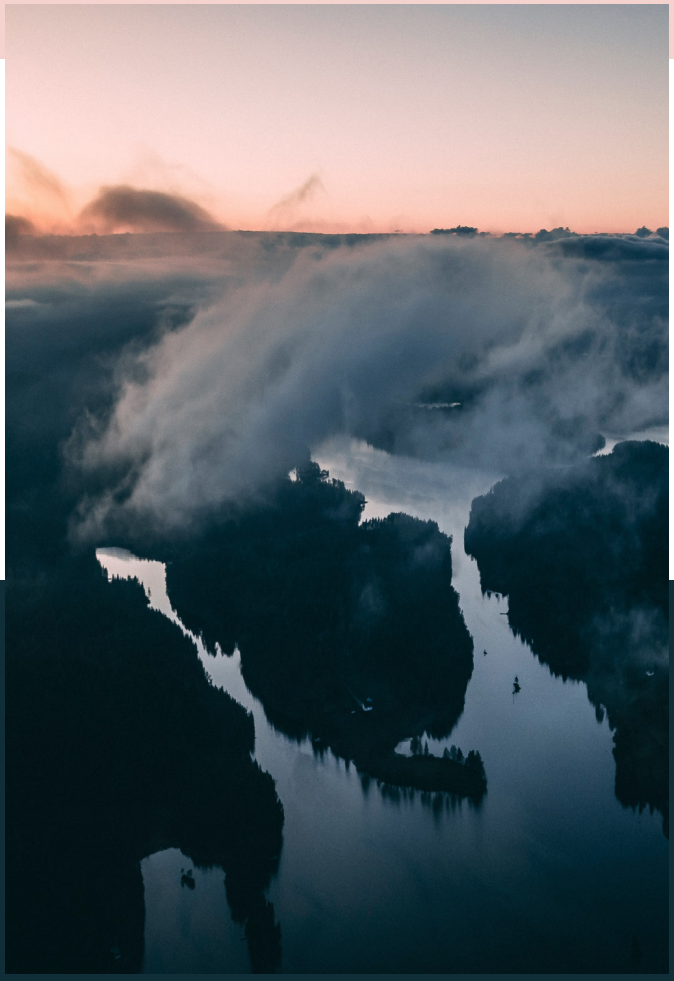
NORDIC LEGAL RESEARCH GROUP

NORDIC LEGAL RESEARCH GROUP ON FAMILY LAW

THE DIVISION OF PROPERTY BETWEEN UNMARRIED COHABITEES

- A NORDIC PERSPECTIVE ON LIVING TOGETHER



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The European Law Students' Association

DENMARK, FINLAND, NORWAY & SWEDEN

THE DIVISION OF PROPERTY BETWEEN UNMARRIED COHABITEES

A NORDIC PERSPECTIVE ON LIVING TOGETHER

The division of property between unmarried cohabitees - a Nordic perspective on living together
Rasmus Engelsted Jonasen (ed.)
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Foreword

Since the youth revolution in 1968, it has been a challenge for many Western countries to legislate on the increasing number of unmarried cohabitees. Over the years, unmarried cohabitation has been widely and socially accepted as a family form, often as a trial marriage.

Denmark, Norway and Sweden constitute Scandinavia, and together with Finland and Iceland they constitute the Nordic countries. These countries have a shared tradition of trying to harmonise family law as they are neighbours and their cultures and social conditions are very similar. Seen in a global perspective, the Nordic countries have played an important role in shaping family laws in Europe. Especially, the Danish Registered Partnership Act on same-sex couples from 1989 has inspired legislators in many countries.

From a Nordic perspective, the legal regulation – or lack thereof – of unmarried cohabiting relationships is a topic of special interest. Each Nordic country has found its own legal way in solving financial settlements on termination of cohabitation. One important difference between the countries is whether a solution is based on principles of property law or whether special family law rules have been introduced for unmarried cohabitees. Likewise, there is a difference as to whether the legal status of unmarried cohabitees corresponds in whole or in part to that of married couples, or whether cohabitees are given a less extensive legal status. These differences are found elsewhere in Europe and in other places in the world. The legal regulations in the Nordic countries illustrate some of the most common approaches to the division of property of cohabiting couples.

The legal situation in Denmark and Norway is characterised by non-statutory law and solutions in case law based on property law principles. For many years, Sweden was the only Nordic country with special legislation on the financial circumstances of cohabitees, the Swedish Cohabitees Act 1987. In 2010, Finland became the second country to introduce overall legislation dealing with the dissolution of cohabitation.

Iceland has no legislation on cohabitation. Due to language barriers, this book will not describe the Icelandic legal position.

Contrary to the intense cooperation that took place between Denmark, Norway and Sweden in the early 1910s preparing new marriage laws, there has been no cooperation at all regarding the legal status of unmarried cohabitees. Therefore, the subject of cohabitees' legal status is particularly suitable for comparative analysis both in terms of legal development in general and in the description of details in selected areas.

Against this background, it has been interesting to take on the task as the Nordic Academic Supervisor for the reports of four Nordic student groups of the European Law Students' Association (ELSA). For a number of years I have worked intensively with teaching and research relating to the legal position of unmarried cohabitees. I am the author of a Danish dissertation, the Family Economy,[1] and co-author of a Nordic book: Nordisk Samboerrett/Nordic Cohabitation Law.[2] The last mentioned book I have written together with my professor colleagues from the other Nordic countries, among others Tone Sverdrup who has been one of the Academic Supervisors from Norway on the present project. As a Danish national expert at the Commission of European Family Law, I have contributed to the Commission's national reports and the guiding principles.[3] All the books mentioned contain proposals for further legislation on cohabitees in Denmark, the Nordic countries and Europe, respectively.

My first task as a Nordic Academic Supervisor was to choose the topic for this project. It was obvious to choose the division of property between unmarried cohabitees on the termination of cohabitation. Most disputes between cohabitees concern claims that the less well-off party make in order to obtain a share of the other party's wealth. Next, I had to prepare research questions with related sub-points. For a start, the authors had to explain the rules and practices of unmarried cohabitees in other areas than family law and to identify the factors taken into account to provide a definition on unmarried cohabitees. Then, the research questions focused on three key issues: joint ownership of assets, compensation upon dissolution of the relationship, and agreements between cohabitees during the relationship and at the end of the cohabitation. Of particular interest is whether indirect contributions are accepted as relevant in the form of housework, upbringing of children and contributions to daily living expenses. Surprisingly, there are considerable differences between the Nordic countries.

Based on the answers to the research questions the authors had to point out which legal questions were to be considered the most problematic in his or her country, in particular with a view to protecting the economically weaker party and to ensuring good living conditions for the children in the future.

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1 Ingrid Lund-Andersen, *Familieøkonomien – Samlevendes retsforhold, ægtefællers retsforhold, retspolitik* (Jurist- og Økonomforbundets forlag 2011).

2 John Asland, Margareta Brattström, Göran Lind, Ingrid Lund-Andersen, Anna Singer og Tone Sverdrup: *Nordisk Samboerrett* (Norsk Gyldendal 2014) and in English: John Asland, Margareta Brattström, Göran Lind and others: *Nordic Cohabitation Law* (Intersentia 2015).

3 Katharina Boele-Woelki, Charlotte Mol and Emma van Gelder (eds) *European Law in Action, volume V: Informal Relationships* (Intersentia 2015) and Katharina Boele-Woelki. Frédérique Ferrand, Christina González Beilfuss and others: *Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions* (Intersentia 2019).

Finally, the authors should make an overall assessment of the legal position in his or her country and make suggestions to improve the legal position.

My second task was to provide feedback on all reports in the first and second drafts, in particular assessing the professional level and ensuring the consistency of the reports.

This book is an impressive research work prepared by students in their spare time. The publication can be useful for legal practitioners, academics at universities as well as for politicians and lawmakers. Personally, it has been a pleasure to me to follow the process and to collaborate with the dedicated students within the Nordic Legal Research Group on Family Law.

Copenhagen, December 2019
Ingrid Lund-Andersen

Preface

Before consuming the dense contents of the quadruple report on the division of property between unmarried cohabitees on termination of cohabitation, readers will benefit from noting the shared structural framework of the reports and reading the next two pages about **cohabitation in the Nordics.**

Shared structural framework of the reports

The following overview of the structure applies to each partial report, be it the Danish, Finnish, Norwegian or Swedish one. It is also worth noting that the reports may be read in any order, as they are simply listed alphabetically; and each report may be read as a standalone report. To add to the framework, authors took part in a meeting on 16 November 2019 in order to highlight the main findings of the report in a conclusive summary to be found in the end of the report.

