28. *Burns v Burns*: the fable forty years on

Andy Hayward

The legal framework regulating the acquisition of interests in the family home in England and Wales has largely remained unchanged despite calls for reform dating back as early as 1983.[1] Those calls originated in the Court of Appeal decision in *Burns v Burns*, where Valerie Burns failed to establish a proprietary interest in the family home owned by Patrick Burns after living together for 19 years and caring for their two children. Mrs Burns' inability to evidence an intention to share beneficial ownership or a substantial financial contribution made towards the acquisition of Mr Burn's property meant she effectively left court without a remedy. Quite surprisingly for the time, the judges in that case commented that Mrs Burns can 'justifiably say fate has not been kind to her'.[2] However, despite recognising the 'unfairness' of the outcome, they believed that this outcome was 'not a matter which the courts can control' and instead was 'a matter for Parliament'.[3]

Forty years on and with no legislative intervention in sight, *Burns* has become one of the most discussed, contested, and politicised cases in the field of family property law. For those campaigning for cohabitation reform, *Burns* exemplifies all that is wrong with the law. Without a statutory cohabitation regime,[4] litigants still must surmount evidential hurdles believed to be set too high and, just like Mrs Burns, navigate a legal framework that is deeply unsympathetic to the messiness of home sharing. But for campaigners it is much more than just a 'hard case'; it represents a focal point for activism, strategising and future reform efforts. Indeed, Resolution, the leading family law practitioner organisation, coordinated a series of events throughout 2023 to mark the fortieth anniversary of the case in a bid to generate momentum for cohabitation reform.[5] Conversely, others see *Burns* very differently. Opponents object to its use as a so-called 'atrocity tale' for the purpose of securing reform[6] and how it has become, much like a fable, a 'strong warning to women of the dangers of cohabitation without marriage'.[7] For them, Mrs Burns is not a victim and, even if she was one back in 1983, women today are unlikely to suffer the same fate owing to changes in home ownership patterns and an increased likelihood of women making qualifying financial contributions.

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1 *Burns v Burns* [1984] Ch 317.

2 ibid 345 (May LJ).

3 ibid 332 (Fox LJ).

4 See Chapter 11 by Briggs in this *Research Handbook*.

5 Resolution, 'Securing cohabitation reform: building a movement and why collaboration matters' (2023) 224 *The Review* https:// resolution .org .uk/ the -review/ archive/ the -review -issue -224/ securing -cohabitation -reform -building -a -movement -and -why -collaboration -matters/ accessed 7 September 2023.

6 See Helen Reece, 'Leaping without Looking' in Robert Leckey, *After Legal Equality: Family, Sex, Kinship* (Routledge 2015); and Rosemary Auchmuty, 'The Limits of Marriage Protection in Property Allocation When a Relationship Ends' [2016] 28(4) *Child and Family Law Quarterly* 303.

7 Anne Bottomley, 'From Mrs. Burns to Mrs. Oxley: Do Co-habiting Women (Still) Need Marriage Law?' [2006] 14(2) *Feminist Legal Studies* 181.

This chapter reflects on the influence and legacy of *Burns* and asks whether the case can meaningfully contribute to modern conversations about cohabitation reform. The chapter is divided into three parts. With the purpose of understanding why *Burns* generated such extensive debate, the first part briefly sketches and revisits the decision itself and its immediate reception at the time. The second part analyses the modern critique of *Burns* and evaluates two core claims by critics that it no longer characterises the situation faced by cohabitants today. The third part explores how *Burns* is being deployed today and asks broader questions as to the value of strategic litigation and the lessons that can be learned from high-profile cases. This is a particularly timely investigation owing to calls from practitioners to find 'another Mrs Burns' or a similar test case in a hope to bypass legislative inertia and prompt reform via the courts. It will be argued that while it is indisputable that high-profile cases can propel reform movements, as was the case most recently in England and Wales with divorce reform, caution must be exercised both in the retelling of that tale and the desire to make universal the specific experience of the litigant concerned. If anything, *Burns* tells us about the power of narrative in family law reform movements. Nevertheless, the case must be presented in a contextualised manner if arguments are to be persuasive and reform ultimately secured.

I

It is somewhat curious that *Burns* has achieved the level of discussion that it has when it is appreciated that the facts are unremarkable and the points of law canvassed are not especially novel. *Burns* was not a decision of the Appellate Committee of the House of Lords, so its contribution to precedent was limited too.

Valerie Burns met Patrick Burns in 1961. Fully accepting that Mr Burns would not marry her,[8] Mrs Burns changed her name by statutory declaration to his and both parties held themselves out to be married to their family and acquaintances. In April 1962, Mrs Burns gave birth to their first child. They initially lived in rented accommodation but preferring to own a property rather than rent, in 1963 Mr Burns purchased a house in London in his own name. He took out a large mortgage and assumed sole responsibility for its repayment. Mr Burns financed that purchase himself by paying the deposit and paid the mortgage instalments using his own funds. Their second child was born in 1963. As Mrs Burns was focused on raising two young children, she did not work for most of the long period of cohabitation. When she did work, Mrs Burns used her earnings to pay for household expenses such as utility bills and they went into a household account to which Mr Burns also contributed. Mrs Burns made domestic contributions to the home such as decorating and purchased household items such as a bed and white goods. The relationship deteriorated in 1978 and ended in 1980. Mrs Burns claimed that she was entitled to a beneficial interest that had been acquired through a resulting trust either in equal shares with Mr Burns or, in the alternative, in shares to be determined by the court.

[8] Mrs Burns's subsequent involvement in a BBC documentary after the case, discussed below, reveals that marriage was not an option because Mr Burns was already married and his Catholic ex-wife refused to grant him a divorce. Discussed in John Mee, 'Burns v Burns: The Villain of the Piece' in Stephen Gilmore, Jonathan Herring and Rebecca Probert (eds), *Landmark Cases in Family Law* (Hart 2010).

At first instance Dillon J dismissed her claim and Mrs Burns appealed. Her counsel argued that Dillon J had applied a narrow interpretation of the law derived exclusively from the earlier House of Lords' decisions in *Pettitt v Pettitt*[9] and *Gissing v Gissing*[10] that overlooked later Court of Appeal rulings and 'changes in custom' since they were decided.[11] Crucially, it was argued that the court was able to impute a trust based on direct or indirect contributions, which could therefore recognise Mrs Burns's domestic work and care for the children. Mr Burns, who represented himself, asserted that Dillon J had correctly applied the relevant legal principles.

The Court of Appeal, comprised of Waller, Fox and May LLJ, dismissed Mrs Burns's appeal on the basis that she had not made a substantial financial contribution to the acquisition of the property capable of triggering a beneficial interest under an implied trust. Importantly, Mrs Burns's contributions to the welfare of the family and bringing up of the children were not factors to be considered when determining whether an individual had acquired a trust interest.

