analysis. This is so for three reasons.

Firstly, if the CICT, in the context of the family home, is responding to an intention to establish a *joint* enterprise, and the parties reflect this intention by each giving as much as they could reasonably be expected to provide, it makes little sense to allocate shares in the beneficial interest which fail to reflect this commitment. It is inconsistent to base a trust on the intention of a joint enterprise and then vary shares.

Secondly, foregoing quantification in favour of strengthening the presumption of joint beneficial ownership, and where that is rebutted, resorting to a RT analysis, would change little in how many cases play out in practice. As has been analysed above, the presumption of joint beneficial ownership is very strong, meaning that some cases never reach the stage of substantive quantification, beyond the courts declaring that the

interest should be held equally.[141] Moreover, as shown by our analysis of the overemphasis of financial contributions in post-*Stack* case law, even if they do, the courts rarely go beyond simply accounting for the financial arrangement between the parties. This can best be seen from *Stack* itself, where the majority, which utilised a CICT, and the minority, which used a RT, arrived at the same division of the beneficial interest.

Thirdly, it is submitted that quantification, when it does play a role, cannot accurately be done. Once we recognise that the significance of the home *should* be wider than finances, then we cannot possibly quantify individual contributions. How can we afford a percentage of beneficial interest based on elements such as identity or socio-cultural significance? Greer and Pawlowski explain that under the current law, when courts do try and quantify, it often leads to arbitrary results,[142] as was conceded by HHJ Behrens in *Aspden v Elvy*.[143] Hayward suggests that in *Stack* and *Jones* 'context-specific analysis is becoming more of an estimation of party fault'.[144] Furthermore, in Parliament, Lord Marks of Henley-on-Thames explains that 'it remains extremely difficult to predict or ascertain what courts will decide the parties' shares should be, even where joint ownership is established'.[145] An approach yielding so much uncertainty is clearly undesirable,

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[141] *Solomon v McCarthy* (n 51); *Pillmoor v Miah* (n 52); *Rowland v Blades* (n 53).
[142] Greer and Pawlowski (n 90) 517.
[143] *Aspden v Elvy* [2012] EWHC 1387 (Ch), [2012] 2 F.L.R. 807 [128] (HHJ Behren).
[144] Andy Hayward, 'Common Intention Constructive Trusts and the Role of Imputation in Theory and Practice: Barnes v Phillips.' [2016] 80(3) Conveyancer and property lawyer 233, 242.
[145] HL Deb 15 March 2019, vol 796, col 1258.

especially in the law of real property, where certainty and clarity are paramount when dealing with the most important asset most people own.

It must be acknowledged that the lack of quantification may create certain difficulties when dealing with the ambulatory nature of human relationships. This may be particularly obvious where, after a long period of maintaining a joint enterprise, the relationship between the parties suddenly breaks down and one of them entirely ceases to contribute. A blunt approach, which, in all likelihood, grants them 50% of the beneficial interest, may be regarded as unfair in such a scenario. However, this issue would arise only in very few cases, where the period of contributions is long enough and the contributions significant enough to establish a joint enterprise, but ends so abruptly and totally as to warrant this feeling of injustice. It is submitted that, the potential of an undesirable outcome in a narrow range of cases, which may not even materialise, should not jeopardise the increased protection afforded to the weaker party in the great majority of cases. In this highly delicate area of the law there is no perfect approach. The courts can, on the one hand, give minute consideration to the facts of each case, estimating the beneficial interests with regards to each individual relationship. This, as stated above, risks uncertainty and biased assessment of certain contributions. On the other hand, while the proposed approach rests on certain generalisations, it offers a significantly more certain outcome, and is specifically concerned with protecting the weaker party by ensuring that due consideration is given to historically undervalued interests. The Court has a legal policy choice to make, and in our submission, for the reasons stated, the latter approach is preferable.

3. How the Proposed Model Would Work

A. Joint Names Cases

This section deals with cases where A and B, who are an unmarried couple, have purchased a family home together, that property was registered in their joint names, however B contributed more than A to the purchase price of the home. In such a case, the proposed CICT model will operate in the following way:

1) At the outset they are joint beneficial owners.
    a) This is because A and B are joint legal owners.
    b) If neither party litigates, they will remain joint legal owners, unless there is a separate act of severance as explained below.
2) The presumption of the PMRT arises.
    a) The presumption arises in response to the unequal financial contributions to the purchase price between the parties.[146]
        i) Thus, it is presumed that the parties intended to be tenants in common in equity and hold the beneficial interest in proportions equal to their contributions.
    b) The presumption would be raised by B, who had contributed the majority of the purchase price.