Each report answers the **same five questions** under the **same five sections** for navigation: **First**, it is explained how the legal situation of unmarried cohabitation is regulated in the country. **Second**, it is described under what circumstances cohabitees can become joint owners of assets. **Third**, the grounds on which a cohabitee may claim compensation upon the dissolution of the relationship are delineated. The first three questions are dealt with mainly as dogmatic questions of statutory law.

The **fourth** section opens the delicate question of what cohabitees can lawfully agree upon. It describes any special regulation concerning agreements between cohabitees during the relationship and at the end of cohabitation as well as any limits thereto. It is also addressed how common it is for cohabitees to conclude a cohabitation agreement and what types of clauses they would typically include.

The **fifth** section then provides the authors with an opportunity to mark problematic areas and put forth qualified suggestions on how to improve the law. It is especially these points which the authors have discussed before agreeing on the **conclusive summary** as a supplement to the reports.

A note on cohabitation in the Nordics

Nordic countries share much history and culture which shows in both social and legal culture. deals with something as mundane as the way couples live together and how it is governed in the socio-legal context of the Nordic countries. Here, the Nordic countries share the features that living together outside of marriage is common and that so-called 'cohabitees'—to a noticeable extent—are protected based on rationales that their way of living together is similar to that of spouses.

One might approach the concept as a liberal form of partnership in view of modern family life. Evidently today, we allow great variation in the ways people decide to live

together, and one form is to live as an unmarried couple in what might also be mentioned a romantic relationship. Others might argue that defining the concept purely in the negative—as *not married*—might be unnecessarily narrow. Do we then presume that the *end-goal* of cohabitees is to marry? Some find that natural, others reject it. Worth noting nonetheless, in the law of Nordic countries, the connection is often explicit, and 'cohabitees' cannot be recognized as such by law if they are married to someone else.

But **what is cohabitation?** Well, it is not marriage and it is not civil partnership or another alternative for homosexual couples. It is simply a common phenomenon of people living together as couples, and it just so happens to be so common in the Nordic countries that the mere act of living together has implications for the rights of those involved; the cohabitees. Keeping one or two scenarios in mind while reading may ease your understanding:

A and B start out dating. Eventually, they think of each other as a couple in a relationship, and (maybe) a few months down the line they want to take it to the next stage. They decide to move together in A's apartment which is new and barely furnished because the apartment was slightly large for A's salary alone. From then on, they split the monthly expenses equally. B also actively helps decide how to furnish the apartment with a new dinner table, a sofa and a cabinet – all of which A pays for. To balance out for the fact that A bought the apartment and the furniture, B spends more money on every day groceries and regularly pays when they decide to go to dinner or to the cinema. This allows A to pay for the furniture and pay off a bit extra on his loan each month.

A's apartment somewhat becomes their apartment, as their economies entangle, but they are still considered separate units as far as the law goes. Along the way, A and B both think they contribute somewhat equally to their upholding; however, they break up on year afterwards. Right there, they will have to come to terms on who stays and who keeps the furniture while one of them will need a new place to live.

- If nothing else is agreed, A will likely keep the apartment with all the furniture. Afterall, A acquired and paid it, so it is his property in the outset. Under some circumstances, however, cohabitees can be considered joint owners (as described in section 2 of each report).
- Now what does B get to keep for buying groceries and dinners? These contributions did not go into lasting assets that can be kept; so, the short answer is: Nothing. The question becomes, instead, whether B can be compensated for having contributed more to the general household than A (as described in section 3 of each report).

  Now consider if A and B keep living together for a few years and, instead of their break-up, what happens is that B eventually becomes pregnant. One month before the child is born, however, A dies in a tragical accident, leaving behind his apartment for his hears. Frankly, A has not written a will which is why B might be left without a place to live, depending on the inheritance laws of the country they live in. Does a cohabitee awaiting the deceased's child inherit?

- Generally, the answer is no, yet our Finnish report discusses changing this in model of Swedish rules that give a minimum entitlement and allows takeover of the joint dwelling in exceptional circumstances, including pregnancy.
- If, instead, A died after the child was born, rules might also create other economic difficulties as the child would inherit as a minor instead of the cohabitee.
  At last, imagine that both A and B live happily together while bringing up their children. A even builds them a common house while B mainly takes care of the children and does everyday housework. A lays down the initial payments for the house materials, but they share living expenses throughout the years. Often A pays for the bigger things, because A gets a higher salary from working more while B watches more over the children. Only when the children are old enough to fly will A and B begin arguing, and after more than 20 years they will break up.
  The questions of ownership and compensation again become pertinent: Who stays to live in the common house which A built and paid for? Can B claim compensation for any unjust enrichment that A obtains from this?
- Courts have historically laid varying degrees of weight to these types of circumstances, as they have rarely allowed so-called indirect contributions to switch ownership.
- More commonly the result would be a discretionary compensation award to B out of A's fortune based on the view that an enrichment on the expense of the house-working and child-caring cohabitee is unjust.
- Only in Sweden would the common house be divided equally by default based on their principle of equal division of cohabitation property.

As a distinct and shared feature overall, cohabitees are viewed as independent persons as oppose to spouses who are generally seen as a joint unit. Thus, the starting point of regulating cohabitees is different from that for spouses; and one effect of it is that dispositions between cohabitees must be legitimate within the sphere of contract law.

As has yet to become clear, there is **no catch-all definition** of what constitutes 'cohabitation' in a legal sense, and there are some differences in criteria set within the Nordic countries for 'cohabitees' to be recognized as such by law. For example, the Finnish definition requires 5 years of living together in circumstances where other countries only require 2 years to recognize cohabitees. At the same time, shared parenthood generally qualifies cohabitees.

We hope that the report will be as enlightening to read as it was to write.
Yours faithfully,

Anika, Anna Cathrine, Charlotte, Cristopher, Darin, Emilie, Eve, Heini, Helena, Maria, Mikael, Rasmus, Rigmor, Robin, Sarah, Sebastian.

Abbreviations and native words used

in the Danish report

Abbreviations

ÆFL (Ægtefælleloven)	The Act on Financial Relations between spouses

Native words

Berigelseskrav	Claim on grounds of unjust enrichment
Boafgift	Estate tax
Familieretshuset	The Family Law House; State administrative institution
Forudsætningssynspunktet	The legal view based on the principle of reasonable expectations
Godtgørelsesbeløb	An amount given as remuneration
Sambolov	Cohabitation Law
Samejekontrakt	Agreement to joint ownership
Samlivskontrakt	Cohabitation agreement
Tinglysning | tinglyst	The act of registering in a public registry | the adjective for something having been registered
Udvidet samlevertestamente	Extended will for cohabitees
Uskiftet bo	estate which has not been divided post the death of the other spouse

in the Finnish report

Abbreviations

HE	hallituksen esitys, government proposal
HO	hovioikeus, court of appeal
Kela	Kansaneläkelaitos, the social insurance institution of Finland
KKO	korkein oikeus, supreme court
LaVM	lakivaliokunnan mietintö, report of the legal affairs committee, Parliament of Finland

Native words

Hallintaoikeus	right of possession
Hallituksen esitys	government proposal

Hovioikeus	court of appeal
Irtain omaisuus	movable assets / piece of personal property
Jäämistöerottelu	estate distribution
Kiinteä omaisuus	immovable assets / real property
Korkein oikeus	supreme court
Käräjäoikeus	district court
Käräjätuomari	judge of district court
Lakivaliokunta	legal affairs committee
Lastensuojelun käsikirja	handbook for child protection
Lastenvalvoja	child supervisor
Nimiperiaate	name principle
Oikeusministeriön työryhmämuistio	working group memo of Ministry of Justice of Finland
Oikeusneuvokset	members of supreme court / legal counsellors
Omistusoikeus	ownership of dwelling
Pesänjakaja	executor of the distribution of an estate
Rikastumiskielto	principle of return of unjust enrichment
Sopimuserottelu	agreement distribution
Sukupuolivaikutusten arviointi	gender impact assessment
Terveyden ja hyvinvoinnin laitos	National Institution of Health and Welfare in Finland
Toimituserottelu	delivery distribution
Vallinnanrajoitus	restriction on the administration of property
Velkajärjestely	arrangement of debts
Väestöliitto	Family Federation of Finland, family welfare organization working in social and health sector

in the Norwegian report

Native words

Styrkeforhold	relative strength/ relation of strength between two parties

in the Swedish report

Native words

Bodelning	division of cohabitation property
Bodelningsavtal	division of cohabitation property agreements