Exploring the circumstances surrounding the acquisition of the house, Fox LJ noted that:

> nothing occurred between the parties to raise an equity which would prevent the defendant denying the plaintiff's claim. She provided no money for the purchase; she assumed no liability in respect of the mortgage; there was no understanding or arrangement that the plaintiff would go out to work to assist with the family finances; the defendant did nothing to lead her to change her position in the belief that she would have an interest in the house. It is true that she contemplated living with the defendant in the house and, no doubt, that she would do housekeeping and look after the children. But those facts do not carry with them any implication of a common intention that the plaintiff should have an interest in the house. Taken by themselves they are simply not strong enough to bear such any implication.[12]

After the property was acquired, Fox LJ determined that Mrs Burns's limited income derived from giving flower arranging lessons and her driving instruction business was effectively her own. Put simply, 'She was free to do what she liked with her earnings.'[13] Moreover, Mr Burns did not encourage her to apply this money to the property to relieve him of the financial burden. The Court of Appeal did find that Mrs Burns used this money to provide gifts of clothing to Mr Burns and their children, pay bills, contribute towards housekeeping costs, and pay for the purchase of household items including doorknobs. But Fox LJ noted that what was ultimately purchased with her own money did not provide 'evidence of a payment or payments by the plaintiff which it can be inferred was referable to the acquisition of the house'.[14]

As no substantial financial contribution could be found that was referable to the acquisition of the property, the final issue was whether, the performance of domestic duties per se could trigger a trust interest. Again, Fox LJ was clear that a trust based on common intention could only arise if there was a financial contribution, direct or indirect, to the acquisition of the property. He noted that 'the mere fact that parties live together and do the ordinary domestic

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9 [1970] AC 777.
10 [1971] AC 886.
11 *Burns* (n 1) 319.
12 ibid 327–8.
13 ibid 328.
14 ibid 328.

tasks is, in my view, no indication at all that they thereby intended to alter the existing property rights of either of them'.[15]

Revisiting the Judicial Reasoning in *Burns*

The outcome of *Burns* is often characterised as a clear case of injustice. One aspect contributing to that perception is that Mrs Burns had devoted a lengthy period of her life to supporting Mr Burns and the family only to receive no share in the family wealth. The relationship duration was certainly an aspect that supported this sense of injustice, and it was a feature emphasised by the Court of Appeal. Leaving aside the uncomplimentary discussion of Mrs Burns as Mr Burns's 'mistress' (which was common language for cases at this time), Waller LJ stressed that this was a case of 'two people living together as man and wife for 17 years as if they were married but not legally married'.[16] Similarly, May LJ noted the cohabitants 'live together without being married, but just as if they were so' and bring up their children 'in the same way as the family next door'.[17] This acknowledgement that they were functioning as spouses in all but name and the juxtaposition between what Mrs Burns might have received had she been married to Mr Burns arguably furthered the sense of injustice.

Another factor contributing to that sense of injustice is judicial conservatism, particularly exhibited by Fox and May LLJ. In many ways *Burns* can be viewed as an overly conservative decision and a reaction to the creative judicial reasoning of the Denning Court of Appeal in the late 1960s and 1970s. It is well known that, after *Pettitt* and *Gissing* had been handed down, Lord Denning MR modified the tests applicable when acquiring and quantifying trust interests or, expressed differently, exploited the well-documented ambiguity in their Lordships' speeches.[18] While Lord Denning's intentions may have been laudable and aimed at protecting those in financial need, there are several examples of strained interpretations and impermissible approaches taken where key passages from *Gissing* were cherry-picked to reach particular results.[19] Thus by adopting a more traditional position in *Burns* there is perhaps a desire by the Court of Appeal to return to trust orthodoxy and reject some of the creativity that has been seen previously.

However, a policy-motivated return to doctrinal purity, especially as *Burns* was handed down shortly after Lord Denning's retirement in 1982, cannot be the only explanation for the result. This is evidenced by the fact that the Court of Appeal was divided, albeit only in reasoning and not in result. Indeed, Waller LJ very nearly found in Mrs Burns's favour. Providing the opening opinion in the case, Waller LJ situated the *Burns* litigation within the wider context of cohabitation cases increasingly coming before the courts. Surveying the decided cases, he

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[15] ibid 331.

[16] ibid 322.

[17] ibid 333.

[18] See e.g. *Falconer v Falconer* [1970] 3 All ER 449; *Heseltine v Heseltine* [1971] 1 All ER 952; and *Hargrave v Newton* [1971] 3 All ER 866.

[19] See DJ Hayton, 'Equity and Trusts' and MDA Freeman, 'Family Matters' both in JL Jowell and JPWB McAuslan (eds), *Lord Denning: The Judge, the Law* (Sweet and Maxwell 1984), A Morris, 'Equity's Reaction to Modern Domestic Relationships' in AJ Oakley (ed.), *Trends in Contemporary Trust Law* (Clarendon Press 1997) and TG Youdan, 'Equitable Transformations of Family Property Law' in S Goldstein (ed.), *Equity and Contemporary Legal Developments: Papers Presented at the First International Conference on Equity* (Jerusalem 1990).

supported the use of imputed intentions promoted by Lords Reid and Diplock in *Pettitt* and found that Mrs Burns arguably had a stronger claim than the successful litigant in an earlier Court of Appeal decision in *Hall v Hall*.[20] In that case the period of cohabitation was shorter at seven years, but the contributions made were more financially significant. Suggestive of a desire to allow Mrs Burns's appeal, Waller LJ believed that accepting an imputed intention 'would surely include some provision to make up for the statutory rights which marriage would have given in the event of a break up'.[21] It is only after reading the draft judgments of Fox and May LLJ that Waller LJ is 'reluctantly persuaded' that such an option is ultimately unavailable in *Burns*.[22] It should be recalled that both Fox and May LLJ also express some degree of reluctance in reaching the decision at the end of both of their judgments. Of course, a temptation to decide the case *differently* does not change the actual outcome of the decision but it is a nuance that is overlooked in modern accounts.

Even among academic commentators at the time there was division as to the acceptability of the outcome reached. In terms of precedent, the result in *Burns* is certainly consistent with previous cases, especially as to decide *Burns* differently would have directly gone against the House of Lords' decision in *Gissing* that had a very similar fact pattern. Thus, as Lowe and Smith remark, while the result in *Burns* was undoubtedly unfair to Mrs Burns, it should 'occasion no real surprise'.[23] But Lowe and Smith's preferred solution would have been Waller LJ's use of imputed intentions and Dewar even believed that the now-scotched creativity exhibited previously by Lord Denning could have been harnessed to find Mrs Burns a remedy along the lines of proprietary estoppel.[24]

Another factor that fuels the perceived injustice of *Burns* is how Fox and May LLJ analysed the predicament of Mrs Burns. Various observations made by Fox LJ suggest that the situation of Mrs Burns was unfortunate yet self-inflicted. For example, after dismissing Mrs Burn's appeal, he noted:

> I only add this. The plaintiff entered upon her relationship with the defendant knowing that there was no prospect of him marrying her. And it is evident that in a number of respects he treated her very well. He was generous to her, in terms of money, while the relationship continued. And, what in the long term is probably more important he encouraged her to develop her abilities in a number of ways, with the result that she built up the successful driving instruction business.[25]

So, like any fable, morality is clearly playing a role here, and it is apparent that conclusions are being drawn as to Mrs Burns knowingly placing herself in an economically disadvantageous position. As the following section will demonstrate, this discourse of voluntary assumption of risk through a failure to protect oneself through marriage continues today and features in later academic critiques of *Burns*.

While these observations speak of exposure to vulnerability, it should be appreciated that Mrs Burns was prevented from establishing an interest because of the organisation of their

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[20] (1982) 3 FLR 379.
[21] *Burns* (n 1) 326.
[22] ibid.
[23] Nigel Lowe and Andrew Smith, 'The Cohabitant's Fate' (1984) 47 *Modern Law Review* 341, 344.
[24] John Dewar, 'Promises, Promises' (1984) 47(6) *Modern Law Review* 735, relying on *Gordon v Douce* [1983] 2 All ER 228.
[25] *Burns* (n 1) 332.

relationship and division of labour. The fact Mr Burns was 'generous' prevented Mrs Burns from being able to prove a substantial financial contribution.[26] Given the level of women engaged in work at that time, that line of argument naturally could be used to deny meritorious claims on the basis that the male partner covered in full the financial needs of the parties. Rather than the female partner being able to contribute to the joint endeavour, her earnings are considered her own and, in turn, her potential to make qualifying financial contributions diminished.