[146] *Stack v Dowden* (n 2) [110] (Lord Neuberger)

3) The presumption of the PMRT is rebutted by the presumption of a CICT.
    a) The presumption of a CICT arises where there is either an express or inferred agreement that the parties intended to enter into a joint enterprise and the party relying on that agreement, in this case A, suffered detriment in reliance on that agreement.
    b) The presumption of a CICT displaces the presumption of a PMRT.[147]
    c) The presumption of a CICT can be rebutted by evidence showing that the parties did not intend to enter into a joint enterprise.
    d) If the presumption is rebutted, then the presumption of a PMRT will apply and the parties will hold the beneficial interest in the proportion in which they contributed to the purchase price.
4) The parties are once again joint tenants in equity.
5) The parties sever the joint tenancy, making then tenants in common holding the beneficial interest 50:50.
    a) This is because, as will be explained below, bringing proceedings amounts to severance under section 36(2) of the LPA.

I. The Presumption of Joint Enterprise

In order to raise the presumption of a joint enterprise the parties will need to show a course of conduct from which an inference,

[147] *Jones v Kernott* (n 3) [23] (Lord Walker and Baroness Hale).

that the parties intended that each should contribute as much to the household as they reasonably could, can be drawn.[148]

II. Detriment

Although the issue of detriment was not argued in either *Stack* or *Jones*, the Court of Appeal has confirmed in *Hudson v Hathway* that detrimental reliance remains a required element for a CICT to arise.[149] While the precise degree of detriment required is unclear, it is assumed that the requirement must have been fulfilled in both *Stack* and *Jones*.[150] This is presumably because, where the agreement is inferred from conduct, the parties' conduct is simultaneously both the evidence from which the agreement is inferred and the detriment which gives rise to the constructive trust.[151] Thus, wherever there is sufficient evidence to find that the parties intended to enter into a joint enterprise, there will also be sufficient evidence of detrimental reliance.

Moreover, it should be noted that, while detrimental reliance is required for the CICT to arise in the first place, it is separate from the question of quantification of interest once the trust has arisen.[152] Thus, its persistence in the application of the

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[148] *Stack v Dowden* (n 2) [69] (Baroness Hale).
[149] *Hudson v Hathway* [2022] EWCA Civ 1648, [2023] H.L.R. 13 [153] (Lewison LJ).
[150] *Hudson v Hathway* (n 149) [107]-[108] (Lewison LJ); Martin Dixon, 'Non-problems, Future Problems and Fairy Dust' [2022] Conveyancer and Property Lawyer 119, 121.
[151] John McGhee (ed) *Snell's Equity* (34th edn, Sweet & Maxwell 2020) 24-056.
[152] *Hudson v Hathway* (n 149) [90] (Lewison LJ).

CICT does not prevent the Court from foregoing the quantification altogether, as proposed in this article.

B. Single Name Cases

This section applies to cases where A and B, an unmarried couple, have established a family home together and that property was registered in B's sole name. (Notably, it is not required that A and B both contribute to the purchase price, so long as they both contribute to the household in correspondence with their intention of a joint enterprise.) In such a case, the proposed CICT model will operate in the following way:

1) At the outset B is sole owner of the property.
2) The CICT presumption arises.
    a) The presumption of a CICT arises where there is either an express or inferred agreement that the parties intended to enter into a joint enterprise and the party relying on that agreement, in this case A, suffered detriment in reliance on that agreement.
    b) The CICT presumption can be rebutted by evidence showing that the parties did not intend to enter into a joint enterprise.
    c) If the presumption is rebutted, then B will remain the sole owner of the property.
        i) Alternatively, if A has contributed to the purchase price, then A can rely on the PMRT presumption to argue that they did not intend to make a gift of their contribution to B.

ii) If A is successful, then A and B will be tenants in common in equity and will hold the beneficial interest in the proportion in which they contributed to the purchase price.

3) The parties are joint tenants in equity.
4) The parties sever the joint tenancy, making then tenants in common holding the beneficial interest 50:50.
    a) Severance takes place the same way as in joint names cases.

I. Detriment

In *O'Neill v Holland* the Court of Appeal defined detriment in the context of single name cases as 'a description, or characterisation, of an objective state of affairs which leaves the claimant in a substantially worse position than she would have been in but for the transfer into the sole name of the defendant'.[153] It is submitted that detriment can be made out whenever: (i) the parties held an intention to form a joint enterprise, but for some reason registered the home in B's name alone, *and* (ii) where A contributed as much as they reasonably could be expected to to the household. This is because A will clearly be in a worse position than they otherwise would have been.