Bodelningsförättare	an estate distribution executor
Boende	residence
Bouppteckning	the property inventory
Bostadsrätt	an owner-occupied apartment
Bröstarvingar	direct heirs
Dold samäganderätt	hidden co-ownership
Familjerättsliga avtal	family law agreements
Fast egendom	immovables
Fritidsbostäder	recreational accommodations
Föravtal	pre-agreements
Förmyndare	guardian
Förmögenhetsrättsliga avtal	property law agreements
Gemensam användning	acquired for the joint use
Gemensamt hushall	joint household
God man för barn	custodian
Jämkning	adjusment
Kvarlatenskap	deceased person's estate
Laglott	the statutory share of the inheritance
Lilla basbeloppsregeln	the small base amount rule
Likadelning	equal division
Lös egendom	movables
Obehörig vinst	unjust enrichment
Parförhallande	couple
Samboavtal	cohabitation agreements
Samboegendom	cohabitation property
Samäganderätt	co-ownership
Skuldtäckning	deduction of debts
Skuldutmätning	distraint
Stadigvarande bosatta	permanently living together
Särkullsbarn	child of the deceased person in a previous relationship
Umgänge	contact
Vardnad	custody

The Danish Report

1. Status quo of unmarried cohabitation in Denmark

1.1 Statistical information

Approximately 25 % of all couples in Denmark are living together as cohabitees.[4] In 2018 that constituted 697.228 individuals or 348.614 couples.[5] In these statistics cohabitee are defined as 1) two people who are living on the same address and have a child together, or 2) two people of opposite sex living on the same address with an age difference of less than 15 years. Furthermore, the individuals must not be closely related and must be at least 16 years of age.

1.2 Legislation and the lack of a family law regime

The Danish approach to introducing law for cohabitation has been restrictive, compared to the other Nordic countries.[6] There is not (yet) a specific law for cohabitees, even though legal authors have made a suggestion for the issue of such.[7] The legal status for cohabitants must be found in different specific legal regimes and in case law.

1.2.1 Social Security Acts

A number of social benefits depend on whether the recipient is single, in cohabitation or married. If a recipient is single, he or she will often receive a supplementary benefit to compensate for the advantages that married couples or cohabitees have, since they are two persons to supply income and carry out household tasks. An example of a social security act that grants supplementary benefits to single recipients is the Law on Child Support (*børnetilskudsloven*) in which § 2, subsection 2, states that a recipient in cohabitation is not considered single.[8]

While a marriage certificate can easily determine that a recipient is married, there is no official way to determine whether a recipient is cohabiting. Thus, the delimitation between cohabitees and singles becomes more unclear.

A recipient is considered to live in cohabitation in regard to social benefits when the cohabitation is "marriage-like". A "marriage-like" cohabitation will often entail the couple living together, but that cannot be the only consideration.[9] A "marriage like"

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4 Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1stedn., Jurist- og Økonomforbundets forlag 2019), p. 15.

5 Ibid. p. 14.

6 Ibid. p. 53.

7 Ibid. p. 255 ff.

8 Guidance on Child Benefits and Payment in Advance of Child Contributions (Vejl. 10177 af 2007-10-11).

9 Ibid.

cohabitation occurs when 1) the couple has joint housekeeping and 2) they are able to marry according to Danish law.[10]

The household is considered to be joint when the recipient of the social service benefits from the other person's contribution to the household as the recipient would benefit if they were married or cohabiting. The benefit can be economical (payment of expenses) or practical (taking care of children, making dinner, etc.).[11]

Especially cohabitees' legal status in regard to social security has been challenged over the last decade. Previous to the change of law in 2013, there was no mutual obligation to maintain one another during cohabitation, in contrary to marriage. In 2013 such obligation to maintain one another was introduced with great consequences for cohabitees on social security. If one of the cohabitees earned above a certain amount, he or she would be able to provide for the other cohabitant, and the cohabitant outside the job market would not be granted social security. The right to social security now depended on your relationship status. What is interesting to note from this law is that cohabitation is defined in yet another way. In this law, an age limit was introduced to preclude young couples under the age of 25.[12] Making the legal status even more obscure, the municipalities were given discretion to declare a couple to be cohabitees, even if they did not fall under the direct criteria of the law.[13] This authority was probably given to avoid circumvention, yet made it very hard for couples to anticipate their legal status. The mutual obligation to maintain one another during cohabitation was abolished again in 2014[14], and today the right to receive social security is not influenced by the other cohabitee's income. The reasoning for the abolishment in 2014 is analysed in section 5.5.

1.2.2 Inheritance Acts

Cohabitees have no automatic legal right to inheritance in case of death. If they want to inherit, they must make an agreement in the form of a will. If none of them have children, the surviving party can inherit everything after the deceased. If there are children involved—either shared or from previous relationships—the children are forced heirs. With the Inheritance Law of 2008[15] cohabitees with children were given the right to make an extended mutual will (*udvidet samlevertestamente*) in which they can inherit each other as spouses with separate property (the surviving party inherits 7/8 and the children inherit 1/8 after the deceased). Being able to inherit each other as spouses must not be confused with having legal status as if married. The right to postpone the children's inheritance—known as possession of the estate without division (*uskiftet bo*)—is still a right reserved for spouses. The extended will is only

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10 Principal Decision 9-13 of the Danish Social Appeals Board (KEN nr 9669 af 31/01/2013).

11 Ibid.

12 Act changing the Act on Active Social Policy and other acts (LOV nr 894 af 04/07/2013, (*Ændring af lov om aktiv socialpolitik m.fl.*), § 2 b, no. 1.

13 Ibid. § 2 b, paragraph 3.

14 Act changing the Act on Active Social Policy and other acts (LOV nr 1522 af 27/12/2014, *Ændring af lov om aktiv socialpolitik m.fl.*) § 1.

15 The Inheritance Act (LOV nr. 515 af 06/06/2007, (*Arveloven*), §§ 87-89.

available for cohabitees who have been living together for at least two years or who have, have had or be expecting a child together. If the cohabitees have children from previous relationships and have not lived together for two years or more, the surviving party can only inherit up to 3/4 after the deceased.

1.2.3 Inheritance Tax Act

When anyone inherit under Danish law, they shall pay tax of that inheritance. How much they shall pay depends on their relationship with the deceased.

A cohabitee who has lived together with the deceased cohabitee for two years and/or have, have had or be expecting a child together pay 15 % in estate taxes (*boafgift*), cf. the Law on Estate Tax § 1, subsection 2, litra d. However, if the cohabitees have neither lived together for two years nor have, have had or be expecting a child together, they pay both the regular estate tax and an additional estate tax, in total 36,25 %, cf. Law on Estate Tax § 1, subsection 2 per contra.

The surviving spouse, on the other hand—no matter the length of the marriage or how many children they have—is exempt from paying any estate tax from the inheritance received from the deceased spouse, cf. the Law on Estate Tax § 3, subsection 1, litra a.

1.2.4 Insurance Contract Act

Cohabitees can benefit each other through a life insurance. Some choose to make a joint life insurance—in which the surviving party will get a fixed sum when the first cohabitee dies—as an alternative or a supplement to a will.

In most insurance contracts the term "nearest relative" is used when deciding who is automatically beneficiary on the life insurance. The one who is the nearest relative will be the beneficiary, unless another person is stated in the contract by name. If cohabitees have lived together for two years or have, have had or be expecting a child together, they are considered "nearest relatives", cf. the Law on Insurance Agreements § 105 a. If they have not lived together for two years, but still want to be beneficiary on the insurance, they can state each other by name in the contract, cf. the Law on Insurance Agreements § 102, stk. 1.

1.2.5 Act on Rent

During the first two years of cohabitation there are no special legislative provisions protecting cohabitees who are renting a home. This gives power to the cohabitee who is registered on the lease. He or she can evict the other cohabitee without consent and give unilateral notice to quit. On the other hand, the cohabitee who is registered on the lease is liable for the rent in total. Even if the couple agrees that the cohabitee not on the lease should undertake the home after the dissolution of cohabitation, the couple cannot force the landlord to accept this change in tenancy.[16] In other words, the cohabitee not listed on the lease has no rights to the home but has no obligations either.

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[16] Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rdedn., Jurist- og Økonomforbundets forlag 2017), p. 338.