Fox LJ provides another revealing observation as to Mrs Burns's contributions and the disadvantageous position she found herself in noting that: 'During the greater part of the period when the plaintiff and the defendant were living together she was not in employment or, if she was, she was not earning amounts of any consequence and provided no money towards the family expenses.'[27] While it was true that Mrs Burns was unable to contribute financially during that period, the simple explanation was that she was caring for Mr Burns's children. This illustrates the difficulty faced by a homemaker in establishing a beneficial interest in this context. Writing at the time, Eekelaar articulated this problem as follows:

> The very activity which deprives a woman of her independent means of acquiring security and saving capital is excluded when deciding whether an alternative form of security was intended. A woman's place is often still in the home, but if she stays there, she will acquire no interest in it.[28]

This reveals that the search for a 'real' or 'substantial' financial contribution was subject to gatekeeping by the court with at that time (male) judges making value judgments as to what is deemed a valuable contribution. This protectionist stance is certainly visible when Fox LJ stressed that it was 'necessary to keep in mind the nature of the right which is being asserted' and that if the plaintiff asserts an interest in a property and thus 'claims to *take it from him*', it must be by process of law.[29] The 'mere fact' of living together does not change property ownership and he saw 'nothing at all to indicate any intention by the parties that the plaintiff should have an interest in it'.[30]

Similarly, May LJ offered an interesting insight into his own perception of the types of work he deemed valuable and those which can be dismissed. He saw, for example, the fact a husband spends his weekends 'laying a patio' as 'neither here nor there' and then conflated that activity with a woman who spends 'so much of her time looking after the house, doing the cooking and bringing up the family'.[31] A hierarchy of contributions is clearly present. Thus, Auchmuty makes the persuasive point that perhaps it was not the law *itself* that generated the injustice in *Burns* but instead it was 'the way it has been applied by male-dominated courts committed (however unconsciously) to preserving men's economic power'.[32] Beresford

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[26] ibid 328 (Fox LJ).

[27] ibid 330.

[28] John Eekelaar, 'A Woman's Place – A Conflict between Law and Social Values' (1987) *Conveyancer and Property Lawyer* 93, 94. Discussed in Andy Hayward, 'John Eekelaar's Contribution to Family Property: Reflections on "A Woman's Place – A Conflict between Law and Social Values"' in Jens M Scherpe and Stephen Gilmore (eds), *Family Matters: Essays in Honour of John Eekelaar* (Intersentia 2022).

[29] *Burns* (n 1) 330 (emphasis added).

[30] ibid 327.

[31] ibid 344.

[32] Auchmuty (n 6) 320. See also Chapter 26 by Auchmuty in this *Research Handbook*.

advances a similar point that Mrs Burn's 'performatively constituted gender role meant that she did not behave "correctly"' and the contributions that she engaged in were 'of no legal interest to the courts'.[33]

So, even after the case was handed down, the perceived simplicity of *Burns* and its central message, can be questioned. Arguably other factors were at play that complicate the seemingly straightforward message attributed to *Burns* that in 1983 cohabitants were left without adequate recourse upon relationship breakdown.

II

Forty years have passed since *Burns* was handed down, yet the decision remains one that is discussed frequently in academic scholarship. As Probert notes, it is 'rare to find a critic who does not mention *Burns*'.[34] It has become the 'classic'[35] or 'most infamous'[36] case and the 'figure of Mrs Burns' as a victim of the law has been analysed and debated extensively.[37] Other commentators view Mrs Burns as 'iconic'[38] or 'totemic'.[39]

Tracing this development of a broader narrative for *Burns* is important when understanding the use of the case today because it raises questions as to what purpose(s) such narrative is serving. Mee is correct to assert that perhaps the significance of the case today is not what it actually decided but the 'perceived injustice which *Burns* has come to symbolise'.[40] For Mee, that injustice was 'the fact that the claimant was unable to share in the wealth created by the family over the duration of the relationship'.[41] This observation and others in the voluminous literature on the case show that *Burns* is no longer considered merely a moment in the development of the implied trusts. Rather the case is being deployed and conceptualised in a much more expansive manner, speaking to broader truths or perceptions as to cohabitation, domestic contributions and women.

Arguably one feature that has fuelled this elevation of *Burns* is Valerie Burns's participation in a BBC documentary 'The Cost of Living in Sin' that aired in November 2002.[42] That documentary was created to raise awareness of the risks of cohabitation, and it provided further insights into the *Burns* saga. It revealed, for example, the traumatic experience of Mrs Burns when litigating the case and that after the judgment was delivered Mrs Burns slept in her car

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[33] Sarah Beresford, 'It's Not Me, It's You: Law's Performance Anxiety over Gender Identity and Cohabitation' (2012) 63 *Northern Ireland Legal Quarterly* 187, 190.

[34] Rebecca Probert, 'Cohabitation: Current Legal Solutions' (2009) 62(1) *Current Legal Problems* 316, 317.

[35] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307 2007) 21 FN 27.

[36] Beresford (n 33) 190.

[37] Bottomley (n 7) 184.

[38] ibid 188.

[39] Jo Miles, 'Cohabitation: Lessons for the South from North of the Border?' (2012) 71 *Cambridge Law Journal* 492, 492.

[40] Mee (n 8) 186.

[41] ibid. See also Law Commission, *Sharing Homes* (Law Com No 278, 2002) 3.99, stating it is a misdescription to say the case was just about a failure to recognize non-financial contributions.

[42] See http://news.bbc.co.uk/1/hi/programmes/panorama/2489373.stm. A full transcript of the programme is available.

in a lay-by. Moreover, while not mentioned in the Court of Appeal decision, the documentary noted that Mrs Burns repeatedly 'turned a blind eye' to Mr Burns's affairs and pleaded with him to stop his infidelity. This developed the image of Mrs Burns as a 'wronged woman', with the documentary using sensationalised language positioning the case as '[a]n ordinary tale of love and loss that made legal history'.[43] Similarly, the stark outcome in the case was emphasised repeatedly: '[a]fter a bruising time, Valerie was left with nothing' and 'wasn't entitled to a penny'.[44] This arguably amplified the sense of injustice that was already palpable when the case was decided. In addition, research by Dawn Watkins involved locating Mrs Burns and hearing her side of the story.[45] It is quite rare for such insights about the lives of litigants to be made available and it is arguable that both the BBC documentary and Watkins's research have created a proximity to Mrs Burns that colours how academics have later discussed the case.

The figure of Mrs Burns has now become a central feature of reform campaigns.[46] The Law Society published cohabitation reform proposals in 2002 with *Burns* appearing on the opening page. Mark Harper, then chair of the Law Society's sub-committee, also appeared in the BBC documentary.[47] More recently, *Burns* was mentioned in Parliamentary debates. In 2009 Lord Lester of Herne Hill remarked in the Cohabitation Bill debate that *Burns* 'well-illustrated' the social problems necessitating reform.[48] The observation that Mrs Burns was 'entitled to nothing' featured in the Parliamentary debates as did the fact that the 'outcome would be virtually unchanged if the case were to reach the courts today'.[49]

But why is Mrs Burns still being discussed today and why is this modern use now so contested? Arguably the modern criticisms of the use of *Burns* centre on two interconnected aspects. The first is that the case would be decided differently today because the law has changed. The second is that social change means that fewer Mrs Burns's exist and thus the problems presented by the law have now diminished. These two assertions require careful consideration as they have direct bearing on how far *Burns* can, or should, be used in modern reform conversations.