C. Severance

Under this model there is no 'ambulatory' nature to the CICT, instead, upon severance it will break into a tenancy in common

[153] *O'Neill v Holland* (n 124)[62] (Henderson LJ)

with equal shares. Thus, the issue as to the need for signed writing under section 53(1)(c) LPA identified by Pawlowski and Brown,[154] and Dixon[155] never arises. It also solves the temporal issue, identified by Brown and Pawlowski: 'the acts of detriment relied on to support a new common intention to vary beneficial entitlement may take place over a period of time'.[156]

This statement highlights that under the ambulatory nature of the CICT the differing contributions will accrue over a period of time (such as contributions to household expenditures and bills) thus, making it difficult to point to a moment in which the shares changed from being equal to unequal. Any change in percentage of beneficial interest will inherently mean severance has taken place; however, the exact moment is illusory and often intangible. Under this model, there is no need to grapple with quantification, and thus, the moment of severance will be explicit and clear. There are three possibilities as to when severance occurred.

(1) The CICT presumption is accepted by the courts, rebutting the presumption of the PMRT. The parties will be found to have been joint tenants under a CICT, which will sever *because* of the proceedings as explained below.
(2) The CICT presumption is accepted by the courts, rebutting the presumption of the PMRT and the parties can point to a clear moment of severance (before the proceedings) with sufficient evidence, this will have to be

[154] Pawlowski and Brown (n 75) 63.
[155] Dixon, 'The Still Not Ended, Never-ending Story' (n 76) 84.
[156] Pawlowski and Brown (n 75) 65.

one of the methods of severance established in *Williams v Hensman*.

(a) The most likely form of severance, relevant in these cases, is mutual agreement. As Browne LJ explained mutual agreement can be inferred from the course of dealing, and thus requires no express communication of an agreement to sever.[157] As long as the parties have sufficient evidence, this may be established.

(3) The CICT presumption is not accepted by the court, in this case the court will find that there has always been a PMRT and thus the issue of severance will not arise.

Whether bringing proceedings can actually amount to severance is contested. Brown and Pawlowski explain that 'where the application [to the court] clearly indicates a desire to sever, [it] may constitute a "notice in writing" within the meaning of s 36(2)'.[158] The case law on this matter is slightly unclear: in *Harris v Goddard* the Court found a divorce petition to the Court was found not to indicate an imminent desire to sever[159] rather the requested relief 'lay in the future and was contingent on the Court's exercising its discretion'.[160] In *Re Draper's Conveyance* the Court found that, where an application to the Court evinces an imminent intention to sever, then the application will act as written notice *per* section 36 LPA.[161] Plowman J even suggests that

[157] *Burgess v Rawnsley* (n 66) 444A (Browne LJ).
[158] Pawlowski and Brown (n 75) 65.
[159] *Harris v Goddard* (n 64) 1209C (Lawton LJ).
[160] ibid 1210H (Dillon LJ).
[161] *Re Draper's Conveyance* [1969] 1 Ch 486 (Ch) 487E-488B (Plowman J).

this can act as severance by operating on one's own share,[162] in line with *Williams v Hensman*.[163] As Dillon LJ states, these two cases can be distinguished from each other: while *Draper* involved a specific request for severance and sale, *Harris* involved a 'general and unparticularised' petition.[164] Thus, a petition can constitute severance if it is clearly phrased.

D. Why Not Parliamentary Reform?

This should be left to the courts rather than Parliament, because we are merely calling for a remodelling of the current judicial approach to family homes. Thus, the courts would not be exercising any power, which they do not already possess. Furthermore, as Lady Hale stated extrajudicially 'legislative reform freezes the law in a particular place and prevents its incremental development'.[165] Such a sensitive area requires flexibility with serious thought being given to the facts of each case. As Hayward explains, certainty in the law of the family home does not come from setting a strict statutory standard, it comes from having a sufficiently developed (and we add *consistent*) case law.[166]

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[162] ibid 492B-492E (Plowman J).
[163] *Williams v Hensman* (n 56) 557
[164] *Harris v Goddard* (n 64) 1210H (Dillon LJ)
[165] Lady Hale (n 42).
[166] Andrew Hayward 'Stack v Dowden (2007); Jones v Kernott (2011) Finding a Home for 'Family Property'' in N. Gravells (ed), *Landmark Cases in Land Law* (Bloomsbury Publishing, 2013) 250.