If both are listed as tenants, they need to agree on everything regarding the tenancy. If they dissolve their cohabitation, they cannot force the landlord to accept one of them as lone tenant in the future.[17]
When the cohabitees have lived together for more than two years, they are free to agree on who will undertake the tenancy when dissolving cohabitation, and the landlord is forced to accept their choice, cf. the Law on Rent § 77 a.[18] If they cannot agree, the matter can be solved in court. The court will determine if there are special reasons for one of the cohabitees to continue the tenancy, e.g. if one of them has children.[19]
The cohabitation needs to be "marriage-like" in order to get the protection that follows in the Law on Rent § 77 a. Siblings who live together or friends who are just roommates will not be included.[20]

1.3 Factors that feed the definition of unmarried cohabitation

If the cohabitees are qualified to make an extended will, they are often covered under other legislative provisions too. What these requirements represent is a "marriage-like" cohabitation. The cohabitation can become marriage-like by length or by children. The cohabitation is marriage-like in relation to inheritance when the couple a) have lived together for two years in a relationship, or 2) have, have had or be expecting a child together. However, since there is no united, accepted definition, and since many laws use the term "cohabitee" without any delimitation, it often leaves the cohabitees unaware of whether they are covered by a certain regulation, see below section 5.2.[21]

2. Joint ownership of assets—Circumstances under which it applies

It is relevant to be able to determine the ownership of assets in three situations: When a creditor wants to levy execution in an asset, when the cohabitees decide to separate, or when one of them passes away.[22]
When determining the ownership of assets, the rules of property law apply to cohabitees as well as for all other relations between parties. The ownership of an asset can either belong to only one of the cohabitees or they can be joint owners. As there is no Danish law of cohabitees, other arguments become essential, such as the agreement between the cohabitees and who paid for the acquisition. Often cohabitees will have mixed economy which makes it harder to determine who the actual owner of the asset

17 Ibid. p. 338.
18 Ibid. p. 339.
19 Ibid. p. 340.
20 Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rdedn., Jurist- og Økonomforbundets forlag 2017), p. 339.
21 Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1stedn., Jurist- og Økonomforbundets forlag 2019), p. 53.
22 Ibid. p. 103.

is. Therefore, it is relevant to discuss under what circumstances cohabitees can become joint owners of assets.

2.1 The agreement regarding ownership of assets

Contrary to other parties than cohabitees involved in agreements regulated by property law, cohabitees have a close solidarity which is important to consider when it comes to determining if a couple has joint ownership of a certain asset.[23] Cohabitees can make an agreement on joint ownership of an asset (*samejekontrakt*) and they usually do this regarding the family home. It is also possible for them to make an agreement regarding the division of the assets and the economy of the cohabitees in general—a cohabitation agreement (*samlivskontrakt*), see also section 4.1.2. The agreement between the cohabitees regarding the ownership of an asset, or the intended ownership, is very important when determining that ownership; therefore, this is the first thing the court will try to establish.[24] In case of doubt about the agreement, or when the cohabitees disagree on the agreement regarding the ownership of a certain asset, the ostensible registered owner will be considered to be the person who the cohabitees intended to make the beneficial owner of the asset.[25]
U 2005.3126 V illustrates this legal status. The female party was registered judicially (*tinglyst*) as the owner of the real property which served as the family home. The cohabitees specifically agreed that the female party should be the single owner of the house, because the male party was self-employed in a risky profession and they wanted to make sure that they would not be evicted if the business shut down. Both cohabitees were liable for debt of the real estate, yet the male party and his business paid most of the mortgages. The male party was declared bankrupt with a debt of 200.000 DKK and his creditors wanted to levy execution in the real property.
The bailiffs court ruled that the male party was the beneficial owner of the house because of the payments that he had made on acquisition of the house and paying off the mortgage loan. The High Court disagreed on the ruling and changed it on the grounds that the male party was not the beneficial owner as only the female party was the ostensible registered owner, and therefore the intention of the cohabitees was deemed to be that she would also be the single beneficial owner. The payments that the male party made were considered his contribution to the common household, as the female party paid other expenses.[26]
If it is not possible to determine who the intended owner of the asset is according to the agreement between the cohabitees—for example if the agreement is verbal and non-verifiable—other measures must be taken. It then becomes relevant which of the cohabitees have contributed economically to the acquisition of the asset in question.[27]

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23 Ibid. p. 103 ff.

24 Ibid. p. 104.

25 Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1st edn., Jurist- og Økonomforbundets forlag 2019), p. 104.

26 Ibid. p. 105.

27 Ibid. p. 106.

In the determination of ownership, the party who paid the purchase price, including the down payment, and who is liable for the outstanding debt, is usually assumed to be the beneficial owner.[28]

In U 2002.43 V both parties had similar incomes for over a decade. The female party was the ostensible registered owner of several assets serving the common household of the cohabitees, including the family home. When the female party died, the male party claimed that the two were joint owners of these assets. The male party had a separate child who he claimed was the reason that the female party had become the ostensible registered owner of the real property—the cohabitees had wanted to make sure that the female party would not have to sell the house because of the child's right to inheritance in case the male party were to pass away.

The High Court ruled against the male party on the grounds that the assets were purchased partially by means provided by the female party and partially via loans that she took in real property. They thereby held that the male party did not lift the burden of proof.

This ruling is an example of the ostensible registered owner also being the beneficial owner.[29]

If the ostensible registered owner does not appear to be the beneficial owner as well, it might constitute doubt about the ownership of the asset. This issue often appears in situations where one cohabitee has invested a larger amount in the acquisition of a certain asset while the other cohabitee is the ostensible registered owner of that same asset.[30]

Some agreements about ownership will easily be verifiable when there is a record of purchase, for example via judicial registration (*tinglysning*). Case law shows that the court in some cases will lay less weight hereto and rule in favour of co-ownership despite the registered agreement between the cohabitees. This practice is inconsistent with the strict application of general principles of the law of property. In Denmark, case law shows that despite only one of the cohabitees being the ostensible registered owner—of, for example, a vehicle—it will in some cases be deemed as co-owned by the cohabitees.[31] The legal position reflects the courts' intention to involve family law opinions regarding cohabitees' issues in application of law of property by determining that their mixed economy can lead to accrued joint ownership because it makes it impossible to determine who the asset in question belongs to.[32]

In two cases from 1999 the court ruled on this issue with opposite outcomes:

In TFA 1999.185 Ø the male party claimed himself to be the single owner of a car. The cohabitees had lived together for six years. The female party was paid a slightly higher

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28 Ibid. p. 106.

29 Ibid. p. 106.

30 Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1stedn., Jurist- og Økonomforbundets forlag 2019), p. 106.

31 John Asland, Margareta Brattström, Göran Lind and others: *Nordic Cohabitation Law* (Intersentia 2015), p. 62.

32 Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1stedn., Jurist- og Økonomforbundets forlag 2019), p. 108.

salary than the male party. The car was bought six months before the female party passed away. The car was financed with a cash price of 138.964 DKK whereof 70.000 DKK was paid by her cohabitee; the male party. The female party had contributed by exchanging her former car, worth 23.000 DKK, and the cohabitees had co-signed on a loan of 45.000 DKK. The female party had no drivers' licence. She did, however, have access to cheap insurance through her employment position. The dues were paid from the parties' joint account which the male party paid a certain amount to every month. The male party claimed that the female party was only registered as co-owner of the car because of the economic and personal relationship between the parties.

The High Court ruled that the car was subject to joint ownership on the grounds that the cohabitees both were liable for the debt and both were registered on the sales contract as well as on the vehicle registration certificate.[33]

In TFA 1999.101 V the High Court also ruled on the issue whether the ostensible registered ownership was to be set aside in favour of joint ownership. The issue regarded a car, a caravan, and a joiner machine that the female party claimed were co-owned. All other household goods were co-owned by the cohabitees. The cohabitees had lived together for 18 years, although the cohabitation had been on and off for the last six of them. The male party was the ostensible registered owner according to all documents issued at the time of the acquisition. The female party claimed that the assets were paid for with means from the cohabitees' joint account, to which the male party objected.

The High Court ruled that the male party could not prove that the intention of the cohabitees on acquisition of the assets was for him to be the single owner. The court ruled in favour of the female party on the grounds that—during the long-term cohabitation—the parties had both contributed to acquisitions of assets and to the household expenses in general.[34]

The judgement is also interesting because the burden of proof is reversed. Whenever the question of ownership is asked in court, the burden of proof usually lies on the party who challenges that the ostensible registered owner is the beneficial owner.[35] There seems to be no clear reason for the action, and the female part could supposedly have carried the burden of proof, as the High Court found that the cohabitees had not agreed on the male part being the single owner of the asset when purchasing it.[36]

2.2 Household goods

Household goods acquired during the cohabitation will usually be considered assets of joint ownership because the cohabitees will usually be involved with each other in an economic relationship.[37] Due to this economic relationship it might be random which

33 Ibid. p. 107.

34 Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1st edn., Jurist- og Økonomforbundets forlag 2019), p. 107 ff.