Deciding *Burns* Differently Today

Several commentators argue that legal developments since *Burns* mean that the law has changed and would not be applied in the same way. Bottomley draws upon subsequent case law, most notably the Court of Appeal decision in *Oxley v Hiscock*,[50] decided in 2004, to claim that *Burns* is 'no longer representative of the law'.[51] Auchmuty contends that while in a narrow sense the ratio of *Burns* still remains 'good law' because domestic contributions and child care per se are incapable of triggering a trust interest, it would be 'very unlikely' the case would be

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43 ibid.
44 ibid.
45 Dawn Watkins, 'Recovering the Lost Human Stories of Law: Finding Mrs. Burns' (2013) 7 *Law & Humanities* 68.
46 See *Gow v Grant* [2012] UKSC 29 [50] (Baroness Hale).
47 Law Society, *Cohabitation – The Case for Clear Law: Proposals for Reform* (2002) 1. See also the Law Commission, *Sharing Homes* (n 41) and Law Commission, *Cohabitation* (n 35).
48 HL Deb 13 March 2009, Vol 708, col 1414.
49 ibid.
50 [2004] EWCA Civ 546.
51 Bottomley (n 7) 187.

decided in the same way today.[52] Taking that argument even further is Gardner, who believes that not only would the outcome be different for Mrs Burns, but also that she would receive '50% or more'.[53] Conversely, there are others, notably Barlow,[54] Mee[55] and Miles,[56] who argue that the relevant trust principles have not changed fundamentally and believe that if a case was brought with the same facts today it would be decided in the same way.

A closer examination of the post-*Burns* legal landscape challenges the confident assumption that the outcome would be different today. The leading authority in this area remains *Lloyds Bank v Rosset*, decided in 1990, where for the purpose of acquiring an implied trust interest the House of Lords required an agreement, arrangement or understanding between the parties that the beneficial ownership was to be shared that was relied upon to the claimant's detriment.[57] Alternatively, there needed to be a direct financial contribution to the purchase price, whether initially or through payment of the mortgage instalments, by which the court could infer said agreement. Crucially, Lord Bridge remarked in that case that his reading of the authorities made it 'extremely doubtful whether anything less will do'.[58] This test meant that non-financial contributions such as work in the home or childcare were incapable of triggering a trust interest. Naturally, the overly restrictive nature of this test received academic criticism[59] and, leaving aside later judicial developments, it is clear that Mrs Burns would never have been able to acquire an interest under *Rosset.*

In arguing that *Burns* would be decided differently, Bottomley places considerable weight on the later Court of Appeal decision of *Oxley* noting the liberalisation of the law and the permissibility of fairness as a method for quantifying beneficial interests.[60] In that case Chadwick LJ believed that where there was no agreement between the parties as to precise shares in the property 'each is entitled to the share which the court thinks fair having regard to the whole course of dealings between them in relation to the property'.[61] While that case was viewed as an important development and an extension of the more holistic approach to quantifying shares evidenced in *Midland Bank v Cooke*,[62] it again would not assist Mrs Burns because such methodology was only accessible once the court had found a trust interest. If Mrs Burns could not establish an interest in the first place, whether through a shared agreement or qualifying financial contribution, the more generous quantum rules would simply not apply.

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52 Auchmuty (n 6) 314.

53 Simon Gardner, 'Problems in Family Property' (2013) 72(2) *Cambridge Law Journal* 301, 307.

54 Anne Barlow, Simon Duncan, Grace James and Alison Park, *Cohabitation, Marriage and the Law* (Hart 2005).

55 Mee (n 8).

56 Miles (n 39) 492.

57 [1991] 1 AC 107.

58 [1991] 1 AC 107, 133.

59 See e.g. MP Thompson, 'Establishing an Interest in the Home' (1990) *Conveyancer and Property Lawyer* 314; and Patrick O'Hagan, 'Lloyds Bank Plc v Rosset – McFarlane v McFarlane Revisited' (1991) 42(3) *Northern Ireland Legal Quarterly* 238.

60 [2004] EWCA Civ 546. See Graham Battersby, 'Oxley v Hiscock in the Court of Appeal' [2005] 17(2) *Child and Family Law Quarterly* 259.

61 [2004] EWCA Civ 546 [69].

62 [1995] 4 All ER 562.

Similarly, Auchmuty[63] reads the outcome of *Burns* in light of two important decisions, *Stack v Dowden*[64] in the House of Lords and *Jones v Kernott* in the Supreme Court.[65] Drawing upon the comments of Lord Walker in *Stack,* Auchmuty places emphasis on his and Baroness Hale's view that the 'law has moved on'[66] and that intention to co-own takes into account 'all significant contributions, direct or indirect, in cash or in kind'.[67] Moreover, observations were made in *Stack* that the acquisition routes in *Rosset* were too exclusionary and that Lord Bridge had 'set that hurdle rather too high'.[68]

As is well known these observations were strictly obiter; both *Stack* and *Jones* were cases involving legal co-ownership, so the *Burns* scenario of sole legal ownership was not directly relevant. Nor was it possible, as a matter of precedent, for the judges in either case to depart from *Rosset.* That said, the criticism of *Rosset* in *Stack* did prompt extensive academic debate and speculation as to whether there was now offered a third acquisition route based on a more holistic search for intentions considering the whole course of dealings between the parties.[69] Others questioned whether the sharp distinction between acquisition and quantification principles had been jettisoned in favour of a single regime potentially more favourable to Mrs Burns.[70]

In the aftermath of *Stack* and *Jones* there was a flurry of litigation that many hoped might usher in a relaxation of the law. However, the Court of Appeal in *James v Thomas*[71] and *Morris v Morris*[72] both applied a strict reading of *Rosset*, insisting on a genuine common intention between the parties and that an inferred common intention based on conduct would be found only in 'exceptional circumstances'.[73] Such a strict approach by the courts even led Piska to conclude that a 'non-owning claimant may in fact be in a worse position than before *Stack v Dowden*'.[74] Later cases have, again, followed this approach to contribution-based arguments. In *Thomson v Humphrey*, Warren J accepted that the law had moved on but, curiously, stated that the correct approach as to qualifying contributions was correctly stated in *Burns* back in 1983.[75] Similarly, echoing the dicta used in *Burns*, it was stressed by Roberts J in *S v J and others* in 2016 that the court must look for expenditure 'referable to the acquisition of the house'.[76] What this suggests, as put colourfully by Ralton, is that rather than giving future Mrs Burns the hope of a different outcome judges have 'scraped the mouldy bits off *Lloyds Bank*