4. The Proposed Model's Benefits

A. Certainty

Barlow suggests the current approach to cohabitation in England and Wales is on an 'ad hoc basis leaving the law complex, confusing and often illogical'.[167] Under our model, quantification is not an issue which the court has to grapple with at all. If there is sufficient evidence as to an intention of a joint enterprise, the shares will be equal; if not, a PMRT, which reflects contributions to purchase price, will exist. Thus, under our model, parties can more easily predict, before beginning litigation, what the division of the beneficial interest will be. This is key. In property law (particularly in the realm of real property) certainty and clarity are paramount, for the Court is dealing with the most important asset most people own.

In joint names cases certainty is achieved because there are only two possible outcomes:

(1) the CICT presumption arises, which B is unable to rebut, and A and B, after severance, hold a tenancy in common with the beneficial interest divided equally; or
(2) the CICT presumption arises, but B is able to rebut the presumption, in which case the PMRT presumption applies, and A and B hold as tenants in common in equity in the proportion of their financial contributions.

[167] Anne Barlow, 'Regulation of Cohabitation, Changing Family Policies and Social Attitudes: A Discussion of Britain within Europe' (2004) 26(1) Law and Policy 57, 60.

In joint legal ownership cases, evidence that the parties were a couple intending to form a joint enterprise, such as contributions to the household through payments, childcare, bills and more, would be invoked to rebut the presumption of a PMRT, instead of for quantification. This model better reflects how individuals generally believe the law should operate. As stated above, Barlow identified that a majority of her interviewees believed that an unmarried and childless cohabitant of two years who made *no* contribution to the purchase, '*should*' have the same financial rights as if she had been married.[168] The logical and cohesive approach, which reflects the expectations of homeowners, in which a joint tenancy can be severed into a 50:50 split or never exist (a PMRT having been created instead) allows the law to reflect reality and be more certain.

In single name cases certainty is achieved because there are only three possible outcomes:

(1) the CICT presumption arises, which B is unable to rebut, and A and B, after severance, hold a tenancy in common with the beneficial interest divided equally;
(2) the CICT presumption arises, but B is able to rebut the presumption, in which case B remains sole owner; or
(3) the CICT presumption arises, which B is able to rebut, but A successfully raises the PMRT presumption, in which case the parties hold a tenancy in common with the beneficial interest divided proportionally to their financial contributions to the purchase price.

[168] Barlow, Burgoyne, Clery and Smithson (n 138) 46 (emphasis added).

This is an improvement on the current state of the law because it replaces a sliding scale of possible outcomes (which cannot be predicted from the incidence of the trust), with a finite list of possible outcomes, one of which (a 50:50 split) is by far the most likely to arise.

B. Coherence in Application

This approach not only achieves the 'single legal regime' Lord Walker and Baroness Hale discussed in *Jones*,[169] but it ensures there is a coherent and consistent approach in all cases which concern the intention of establishing a joint enterprise. Furthermore, the proposed model solves the ambiguity and lack of clarity as to the current law in single name cases because it provides a clear line of analysis for the courts to follow: either the presumption of a CICT will be rebutted or it will not. If the presumption stands, the parties will have a tenancy in common with equal shares (severance will occur upon proceedings if it did not happen at an earlier point). If the presumption is rebutted the question will become whether the PMRT presumption stands or is rebutted.

C. Temporal Clarity

Quantification makes it challenging to determine when exactly severance takes place, especially since the 'whole course of the dealings'[170] is considered.[171] Adopting our model of the CICT

[169] *Jones v Kernott* (n 3) [16] (Lord Walker and Baroness Hale).
[170] *Stack v Dowden* (n 2) [60] (Baroness Hale).
[171] Pawlowski and Brown (n 75) 65.

mitigates the uncertainty and allows for greater clarity as to the moment of severance. As explained above there are three ways in which severance can occur. Thus, any issues with temporal certainty will be resolved, either because they would never arise in the first place, or because a clear moment of severance can be easily determined.

Conclusion

It has been shown that the current state of the law suffers from a lack of clarity and certainty and fails to fully give effect to the parties' intentions. This article has proposed an alternative solution by altering the CICT so that it no longer deals with quantification. Rather, it should simply respond to the common intention of establishing a joint enterprise by dividing beneficial ownership equally. This achieves the single legal regime alluded to by Lord Walker and Baroness Hale in *Jones* and thus achieves greater consistency in the law. It also clarifies the issue of severance, making the law more predictable.