35 Ibid. p. 108.

36 Ibid. p. 106.

37 Ibid. p. 108.

of the cohabitees pay for the items for the joint home—they might pay it together or they might forget which one of them purchased it. Therefore, the presumption about household goods purchased during the cohabitation often is that these are co-owned by the cohabitees. Although the courts often rule in favour of co-ownership, in Denmark, this presumption is not entirely clear which means that cohabitees cannot rely on it to fall back on. Ultimately, when there is neither a clear agreement nor evident intention of the ownership, and when the financial contributions of the parties are unclear, the consequence is that the asset must be considered co-owned by the cohabitees.[38]

In U 1982.93 H the Supreme Court of Justice ruled on the ownership of the real property which made the family home, a car as well as the household goods with a value of 10.000 DKK. The cohabitees had lived together for 2.5 years. Through the cohabitation, the male party had an income of more than double of what the female party earned, but the cohabitees still had common economic and personal household. The court ruled that the real property and the car were owned by the male party alone, but the household goods were co-owned on the grounds that the cohabitees had a common economy and they both had income during the cohabitation.[39] The female party's share was ruled to be part of her claim of compensation which constituted a total value of 20.000 DKK, see also section 3.

2.3 Real property

If cohabitees intent to transfer ownership of real property in full or in part, verbal agreements are valid. However, they are difficult to prove and cannot have legal effect towards third parties, for example creditors, without it also being judicially registered (*tinglyst)* which must be in writing.[40] An agreement between the cohabitees is the only possible way of transferring ownership of the asset. Subsequent circumstances will not lead to a transfer of the ownership. If one of the cohabitees pay dues or work on the others property to improve it, it will not mean that the cohabitees will become joint owners of the property. Case law states this in several cases, and one example is TFA 2004.93 V where the male party was not considered co-owner of the female party's house even though he had been paying mortgages and spent 500.000 DKK on house improvements.[41] Contributions like the ones in this verdict will often be recognised as contributions to the common household. If the amount is very large it

[38] John Asland, Margareta Brattström, Göran Lind and others: *Nordic Cohabitation Law* (Intersentia 2015), p. 62 ff.

[39] Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1stedn., Jurist- og Økonomforbundets forlag 2019), p. 108.

[40] John Asland, Margareta Brattström, Göran Lind and others: *Nordic Cohabitation Law* (Intersentia 2015), p. 63.

[41] Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1stedn., Jurist- og Økonomforbundets forlag 2019), p. 110.

might be possible to claim ordinary compensation or claim the 'ordinary unjust enrichment' known from ordinary property law, see also section 3.[42]

2.4 Contributions in the form of housework and upbringing of children

There are no examples in Danish case law where indirect contributions in the form of housework and upbringing of children alone has resulted in joint ownership of assets. Through the 1970's, however, the court established extensive joint ownership for cohabitees, see also section 3.5 and 4.1.1. The extensive joint ownership meant that in a line of cases the courts ruled in favour of joint ownership beyond what usually goes according to property law. In these cases, the court ruled on the grounds that the cohabitees both had made economical contributions according to their personal abilities. This meant that the court also accepted subsequent contributions as a valid argument in order to establish co-ownership. The court is not clear about what value contributions in the form of housework and upbringing of children constitute, but Ingrid Lund-Andersen states in "Uddrag af Familieøkonomien" that contributions in the form of housework and upbringing of children appears to be more of a supporting argument than the main reason of the rulings. Contrary to what is the case nowadays, the cohabitees' expectations about the ownership of assets appeared to be irrelevant to the court in its rulings.[43]
This practice suddenly stopped because of the Supreme Court ruling in U 1980.480 H where the High Court had ruled according to former practice, but the Supreme Court rejected it and declared an unjust enrichment instead, see also section 3.[44]

3. Grounds to claim compensation upon dissolution

As mentioned above, cohabitation is not subject to any general legislation in Denmark, as opposed to the detailed Danish matrimonial legislation which applies to marriage and civil partnerships.[45] Cohabitees do not have a mutual duty to maintain one another like spouses have, cf. The Act on Financial Relations between Spouses (*Ægtefælleloven, ÆFL*), § 4.[46] Secondly, they do not have to divide their properties in half at the discontinuation of their relationship, cf. ÆFL § 5, subsection 2; and thirdly, cohabitees do not legally inherit each other. Furthermore, it is important to note that there are no formal requirements to dissolution of the relationship, neither *inter partes* nor in relation to anyone else.[47]

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42 Ibid. p. 110.

43 Ibid. p. 102.

44 Ibid. p. 102.

45 Anita Godsk Pedersen and Hans Viggo Godsk Pedersen: *Familie- og arveret* (10th edn., Karnov Group 2016), p. 165.

46 "*Lov om ægtefællers økonomiske forhold*" (LOV nr 548 af 30/05/2017) is the law, which regulates the financial conditions between spouses in Denmark. In this study, the law will be referred to as 'ÆFL'.

47 Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rd edn., Jurist- og Økonomforbundets forlag 2017), p. 326.

Court practise does, however, display that rejection of marriage is not always a conscious refusal of the legal consequences of marriage. For instance, while matrimonial legislation is rather defensive towards the economically weaker party of a marriage—for example through regulation on alimony, unjust enrichments, inheritance law etc.—there is no corresponding protection of the economically weaker cohabitee.[48] Therefore, the economically weaker party has no statutory rules to rely on, if the cohabitation ends and the party experiences problems with supporting itself. However, there are some principles that have been created in case law. These are made to prevent the negative results that may occur, if one of the cohabitees has accommodated him- or her-self for the sake of the other cohabitee during the relationship—for instance by staying at home and doing housework, so the other cohabitee could work, which has then exceeded the non-working cohabitee's career[49].
Although unmarried couples may experience many of the same problems upon dissolution of a relationship that married couples do upon separation or divorce, it is the courts' decision 1) whether matrimonial legislation may be applied analogously in cohabitation-related litigations, 2) if other existing rules may apply or 3) to develop a practice which becomes applicable law in the field.[50] Although there is no written legislation on cohabitation in Denmark, cohabitees do still have the possibility of claiming some sort of financial compensation upon dissolution of the relationship if they are in an unfortunate financial situation. Under some circumstances, co-ownership over assets may be established to a certain extent, and in other cases one of the cohabitees may be enjoined to pay economic compensation to the other party due to concerted action.[51]
As a general rule, each cohabitee owns the assets that they brought into the cohabitation. Both parties keep the full disposal over their own assets, and each party is liable for its own debts with its own property.
If both cohabitees have contributed somewhat equally to the common housekeeping, there is no claim between the parties on dissolution of the relationship. Not even if one party has paid all expenses, whilst the other one has been responsible for domestic chores. However, if the division of chores and expenses results in one party being able to save money while the other party does not have the same opportunities, a unjust enrichment may ensue for the impecunious party. As mentioned above, these unjust enrichments are not deriving from legislation, but are instead based in case law.

48 Anita Godsk Pedersen and Hans Viggo Godsk Pedersen: *Familie- og arveret* (10thedn., Karnov Group 2016), p. 165.
49 Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rdedn, Jurist- og Økonomforbundets forlag 2017), p. 322.
50 Ibid. p. 325.
51 Anita Godsk Pedersen and Hans Viggo Godsk Pedersen: *Familie- og arveret* (10thedn., Karnov Group 2016), p. 167.

3.1 Support during the cohabitation

As mentioned in section 1.1.1., there is no maintenance obligation between cohabitees, but if parties chose to share household costs and current expenses, "a bargain is a bargain". This means that a cohabitee cannot expect a refund from financial contributions to maintenance of the household. However, in some cases, practical and economical contributions to the maintenance during the cohabitation may result in a unjust enrichment if the other party has been able to save up money due to the couple's internal spreading of duties and maintenance.[52] More on unjust enrichments below.

3.2 Support after separation

For unmarried cohabitees, there is no obligation to support one another after separation. Therefore, it is not possible to "compensate" for an unequal attachment to the labour market by enjoining one of the parties to pay alimony to the other party after a separation. Not even if the difference in attachment to the labour market was due to a common agreement on prioritising one of the parties' careers above the other party's career. However, the parties can agree on paying each other maintenance.

3.3 Unjust enrichments upon separation[53]

As mentioned in 3.1., parties who have both contributed to the household do not have any claims in case of dissolution of the relationship. However, if one of the parties get the opportunity to save money on the costs of the other party, it may result in an unjust enrichment to the impecunious party. The unjust enrichments for cohabitees have been developed in case law.

3.4 The different unjust enrichments of Danish law

It can be hard to distinguish the difference between the 'ordinary unjust enrichment' known from ordinary property law (*berigelseskrav*) and the 'special unjust enrichment' for cohabitees which has been developed in case law.

The major difference between the two is that the ordinary unjust enrichments (*berigelseskrav*) depend on an economic loss for the party that has enabled the other party to save up money at its own expense. Therefore, an ordinary unjust enrichment requires a loss on one party and enrichment on the other party. The unjust enrichment between cohabitees has only been seen in cases, where the cohabitation has not lasted long enough to justify a compensation claim.