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63 Auchmuty (n 6).
64 [2007] UKHL 17.
65 [2011] UKSC 53.
66 [2007] UKHL 17 [26], [60].
67 [2007] UKHL 17 [31].
68 [2007] UKHL 17 [63] (Baroness Hale).
69 See e.g. Martin Dixon, 'The Never-Ending Story – Co-ownership after Stack v Dowden' [2007] *Conveyancer and Property Lawyer* 456; and Andy Hayward, 'Finding a Home for "Family Property"' in Nigel Gravells (ed.), *Landmark Cases in Land Law* (Hart 2013).
70 Simon Gardner and Katharine M Davidson, 'The Future of Stack v Dowden' (2011) 127 *Law Quarterly Review* 13.
71 [2007] EWCA Civ 1212.
72 [2008] EWCA Civ 257.
73 *Morris*, ibid [23] (Sir Peter Gibson).
74 Nick Piska, 'A Common Intention or a Rare Bird? Proprietary Interests, Personal Claims and Services Rendered by Lovers Post-Acquisition' [2009] 21(1) *Child and Family Law Quarterly* 104.
75 [2009] EWHC 3576 [29].
76 [2016] EWHC 586 (Fam) [49] quoting *Oxley* (n 50) [31] and *Burns* (n 1).

v Rosset and declared it good eating … whilst managing not to mention *Lloyds Bank v Rosset* by name'.[77]

Research by Sloan and Mills has also confirmed that lower courts have not taken the lead from *Stack* and *Jones* and relaxed the acquisition routes. In a close analysis of post-*Jones* case law, Sloan concluded that:

> [d]espite encouraging rhetoric … about the reach of *Jones* in cases from a wide range of contexts, judges in both the High Court and the Court of Appeal have been largely unable, but occasionally unwilling, to accept the Supreme Court's invitation.[78]

As a result, the distinction between sole and joint legal disputes has been maintained. Moreover, the endorsement of a more context-specific inquiry for the divination of party intentions suggested in *Stack* has not materialised in subsequent acquisition cases. For balance, it should be appreciated that other factors may explain why. The complexity of trust principles serves as a strong disincentive to litigate as does the absence of legal aid and the risk of a costs order if the case is lost. But, overall, there appears to be a striking reticence on the part of the judiciary to innovate, perhaps considering the important conceptual and practical differences between cases where a claimant has an already established interest and those where they do not.[79]

For completeness, Gardner's view that Mrs Burns might today receive half is unpersuasive.[80] It is premised on the belief that as the relationship in *Burns* could be viewed as 'materially communal',[81] the courts would be inclined to recognise her homemaking and child-raising contributions. Thus the spirit of *Stack* and the obiter comments made in that case suggesting that the law has moved on might result in a judicial willingness to find a tacit or implied common intention. This could then allow the courts to use fairness when quantifying shares having regard to the whole course of dealings between the parties. As noted above, while many hoped that *Stack* would usher in a more flexible approach to the acquisition rules, such invitation has been declined by the lower courts and any change has failed to materialise in the case law.

While it is impossible to state with certainty that Mrs Burns would receive nothing today, indications from the modern case law suggests that such a generous interpretation is simply not there. Neither *Oxley* nor *Stack* provide the 'magic wings which would allow the courts to escape the maze'.[82]

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[77] Alex Ralton, 'Establishing a Beneficial Share: Lloyds Bank v Rosset Revisited' [2008] 38 *Family Law* 424, 425.

[78] Brian Sloan, 'Keeping Up with the Jones case: Establishing Constructive Trusts in "Sole Legal Owner" Scenarios' (2015) 35 *Legal Studies* 226, 251.

[79] See Matthew Mills, 'Single Name Family Home Constructive Trusts: Is Lloyds Bank v Rosset Still Good Law?' (2018) 82 *Conveyancer and Property Lawyer* 350.

[80] Advanced in Simon Gardner, 'Problems in Family Property' (2013) 72(2) *Cambridge Law Journal* 301.

[81] See earlier work by Gardner, e.g. Simon Gardner, 'Family Property Today' (2008) 124 *Law Quarterly Review* 422.

[82] Mee (n 8) 200.

Social Context Moved On

The second argument advanced when questioning the modern relevance of *Burns* is that the social context has changed since 1983 when the case was handed down. In many ways that is true – Mr and Mrs Burns began cohabiting in the early 1960s when it was far more common for the family home to be placed in the male partner's name and there was a much more pronounced gendered division of labour. More liberal attitudes towards cohabitation began to emerge in the 1960s but it was by no means a relationship that was universally accepted or something that was recognised as a viable alternative to marriage.[83] Indeed, marriage enjoyed considerable popularity in the early 1970s, with the marriage rate steadily decreasing ever since.[84]

Writing in 2001, Probert argued that while it was clear that the law operated disadvantageously for Mrs Burns, it was 'less clear that the experience of a woman who started living with her partner in 1961 typifies that of the modern cohabitant'.[85] Drawing upon available statistical data at the time, Probert argued that the law in 2001 was not as unfavourable as routinely presented when one considers modern women's legal ownership of property, employment and contributions to the home. For Probert, Mrs Burns would be in an anomalous situation in 2001 as 'the average cohabiting relationship is shorter, more likely to end in marriage, more likely to involve financial contributions from the female partner and less likely to involve children'.[86]

Various points are advanced as to why Mrs Burns may no longer be representative of modern women. Probert noted that the issue of ownership of the family home affected just over a quarter of cohabiting women. The reasons for this related to the fact that sole legal ownership by the male partner has more recently given way to more instances of legal co-ownership and assumption of liability under a mortgage was no longer exclusively taken by men. A significant number of cohabiting couples rent, rather than own, their properties too. Modern conveyancing processes when purchasing property and expressly declaring beneficial ownership were also playing a role in demarcating entitlement thereby reducing the numbers of Mrs Burns-type claimants reliant on the implied trusts. Where beneficial ownership had not been secured through legal co-ownership or an express trust, Probert noted that given the number of employed cohabiting women in 2001 (which increased if the couple was childless) there was a greater likelihood that a qualifying contribution would be made.[87] Once such contribution was established, courts would enjoy greater flexibility when quantifying beneficial interests.

It should be noted that despite questioning the use of *Burns* in 2001, Probert's key contention was that any changes to the law should be evidence-based and not premised on the 'problems of past generations'.[88] Cohabitation reform itself was not rejected. Indeed, Probert

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[83] Compare *Gammans v Ekins* [1950] 2 KB 328 and *Dyson Holdings Ltd v Fox* [1976] QB 503.

[84] Office for National Statistics, *Marriages in England and Wales: 2019* (19 May 2022).

[85] Rebecca Probert, 'Trusts and the Modern Woman' [2001] 13(3) *Child and Family Law Quarterly* 275, 275.

[86] ibid 284.

[87] See ibid 281, citing Kathleen E Kiernan and Valerie Estaugh, *Cohabitation: Extra-marital Childbearing and Social Policy* (Family Policy Studies Centre 1993) noting that 92 per cent of childless cohabiting women work and 92 per cent of them work full-time and that where there are children only 43 per cent work, of whom 46 per cent work full-time.

[88] Probert (n 85) 286.

remarked that further increases in the rate of cohabitation or particularly lengthy relationships may justify reform in the future. It is therefore an opportune moment to assess whether *Burns* remains an outlier case and a scenario not reflective of the norm today.

Over 20 years after Probert's critique was published, the societal context has certainly changed. There has been a large increase in cohabitation, consistent with trends seen in a large number of other jurisdictions.[89] While the marital family remains the most common family type – it stood at 12.6 million in 2022 – cohabitation is the fastest growing.[90] The number of cohabiting couples jumped from 1.5 million in 1996 to around 3.6 million in 2022, representing an increase of 144 per cent. One in five couples are cohabiting and it is predicted that this will rise to one in four couples by 2031. The recent Census data shows that the proportion of adults who have never been married or in a civil partnership has increased for all ages under the age of 70 since the previous exercise in 2011.[91] Most striking here is the age bracket of 25–35 year olds. In 1991, 2.7 million individuals in that bracket were unmarried. Today that figure is more than double, standing at 5.8 million.[92]

In 2001 Probert noted that most cohabitants are childless and at that time of the 2.1 million cohabiting couples, 800,000 had children.[93] Recent statistics indicate that in 2022 of the 3.6 million couples cohabiting around 1.2 million have dependent children.[94] Interestingly, for the first time since records began in 1845, in 2022 there were more births (51.4 per cent) registered to unmarried mothers than married mothers. For context, when *Burns* was decided in 1983 only 15.8 per cent of births were outside of marriage and when Probert's analysis was published in 2001 that figure stood at 40.0 per cent.