The ordinary unjust enrichment is typically used in situations where one party has paid for a renovation or rebuilding on the other party's real property during the relationship (a loss for one party), and when this financial contribution has increased the denomination of the estate (an enrichment for the other party). The unjust

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52 Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rdedn, Jurist- og Økonomforbundets forlag 2017), p. 326.

53 Not to be confused with separation between spouses.

enrichment cannot amount to more than the loss, and only extends hereto where the enrichment has been at least the size of the loss.[54]
The unjust enrichment for cohabitees is different from the ordinary one. As mentioned above, it was developed through case law from the 1980's and onwards. This unjust enrichment can be used even without an economic loss suffered by the party who has enabled the other party to save up money. The amount of the unjust enrichment between cohabitees is largely fixed on a discretionary basis.[55]

3.5 Development in unjust enrichments and dismissal of co-ownership

Until the 1980's, the Danish city courts and the Danish High Courts tended to declare co-ownership in a lot of cases concerning the family home for unmarried cohabitees, although the general property law requirements were not necessarily fulfilled.[56]
The practice was finally changed with the ruling, U 1980.480 H, where the Danish Supreme Court of Justice declared that two cohabitees' properties could be divided based on different considerations from considerations regarding solely property law. However, in this verdict, it was not possible to declare co-ownership on 'easier terms' as in previous rulings. The Danish Supreme Court attached importance to use of unjust enrichments as tool for cohabitees upon dissolution of the relationship in cases where one of the parties is left without any assets or capital.[57]
U 1980.480 H is still a leading ruling in the field. The female party, her separate child and the male party, lived together in the male party's apartment, until the male party bought a detached house in 1973 into which they all moved. The purchase price was financed with a loan raised by the male party. Both parties had paid employment during the entire cohabitation, but the male party's salary was about twice the size of the female party's salary. In 1975, the female party and her separate child moved out, and the property was sold for a net yield of approximately 130.000 DKK.
The Supreme Court judges agreed to reject the female party's claim about co-ownership of the house, although 1) the male party had not paid a cash amount, 2) it was due to tax purposes that the house was bought in the male party's name and 3) it was a common decision between the male party and the female party to purchase the house for it to serve as their family home.
The majority of judges said that co-ownership had not occurred in the traditional sense, whilst the minority of judges said that "some sort of co-ownership had occurred and to some extent, a matrimonial-like property regime"[58]. The Supreme Court made it clear that the fact that the property was purchased under circumstances where both

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54 Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rdedn, Jurist- og Økonomforbundets forlag), p. 328.

55 Ibid. p. 329.

56 Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1stedn., Jurist- og Økonomforbundets forlag 2019), p. 255.

57 Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rdedn, Jurist- og Økonomforbundets forlag 2017), p. 329.

58 UfR 1980.480 H and ibid. p. 329.

parties contributed financially to the joint finances is not enough to establish co-ownership.
The judges in U 1980.480 H disagreed on the question about a claim on other grounds than the common financial contribution. The minority pointed out that the female party had not had an income that could cover more than hers and her child's expenses, and that she did not have the possibility of saving up money by herself. Thus, some sort of co-ownership or matrimonial-like property regime has not occurred. The majority of judges (five out of seven) meant that the female party had a just claim on a specific amount of the sale proceeds deriving from the house sale. This claim was set to 25.000 DKK based on an estimate.
These five judges hereby created the basis for the special compensation between cohabitees based on an adjustment from the doctrine of unjust enrichment on the grounds of considerations about common contribution to the household expenses.[59]

3.6 Further development of the unjust enrichments in case law—the principles of reasonable expectations and legitimate expectations

The first time that the principle of reasonable expectations (*forudsætningssynspunktet*) clearly broke through was in the ruling U 1984.166 H. A couple separated in 1980 after 16 years of cohabitation. They had three children together, and the female party was without an income at the beginning of cohabitation as well as at the end of it, because she had primarily been a full-time housewife. During the cohabitation, the male party had increased his personal capital markedly, because he was able to focus on working with his own company. The Danish Supreme Court considered that the male party had wanted the female party to remain non-working during the cohabitation, and that household work had been essential for the male party's opportunity of improving his private economy. Therefore, the majority of judges awarded 200.000 DKK, referring to her "legitimate expectation that she, upon dissolution of the relationship, would not be practically without private means".[60] The minority found that she was not entitled to compensation, because her household work had not contributed to the increase of the male party's fortune.
The Danish Supreme Court judge, Mondrup, finds in the commentary to the ruling that the claim could not be reasoned on analogies from the matrimonial legislation as the Danish High Courts had found before. All judges agreed on this declaration.[61] The statement of the majority has since been reused in various rulings. One of the later examples is U 2016.1426 Ø (or TDA 2016.154/1 Ø).
In U 1985.607 H, the Supreme Court of Denmark summarised the grounds for the awarded unjust enrichments between cohabitees in previous rulings. Firstly, compensation can be awarded to the party, who has contributed to the parties'

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59 Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rdedn, Jurist- og Økonomforbundets forlag), p. 330.

60 UfR 1984.166/2 and Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rdedn, Jurist- og Økonomforbundets forlag 2017), p. 330

61 Ibid. p. 331.

common expenses. Secondly, these contributions should have helped essentially to the other party's opportunity of amassing or preserving a not inconsiderable fortune.[62] The size of the amount is to be fixed on a discretionary basis with consideration of the duration of cohabitation and to the financial situation of both parties at the end of the relationship.[63]

In U 1985.607 H the conditions regarding participation in the establishment of a fortune were not fulfilled. The Supreme Court of Denmark concluded that the female party had not contributed financially to the common expenses of the couple nor to the wealth gain of the male party. Consequently, there were no grounds for awarding the female party an amount as compensation. By the discontinuance of the cohabitation, the male party had a home equity in a real property, which he had built during the relationship on a lot that he had acquired before the relationship was initiated. During the cohabitation, the female party had primarily been unemployed and had been a payee of public benefits due to a disease. As opposed to the case in U 1984.166 H, the reason why the female party had been out of the labour market during the cohabitation had nothing to do with improving the male party's personal capital, and neither her income nor her domestic work had been significant for the male party's possibility of improving equity in the house.[64]

In a bundle of later rulings, U 2012.992 V, U 2014.1046 Ø and U 2016.1426 Ø, the female parties were all awarded compensation. In all three cases, both parties had somewhat equal incomes during the cohabitation, and the female parties had contributed to the male parties' establishment of a substantial fortune deriving from equity on real properties—in all cases—owned by the male parties. In all cases, the female parties had legitimate expectations of not being practically without means upon discontinuance of cohabitation.

In U 1986.756 H the female party was awarded compensation equivalent to approximately half of the value of the assets that were acquired during cohabitation, or which the parties had equally contributed to. This is an unusual ruling, since the compensation amounts are usually significantly lower than the moiety of the value that the wealthier party can bring along from the cohabitation.[65]

3.7 Situations that do not constitute (larger) unjust enrichments

A number of rulings do not award compensation. The rulings are similar on the count that the Courts found that one party had not contributed to the establishment of the other party's fortune, so saying that the conditions for awarding compensation were not fulfilled.[66] In U 1980.601 H, two men had ended a 13 year long cohabitation with

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62 John Asland Margareta Brattström, Goran Lind, Ingrid Lund-Andersen, Anna Singer, Tone Sverdu: *Nordic Cohabitation Law* (1st edn, Intersentia).

63 UfR 1985.607/2 and Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1st edn., Jurist- og Økonomforbundets forlag 2019), p. 399 – 406.

64 Ibid. p. 332.

65 Ibid. p. 332.

66 Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rd edn, Jurist- og

plenty of longer breaks during the relationship. The Danish Supreme Court found that it was not proven nor rendered probable that the impecunious party had contributed to preserve or bring up the other party's fortune. Hence, compensation was not awarded.

In TFA 2010.221 V the female party was awarded a relatively small amount of 25.000 DKK, whilst the male party's capital was approximately 2.200.000 DKK. In the case, it is pointed out that the enrichment of the male party was caused primarily by trade conditions in the housing market, and that the male party had been able to service his debts and to pay for his personal expenses without the financial aid of the female party. Similar circumstances were seen in TFA 2011.27 Ø where the female party was not awarded compensation after 22 years of cohabitation with a sharply divided economy between the male party and the female party (as in TFA 2010.221 V). The two rulings are characterised by 1) two impecunious women, who barely had the ability of upholding their own expenses, 2) a split-up economy between the couples and 3) men who were able to amass a fortune independently.[67] The breaking point of all the mentioned rulings seems to be whether the owner of a property was able to net a profit on it alone.