Another key consideration is the age at which couples have children. In 2021, the average mean age of mothers giving birth was 30.9 in contrast to 27.7 back in 1991.[95] This age is significant because the recent Census data tells us that the number of unmarried individuals aged 25 to 29 increased from 73.9 per cent in 2011 to 84.2 per cent in 2021 and for those aged 30 to 34 years of age, the increase was from 49.2 per cent to 58.9 per cent. These figures reveal that with the general growth in prevalence of cohabiting families, there remains a large and growing number of individuals and couples that are unmarried, some of which are having children together.

The mere fact that more people are cohabiting does not necessarily support or undermine the contention that the societal context has changed since 1983 and that *Burns* is no longer representative of issues faced by cohabitants today. If this expanded cohort of cohabitants are protecting themselves through private agreements or making qualifying financial contributions to the acquisition of property, then the issues raised by *Burns* might no longer materialise. The

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[89] See Jens M Scherpe and Andy Hayward, *De Facto Relationships: A Comparative Guide* (Edward Elgar 2025 forthcoming).

[90] Office for National Statistics, *Families and households in the UK: 2022* (18 May 2023).

[91] Office for National Statistics, *Marriage and Civil Partnership Status in England and Wales: Census 2021* (22 February 2023).

[92] ibid.

[93] Probert (n 85) 277, 282.

[94] Office for National Statistics, *Births in England and Wales: 2022* (17 August 2023).

[95] Office for National Statistics, *Birth characteristics in England and Wales: 2021* (19 January 2023).

difficulty, however, is that recent evidence places considerable doubt on whether these issues are 'clearly on the decline' as Auchmuty has suggested.[96]

As for couples entering private agreements, evidence casts doubt on the prevalence of such practice and thus its ability to protect individuals in the predicament of Mrs Burns. Issues arise owing to widespread misunderstanding of legal entitlement and whether couples appreciate that they need to create their own legal arrangements.[97] Research by Anne Barlow in 2019 saw 47 per cent of the population believing that cohabitants have a common law marriage giving them the same legal rights as if they were married.[98] Problematically that figure increased to 55 per cent where couples have children and has remained largely unchanged over the past 20 years – it stood at 51 per cent in 2006. The erroneous belief that cohabitants are already protected, combined with couple optimism bias (i.e. the belief that protection is not needed because the couple will stay together) may translate into the relatively low uptake of cohabitation contracts. Sharon Thompson has also argued that the prevalence of the common law marriage myth explains why many couples do not enter cohabitation agreements because they are only effective 'if the parties are aware of what their rights are'.[99]

In terms of the making of financial contributions to trigger a trust interest, the picture is more complex. A study conducted by Douglas, Pearce and Woodward in 2007 surveyed the property issues that arise when cohabiting couples separate.[100] While noting a clear diversity of cohabiting relationships, they identified scenarios where significant injustice arose. Importantly, while acknowledging the view that the '*Burns v Burns* scenario' is perceived by some as outdated, they found 'clear examples' of it still arising in their study.[101] Real-life examples included one party being unable to establish an interest in the family home despite a lengthy period of cohabitation and the provision of care for children. This led them to conclude that not only was the Law Commission in 2007 vindicated in their criticisms of the current law but also that the need for reform had intensified. This urgency was attributable to:

> the withdrawal of legal aid from most family proceedings, meaning that it has become harder than ever for separating cohabitants of modest or even comfortable means to secure adequate legal advice and assistance relating to case law which even experienced practitioners can struggle to work with.[102]

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[96] Auchmuty (n 6) 314.

[97] Equally there are misunderstandings as to the entitlements of spouses and civil partners: noted by Auchmuty (n 6) 319–20.

[98] See Anne Barlow, Carole Burgoyne, Elizabeth Clery and Janet Smithson, 'Cohabitation and the Law: Myths, Money and the Media' in Alison Park et al (eds), *British Social Attitudes: The 24th Report* (2008); and M Albakri, S Hill, N Kelley and N Rahim, 'Relationships and Gender Identity' in *British Social Attitudes 36*, The National Centre for Social Research 2019: www.bsa.natcen.ac.uk/media/39358/5_bsa36_relationships_and_gender_identity.pdf, last accessed 10 April 2023.

[99] Written evidence to the Women and Equalities Committee Inquiry into the *Rights of Cohabiting Partners* by Dr Sharon Thompson HAB0342.

[100] Gillian Douglas, Julia Pearce and Hilary Woodward, *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (Cardiff University and Bristol University 2007).

[101] Written evidence to the Women and Equalities Committee Inquiry into the *Rights of Cohabiting Partners* by Gillian Douglas (Dickson Poon School of Law) HAB0367, para 2.14.

[102] ibid 2.15.

Practitioners also attest to *Burns*-type scenarios arising today.[103] Crucially, these perspectives are invaluable as they provide evidence of clients seeking legal advice but being then unable to litigate owing to access to justice issues. In written evidence submitted to the Women and Equalities Committee Inquiry into the Rights of Cohabiting Partners, Resolution stated that under the current law 'it is possible to live with someone for decades and to have children together, but then simply walk away without the economically stronger party taking any responsibility for a former partner when the relationship breaks down'.[104] In surveys of Resolution members, it was found in 2017 that 98 per cent of respondents were unable to help couples due to a lack of legal protection, with similar findings reported again in 2019.[105] Similarly, Graeme Fraser, Chair of Resolution's Cohabitation Committee, noted that 'members encounter many individuals … left unprotected by the current law, even after very long relationships during which they raised the children of the relationship (the "Burns" scenario)'.[106] While some of these observations may be anecdotal and difficult to verify because these disputes are not reaching the courts, family law practitioners are attesting to clients coming to them for advice with similar characteristics to Mrs Burns.

Another dimension to consider is the provision of childcare today because the division of labour, of breadwinning and homemaking, often creates relationship-generated disadvantage. It could be considered that *Burns*-type litigants are less widespread because the cost of buying the family home now requires financial outlay from both parties. Therefore, it could be assumed that with changes in attitudes towards responsibility for childcare combined with the belief that it should be shared would correlate to both parties financially contributing to the home. There is certainly clear evidence of change. Around the time *Burns* was decided, the British Social Attitudes Survey saw 48 per cent agree with the statement that 'a man's job is to earn money and a woman's to look after the home'.[107] In 2023, that figure decreased to 9 per cent. Similarly, the employment rate in 1983 for women aged 16–64 was 54 per cent, which has now increased to 72 per cent. However, while attitudes have clearly changed, the 2023 Survey revealed that practices had not and that women were still disproportionately working the so-called 'second shift'.[108] Respondents were in favour of equal sharing of household labour in theory, but it was revealed that 63 per cent of women stated they were doing more than their fair share of it.[109] Similarly empirical research by Anna Heenan has shown that while there is greater sharing of childcare between men and women today, it is not equally divided. In their study, all mothers interviewed reduced their work or gave up work entirely to prioritise

[103] See also comments of Baroness Butler Sloss, who noted during the Second Reading of Lord Lester's Cohabitation Bill that 'My experience is very similar to the Burns case referred to by the noble Lord, Lord Lester of Herne Hill. I have dealt with similar cases again and again': HL Deb 13 March 2009, Vol 708, col 1429.