Partners who only contributed minimally to the household expenses and chores do not have a legitimate expectation of having a share in a potential wealth gain. Partners who agree on a division of labour which creates the possibility for one party to amass a fortune can be awarded an amount of compensation, although they have not contributed financially to the household. Partners who have been non-working or part-time working at their own request or due to disease or handicap cannot, however, expect to obtain compensation, although their partner has accumulated a fortune during the cohabitation.

Put in a different way: the unjust enrichments are not meant to place unmarried cohabitees on an equal footing with spouses, but the real purpose of the claims is to ward off unreasonable consequences from the fact that one party has been able to amass a fortune with the help from or at the expense of a financially weaker party.[68]

3.8 Mutual claims

The question whether one party can advance a claim from the other party due to a transfer of property occurs for cohabitees as well as married couples. Mostly, the question can also be answered in the same way that it is answered when settling disputes involving spouses. A transfer can be part of 1) a bilateral contract between two parties, for example payment for an asset bought by one party from the other party, or 2) a contribution to mutual maintenance, a loan or a present. From the second category of transfers, only loans will have to be paid back. If a transferred amount does not submit to one of these categories, there might be grounds for an ordinary unjust enrichment (*berigelseskrav*) or, in certain cases, there might be grounds

Økonomforbundets forlag 2017), p. 332.

67 Ibid. p. 333.

68 Ibid. p. 333.

for one of the special unjust enrichments between cohabitees mentioned above. The categorisation of the other claims follows the same rules as for married couples.[69]

3.8.1 Loans and unjust enrichments

A loan agreement between two cohabitees can be made orally or in writing. Also, it can be made impliedly—exactly in the same way as for spouses.[70] In estimating whether the transfer can be classified as a loan or not, importance is attached to the action pattern of the parties. For instance, if the parties have taken the reimbursement of the loan into account in their budgets, or if it is usual that the parties transfer money to each other and pay them back. Both factors weigh in favour of a loan, cf. for instance U 2006.544 H where a loan of 716.000 DKK was sufficiently proven, because a liability term with one party corresponded to an asset item with the other party.[71] If the couple has arranged their economy with a thought of community, this often results in a mixture of the parties' finances. This makes it practically impossible for one of the parties to succeed with a claim of something being a loan that has to be repaid from the other party.

The ruling TFA 2002.361 Ø concerns a 30 years long cohabitation. The male party tried to obtain a ruling against the female party to make her pay the interest rates of a loan which admittedly bore interest, according to the pledge that was drawn up as a collateral security for the loan. However, the male party had not charged rates from her during the cohabitation. He also tried to get a refund of a financial contribution which he had paid to the female party's car, as well as a phone bill which he had paid for her during the cohabitation. The female party was acquitted in both the District Court and in the High Court with note that the male party had no grounds for a claim against the female party.

That a relationship is long-term with larger transfers that are not claimed back can become important in different ways. It has probative value, because it weighs against the transfer being a loan when a long time has passed since the date for the transfer and the demand for a refund. The long-term cohabitation and the way in which the parties have arranged their economy may result in a breach of expectations of repayment which causes the claim to lapse.[72]

In U 1972.751 H, the male party had accommodated the female party money during the beginning of the cohabitation. The purpose of the loan was to help the female party run her business which both parties worked in. Furthermore, the male party had contributed to the inventory of the female party's store with some (probably valueless) rolls of material. The upkeep of the female party's store provided a basis for the couple's income, but the female party had not amassed any fortune; on the contrary, her original capital had turned into debts by the end of the cohabitation. By the end of the relationship (and not before) the male party demanded repayment of the amount

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69 Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rdedn, Jurist- og Økonomforbundets forlag 2017), p. 334.

70 Ibid. p. 334.

71 Ibid. p. 335.

72 Ibid. p. 335.

that he had lent her, plus the value for the rolls of material. The parties had produced a loan document, but the Supreme Court still found that the amount was not to be refunded, because the conditions for repayment had breached.[73]

The Supreme Court pointed out that the male party—for several years after the instrument of debt was signed—had lived with the female party with a "joint enterprise" and consumption without claiming back the amount. It was not the cohabitation itself which made the expectations breach, but rather the facts that 1) the male party ran the business along with the female party, 2) he lived on her income as well, 3) the loan was attached to the business and 4) he did not claim a refund of the loan until several years afterwards in connection with the discontinuance of the cohabitation.

The one who claims repayment has the burden of proof that a refund was required. Even a transfer of a large lump sum can, in some cases, be seen as part of the parties' economic conditions, and it may therefore not be claimed back in those cases, cf. TFA 1998.252 V where the female party's transfer of 51.000 DKK to the male party's bank account was considered a loan, because she had previously withdrawn 30.000 DKK from the male party's account. In the case, the parties had mixed up finances, and the male party had paid for most of the couple's expenses during the cohabitation. However, as a general rule, larger lump sums will often indicate a loan or result in a unjust enrichment, as mentioned above.[74]

Moreover, the length of the relationship plays a role. In cases with a relatively short-termed cohabitation, the courts are more likely to declare repayment obligations than in cases with long-term cohabitation. The shorter the period is from the amount is paid from one party until the other party pays it back, the more likely it is that the judges will recognise passivity as an indication of the money transfer being a loan all along. Also, the less likely it is that the repayment obligation has lapsed because of later circumstances and breached expectations. TFA 2004.322 V and TFA 2008.539/2 V both dealt with one party who had paid for real property. Shortly afterwards, the properties were sold by execution, and both cohabitations ended. In both cases, the cohabitations were short-termed, but were probably the circumstances and the quick transfers, rather than the length of the cohabitations, that were decisive for the rulings.

If there is no proof of a loan, and if a transfer is extraordinary, a unjust enrichment might be relevant, cf. for instance TFA 1999.185 Ø where the male party was awarded 124.000 DKK based on a doctrine of unjust enrichment.[75]

3.8.2 Co-ownership

Unmarried couples cannot establish co-ownership if one party merely pays for current expenses that attach to the other party's assets. However, the couple can acquire assets together, sell shares of assets to each other or give each other presents, and thereby establish co-ownership. Payments from one party to another that make one party able

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73 Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rdedn, Jurist- og Økonomforbundets forlag 2017), p. 336.

74 Ibid. p. 336.

75 Ibid. p. 337.

to pay off a debt, for instance, do not establish co-ownership, but they may provide a basis for unjust enrichments, see also section 2.[76]

3.8.3 Fees for completed work

If one of the parties has worked for the other party, it may have resulted in a significant financial advantage for the other party. However, the right to demand a fee for completed work during the cohabitation requires that the payment has been arranged from the beginning. Ordinary tasks connected to the upkeep of the household, such as cooking, cleaning and everyday work cannot be priced, unless it is agreed between the parties.[77] It might be relevant for considering a unjust enrichment for a party by the end of the cohabitation whether a party has performed a task for the other party or for their common good, or whether a party has contributed significantly more to the common expenses than the other without earning enrichment in the form of savings.

4. Cohabitation agreements—frequency, limitations, typical clauses

4.1 Agreements between cohabitees during the relationship

Cohabitees can make agreements during the relationship on equal terms as people who do not live together. For documentation purposes, such agreements should be written down. However, cohabitees often do not write it down, because then they must agree on 1) making an agreement, 2) the premise of the agreement, and 3) the content of the agreement.[78] Not all are willing to do this work, since it is often an emotional topic of discussion, and therefore many agreements are unwritten. That opens questions of whether implied agreements can be valid.

4.1.1 Implied agreements

The implied agreements will often originate from the cohabitation itself. They can contain the division of tasks when cohabiting, for example division of household tasks or arrangement of economy.[79]

Especially the question of ownership of assets, for example ownership of the house, has previously been subject to implied agreements. This question may even arise during the relationship if a creditor wants to levy execution on the property.[80]

As explained in section 2.4 and 3.5, the District courts and the High courts during the 1970's established an extensive interpretation of joint ownership between cohabitees. This concept made it possible for a cohabitee who was not formally the owner of the house—but contributed to the household economy in general—to become co-owner

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76 Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rdedn, Jurist- og Økonomforbundets forlag 2017), p. 337.

77 Ibid. p. 338.

78 Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1stedn., Jurist- og Økonomforbundets forlag 2019), p. 216.