[104] Written Evidence to Women and Equalities Committee Inquiry into the *Rights of Cohabiting Partners* by Resolution HAB0238.

[105] ibid.

[106] See Graeme Fraser, 'Cohabitation Law: A View from the Coalface', Presentation to Cohabitation Reform in England and Wales Conference held at the Inner Temple, January 2023.

[107] National Centre for Social Research, *British Social Attitudes 40: Gender Roles* (September 2023).

[108] Arlie Hochschild and Anne Machung, *The Second Shift: Working Families and the Revolution at Home* (Penguin 2003).

[109] National Centre for Social Research (n 107).

childcare.[110] Heenan noted that assuming the role of primary caregiver, as Mrs Burns did, can produce unequal consequences in that taking time out of work affects wages, career progression and the accumulation of assets or savings.

One final point is that while studies have stressed that the deficiencies of the law can negatively impact both men and women, the current situation can adversely affect women more. The gendered implications of the law have long been recognised. The law, as exemplified by *Burns*, was found to discriminate against homemakers by the Law Commission in 2002[111] and Toulson LJ noted in 2013 that 'law of property can be harsh on people, usually women'.[112] More recently, this dimension was emphasised in 2022 in evidence submitted by Resolution to the Women and Equalities Committee Inquiry. They noted that:

> Resolution's members encounter many individuals, often female, left unprotected by the current law, even after very long relationships during which they raised the children of the relationship. Of those who responded to member surveys in 2017 and 2019 63% and 67% respectively said that in their experience this is an issue where women lose out more often than men (3% said more men lose out than women, and 25% said it seems roughly even).[113]

Similarly, in oral evidence to that inquiry, Michael Horton KC, representing the Family Law Bar Association, acknowledged that women were often adversely affected by the law. He remarked, '[i]t was Mrs Burns who was left in the lurch, not Mr Burns, and I think in the generality of cases it will be'.[114] These observations were ultimately recognised in the final report published by that Committee, which placed considerable emphasis on the fact that the law as applied today generated important equalities issues.

More importantly, and a dimension not discussed at the time of *Burns*, the report exposed the additional burdens faced by women from ethic minority backgrounds who had undertaken a religious-only ceremony such as the nikah. Owing to such ceremony not being legally recognised under English law, women were left in an economically disadvantageous position despite genuinely believing they were validly married.[115] Cumulatively this shows that although the societal context is different, it has not changed to such an extent that the *Burns* scenario has completely disappeared.

III

The preceding section has demonstrated that in 2023 it is perhaps overly simplistic to dismiss *Burns* outright. It is still questionable whether the case would be decided differently today and while Auchmuty and Probert are correct that ownership patterns have changed and there

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[110] Written evidence to the Women and Equalities Committee Inquiry into the *Rights of Cohabiting Partners* by Dr Anna Heenan HAB0286.

[111] Law Commission, *Sharing Homes* (n 41) para 2.108.

[112] [2013] EWCA Civ 382 [9].

[113] Resolution (n 104). See Women and Equalities Committee, *The Rights of Cohabiting Partners* (July 2022) para 25.

[114] See Oral evidence submitted to *The Rights of Cohabiting Partners* inquiry, HC 130 – Q101.

[115] See e.g. *Attorney General v Akhter and Khan* [2020] EWCA Civ 122; Law Commission, *Celebrating Marriage: A New Weddings Law* (Law Com No 408, 2022) and discussion of this issue in Women and Equalities Committee (n 113) 12–14.

is now a greater likelihood of a qualifying financial contribution being made, practitioners are still attesting to clients coming forward in circumstances like that experienced by Mrs Burns. The issue may also have added elements when the intersection with religious-only marriages is considered. That said, it is argued that the current use of *Burns* and its positioning in the campaign for reform is far from satisfactory. Put simply, *Burns* need not be such a prominent feature of the reform campaign and stronger arguments for cohabitation reform can be made. While the Mrs Burns 'got nothing' soundbite works in a Parliamentary debate or a Select Committee where time pressures are present, it is premised on there being a universally accepted understanding of what the case decided, its legal reasoning and its application today.

Arguably *Burns* can still be used but in a more nuanced manner. Such contextualised reading of *Burns* has several benefits. First, its current use runs the risk of alienating women, a key demographic in the campaign for reform. As Bottomley noted the use of *Burns* by reform campaigners 'invokes the image of the women they are concerned to protect – a woman with children who becomes financially vulnerable because of her role as partner/mother'.[116] Put differently, Mrs Burns is the 'victim who has lost everything through her commitment to [a] man'.[117] *Burns* is therefore a morality tale illustrating that cohabitation can leave women vulnerable and that Mrs Burn's 'plight' should act as a warning to all women. This presentation of women as 'vulnerable' in this context may be well intentioned or even strategic with a view to underlining the pressing need for reform, but it undermines the acceptance and persuasiveness of reform arguments. It is trite that women do not want to be lectured as to the risks of their relationships or consider themselves vulnerable.

By connecting cohabitation with the inevitability of vulnerability, *Burns* has a polarising effect. Given the outcome in that case and when it was decided, some women may view that their position is fundamentally different and that they would not expose themselves to that situation. By placing *Burns* at the extreme end of potential predicaments, the case becomes more exceptional, otherworldly and, as a result, not a direct concern for them. In turn, its prominent position within the reform conversation jars because many would not see it as truly representative of cohabitation today.

Emphasising vulnerability also has the effect of denying agency. By stating that economic vulnerability can arise from cohabitation, the discourse tends to suggest a corresponding absence of autonomy, which is not always the case. Cohabitants, as Barlow and Smithson have argued, are not a homogenous group and there are varying levels of understanding as to the legal framework.[118] While some cohabitants believe in the myth of common law marriage and that they are in fact protected when they are not, others display a high degree of 'legal rationality'.[119] They may, for example, have created wills, executed joint property transfers, or signed cohabitation contracts. Although the previous section has cautioned against presenting these activities as a substitute for reform, the fact some cohabitants are self-ordering must be appreciated. It is an important dimension that can resist some of the over-generalisations made and can recognise the fact that there will be cohabiting women that have financial resources

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[116] Bottomley (n 7) 188.

[117] ibid 195.

[118] See Anne Barlow and Janet Smithson, 'Legal Assumptions, Cohabitants' Talk and the Rocky Road to Reform' [2010] 22(3) *Child and Family Law Quarterly* 328.

[119] See Anne Barlow, 'Legal Rationality and Family Property: What has Love Got To Do with It?' in J Miles and R Probert, *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart 2009).

they want to take steps to protect. Moreover, it reinforces the key argument by Barlow and Smithson that addressing relationship-generated disadvantage requires a multi-faceted approach with opt-out protections addressing the circumstances of certain cohabiting couples running along an opt-in registration scheme (namely civil partnerships) that may be attractive for some cohabiting couples wishing to formalise.[120] This nuance can go towards addressing the concerns of Auchmuty that the somewhat generalised position advanced through the conduit of *Burns* is not representative of 'the great majority of property-owning cohabitants'.[121]

This does not, it is argued, diminish the need for cohabitation reform. Rather it demands a change in the prevailing narrative so that such need is understood *better*. Various steps could be taken. The terminology of 'vulnerability' and 'plight' should be rejected and instead replaced with more neutral expressions such as economic disadvantage. This approach found favour with the Law Commission in their 2007 project framing their proposal around the concepts of retained benefit and economic disadvantage.[122] Similarly, Anne Barlow's research has long emphasised the more neutral concept of relationship-generated disadvantage. While some may view this as an exercise in linguistic gymnastics or something that will not reach the public's consciousness, modifying the language and making it more neutral in tone avoids exaggerating and sensationalising key arguments in the reform campaign. It, hopefully, will bring on board individuals questioning reform, including those that may have engaged in self-ordering themselves and taken steps to regulate their relationship in law. Moreover, such change would not diminish the negative impact that the law has upon women or the fact that it might adversely affect more women than men.

This change in the language would also better reflect the exercise of the courts if statutory reform proposals were to be introduced. To date, none of the reform proposals produced have recommended an equalisation in treatment between spouses and cohabitants and have instead (largely) centred on reversing benefits and detriment. The Law Commission's 2007 proposals even ruled out generous forward-looking maintenance, preferring instead to take a more retrospective analysis remedying economic disadvantage and reversing retained benefits.[123] As a result, courts would not be using fairness or an expansive discretionary test to remedy vulnerability or suggesting that cohabitation itself creates a status that triggers an entitlement. Instead, courts would be empowered to reverse relationship-generated disadvantage on narrowly drawn terms. Using the more mechanical language of disadvantage, that is derived from the particular arrangement of the relationship or the choices made by the parties, would avoid the emotionally charged connotations associated with vulnerability.

A second benefit of using *Burns* in a more nuanced way is that it can prompt important discussions about the value of domestic contributions, and why they are still undervalued by the law. The 'soundbite' of *Burns* remains that a non-financial contribution such as childcare does not generate a beneficial interest. In law, that remains the case and the benefit, therefore, of a statutory cohabitation regime is that alongside any financial contributions made, domestic work can be recognised and financially valued. As reform proposals tend to focus on contributions rather than entitlements, important opportunities arise for the judicial discussion of domestic contributions and how they are conceptualised and quantified. Rather than focusing

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120 Barlow and Smithson (n 118) 337.
121 Auchmuty (n 6) 315.
122 See Law Commission, *Cohabitation* (n 35).
123 ibid.

on the length of the relationship in *Burns* or its quasi-marital nature, which can be perceived as the peddling of atrocity tales, attention can instead be turned to why there remains a difference in treatment between the various types of contributions. *Burns* can be used as a case illustrating the need for us to recognise such contributions as a valued work and something that can be financially commodified.[124] Heenan's research reveals that such conversation is long overdue given the fact that women tend to devalue and even dismiss their non-financial contributions as something that is not as important as financial ones.[125]

A third benefit of using a more caveated and contextualised depiction of *Burns* is that it will appreciate the diversity of cohabiting couples and the varied beneficiaries of reform. The push-back among some critics of the use of *Burns* centres on the idea that cohabitation is presented in a monolithic manner and that any reform would represent 'a statutory rescue of Mrs Burns and her ilk'.[126] But rescuing Mrs Burns should not be main aim of reform. While it is true that *Burns*-type litigants would have the greatest to gain from future reform, campaigners need to emphasise that the benefits of reform would extend to a much broader cross-section of society. Economic disadvantage would no longer be tackled using the ownership of real property and instead courts would have at their disposal a much broader range of orders including those relating to maintenance or pension sharing.

Recognising the limits of *Burns* has other implications too. Most importantly, it casts considerable doubt on whether we need another Mrs Burns case to come before the courts to reignite or propel reform efforts. One reason why test cases have been recently discussed in England and Wales and in the cohabitation context was the strategic and successful use of a high-profile case in the campaign for comprehensive no fault divorce. Such case, *Owens v Owens*, resulted in the Supreme Court refusing to grant Mrs Owens a divorce on the basis that she was unable to establish that Mr Owens had behaved in such a way that it was unreasonable to expect her to continuing living with him.[127] Unsurprisingly, trapping Mrs Owens in a love-less marriage prompted a media furore and allowed campaigners to persuade the public on all sides of the political spectrum of the absurdity and intellectual dishonesty of divorce law. The law was later amended via the Divorce, Dissolution and Separation Act 2020.

Finding an equivalent to *Owens* in the cohabitation context presents several challenges. To achieve the visibility required, it would need to be a case of sole legal ownership, with the claim to a trust interest based exclusively on non-financial contributions. This would present some difficulties because even the presence of a relatively small financial contribution would satisfy the relevant trust principles and such scenario is comparatively rare because legal co-ownership is more common today.[128] Moreover, there are several risks to litigation such as evidential issues in establishing a claim, the absence of legal aid, the risk of a costs order being made against the claimant if the claim was unsuccessful and the constant temptation to settle. Even if such a case did exist, the issues identified in this chapter come into sharp focus because reform conversations would, again, be framed around a case example that may fail to reflect lived realities of cohabitants today. This is not to suggest that test cases do not have any value

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[124] See e.g. Sam Bannister, 'Domestic Contributions as Unjust Enrichments: Commodifying Love?' [2021] *Child and Family Law Quarterly* 257.

[125] Heenan (n 110).

[126] Miles (n 39) 495.

[127] [2018] UKSC 41.

[128] Rebecca Probert, 'Equality in the Family Home?' (2007) 15 *Feminist Legal Studies* 341.

or that strategic litigation cannot advance cohabitation reform. Indeed, after *Burns* was handed down in 1983, Ingleby remarked that the reasoning of the judges in that case could be viewed as an attempt to 'provok[e] Parliament into legislative action'.[129] Rather, it is to caution against the use of a specific factual scenario as a prime example of why we need cohabitation reform.

IV CONCLUSION

It is revealing that Mrs Burns could not see herself, or her own story, in the academic recounting of *Burns*. As Watkins remarked, despite Mrs Burns achieving 'a lasting form of legal celebrity'[130] and her fate being known to many, her story is really 'our distorted creation' with campaigners for reform, on both sides, often failing to check its accuracy.[131] This observation is hardly surprising given the level of academic critique *Burns* has generated since it was decided 40 years ago. *Burns* has not just been deployed as a legal authority for a principle of trusts law; Mrs Burn's story has assumed the role of a fable or warning to others of the risks of cohabitation.

This chapter has called for caution and greater precision in our use of *Burns*. While accepting that the acquisition of property and home sharing practices have changed considerably since the case was decided, this chapter recognises that a similar outcome is likely to be reached if *Burns* was litigated today. A gendered division of labour still exists, and non-financial contributions remain undervalued and ignored by the law. The case cannot, therefore, be dismissed as anachronistic or merely a historical footnote in the development of family property rules. But the fact the law may continue to disadvantage Mrs Burns today does not mean that the decision is representative of cohabitants and the position *all* women face when cohabiting. We must resist the temptation to see in that case broader truths about cohabitation or attempt to universalise the experience of Mrs Burns.[132] Much stronger arguments for cohabitation reform can, and should, be made.

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[129] Richard Ingleby, 'Sledgehammer Solutions in Non-Marital Cohabitation' (1984) 43(2) *Cambridge Law Journal* 227, 230.

[130] Watkins (n 45) 90.

[131] ibid 68.

[132] See Law Commission, *Sharing Homes* (n 41) para 5.17 noting: 'In truth, her grievance was more broadly based: she had no financial remedy for the loss she sustained as a result of the time and efforts she had devoted to the family'.