79 Ibid. p. 215.

80 Ibid. p. 103.

of the family home.[81] Assets bought for common use during the cohabitation were supposedly co-owned, if both cohabitees had income.[82] The case of U 1979.225 Ø is an example of this legal position, and it also illustrates that the question of joint ownership can (and often will) rise at the dissolution of cohabitation. In this case, the Eastern High Court concluded joint ownership, even though the male party was the formal owner and had paid for acquisition of the property. The female party also had income, and thus the expectation was joint ownership. It was crucial for the verdict that both cohabitees contributed according to their separate means. It seems less important that the female party also contributed by taking care of household tasks.[83]
The purpose of the extensive joint ownership was to compensate the weaker cohabitee at the dissolution of cohabitation, but it also mattered for creditors during the relationship. In 1980 this legal status was replaced with a concept where the weaker cohabitee was compensated with a sum equal to his or her investment in the property, instead of establishing joint ownership.
This change in the legal position has made it much harder to establish joint ownership due to an implied agreement. Today, joint ownership is only established if this was the assumption of the cohabitees during the cohabitation. In order to find out if the cohabitees assumed joint ownership, it can be important to observe who was formally registered and who paid for the asset. If the economy of the cohabitees is mixed, it is not possible to find out who paid for the asset. In such case, one must observe whether each of the cohabitees had an income that would have made it possible for them to contribute to the payment of the asset. This makes the joint ownership somehow random and will probably only be established with household effects and not often with property.[84]

4.1.2 Explicit agreements

Explicit agreements made between cohabitees will often be written down as legal documents.
An agreement can constitute a joint ownership of an asset (*samejekontrakt*). The agreement regulates the ownership, the diversion of expenses, the disposal of the asset, the liability of the debt and/or the terms for dissolution of the joint ownership.[85]
It is always possible for cohabitees to make a more general cohabitation agreement (*samlivskontrakt*). Such agreement often regulates matters of economy during the relationship as well as at the dissolution of the relationship.
The cohabitation agreement cannot contain an agreement to deferred community of property, as is the legal status upon marriage. This was the case in U.1979.808/1 when cohabitees tried to register a declaration on their property which stated that they

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81 Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1stedn., Jurist- og Økonomforbundets forlag 2019), p. 210.
82 Vibeke Vindeløv: *Retsstillingen for ugifte samlevende* (Gad 1988), p. 118.
83 Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1stedn., Jurist- og Økonomforbundets forlag 2019), p. 102.
84 Ibid. p. 112.
85 Ibid. p. 220.

should be considered married. Such a registration was refused by the court, since they could not in general adopt the rights followed by marriage. They can, however, agree to joint property on specific assets, such as the car, the house, etc.
In 2005 Ingrid Lund-Andersen did a survey amongst Danish attorneys working with family law where she asked how often they made agreements between cohabitees.[86] 7 out of the 24 attorneys answered that they regularly made agreements between cohabitees about joint ownership of a specific asset, but none of the 24 attorneys made general cohabitation agreements on a regular basis. That small survey indicates that a general cohabitation agreement is not very common—or at least is not made by attorneys—meanwhile specific agreements about the ownership of assets is more common amongst Danish cohabitees.
In case of death, cohabitees have no automatic legal right to inheritance, as explained in section 1.1.2. If they want to inherit, they can make an agreement in the form of a will.
Making a will is not the only way to secure the surviving part when living together without being married. Cohabitees can benefit each other on their insurance (as explained in section 1.1.4).[87] If they do not, they will automatically become the beneficiary whenever they meet the requirements of making an extended will.[88] This rule has unfortunately led to a common misunderstanding that cohabitees have the same legal rights as married couples when they have lived together for two years. As stated above, this is not the case; They only become beneficiary on insurances, meanwhile all other inheritance rights must be agreed on and written down.
If the cohabitees have children together, their cohabitation agreement can involve matters regarding their children. It can contain an arrangement of how to "divide the children" in case the parents dissolve their cohabitation. Such agreement can contain matters of custody and residence of the children, visitation rights and/or child support. In theory these areas can be regulated solely by a cohabitation agreement, but with the important exception that the Family Law House (*Familieretshuset*) can dismiss the agreement on grounds that another arrangement will be in the best interest of the children. The Family Law House will always make the interests of the child(ren) an important consideration, cf. Law on Parental Responsibilities § 1.

4.2 Agreements between cohabitees after the dissolution of cohabitation

4.2.1 The economically weaker party

The above-mentioned cohabitation agreement can contain an obligation to support each other in case of dissolution of cohabitation. If such an agreement is made impending dissolution of the relationship, it is most likely binding for the parties due to the common principle of agreements being legally binding. But, if the agreement is

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86 Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1st edn., Jurist- og Økonomforbundets forlag 2019), p. 221.

87 The Insurance Contract Act (LBK nr 1237 af 09/11/2015, *Forsikringsaftaleloven*), § 102, stk. 1.

88 Ibid. § 105 a.

made long before the dissolution of the relationship, it is more questionable whether that common principle will be upheld. If the parties have not been able to foresee the long-term consequences of the agreement, the consequence often is that the agreement is non-binding. The closer to the dissolution of the relationship, the easier it is to make binding agreements containing an obligation to support.
The content of the agreement can also have an impact on whether the agreement is binding or not. The more extensive the agreement is, the more unlikely it is that the parties could comprehend such extensive consequences. In analysing the extensiveness of the agreement, it might be useful to compare with the support duty for spouses. If the agreement is more extensive than the mutual support duty for spouses, it is more likely to be non-binding for the cohabitees.[89]
Unlike spouses, cohabitees can agree in advance on how to divide their finances in case of dissolution of the cohabitation. Spouses can only make such an agreement impending a separation or divorce, while the freedom of contact is wider for cohabitees. With a cohabitation agreement containing the division of finances in case of dissolution of cohabitation, the financially weaker part can be protected. However, if the reasonable expectations on which cohabitees have based the agreement subsequently fail—making the agreement unreasonable—the agreement will be invalid, cf. Law on Contracts § 36.

4.2.2 Children

In general, the rules and regulations protecting children are seeking to be independent of the parents being married or not.[90] The child has no say on whether or not his or her parents are married, and the need for protection is the same when his or her unmarried parents split up. The European Convention on Human Rights, article 14, also protects the interests of the parents and acts as a safety net—ensuring that any unfair differential treatment between married and unmarried parents in national law will be sanctioned. An example of this can be found in the case of Summerfeld v. Germany, no. 31871/96, (2003) from the European Court of Human Rights. A national rule caused that Summerfeld had to carry a heavier burden of proof than fathers who had been married to the mother of their children, thus the court ruled that art 14. cf. art 8 had been violated.
If there is no cohabitation agreement involving the children, the parents must come to an agreement on how to "divide the children" in the present situation. If they cannot come to an agreement—or if their agreement does not take the interest of the child into account—Family Law House can make a ruling. If the parents are not satisfied with the ruling, they can take the matter to the Family Court which is a section of District Courts.
A subject of great interest for the child is the matter of the future living conditions. Will the child be able to stay in the family home, close to school and friends, or will it

89 Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rdedn., Jurist- og Økonomforbundets forlag 2017), p. 343.

90 John Asland, Margareta Brattström, Göran Lind and others: *Nordisk Samboerrett* (1stedn., Gyldendal Juridisk 2014), p. 226.

be required to move, change school and make new friends? The Act on Financial Relations between Spouses between Spouses takes the child's interest into consideration when the matter is decided by the court, cf. § 48, section 3. The parent with custody of the child is more likely to be granted future ownership of the house, even though the house is currently owned by the other spouse.[91]
Such protection of the child's interest in staying in the family home is exclusive for children with married parents. At the dissolution of cohabitation, the parent who owns the house will be able to stay, regardless what will be in the best interest of the child.

4.2.3 Uniting the family

Cohabitees can make financial agreements before or in connection to the end of cohabitation. The purpose can be that the financially stronger cohabitee is obligated by their agreement to continue to support the financially weaker cohabitee for a time after the dissolution, to make sure that he or she can establish a new life for the cohabitee and the children. This can contribute to ensuring that the parents and children can continue as a family, but now with two residents.
This was the case in U 1986.435 H. The cohabitees had agreed that the female party at the end of many years of cohabitation should receive a compensation from the male party. The female party had contributed to the increase of the male party's property since she had taken care of their nine children and helped at his firm on a daily basis. The question for the court was whether she should pay taxes of the received amount of 130.000 DKK. If the received amount were considered a gift or pay for work, then she would be obligated to pay taxes.
In the High Court they did not perceive the transfer of assets (an old car and a certain amount of money) as a taxable transfer. Considering the nature and length of cohabitation they did not find that the agreement between the cohabitees were outside the limits of a fair division of property. The Supreme Court upheld the decision of the lower court but emphasised that the purpose of the compensation was of great importance. The purpose was to make the female party able to establish a new home for herself and for the young children.
In U 2012.1629 H a transfer of six million Danish Kroner was not considered a tax-free compensation although the amount was to be used to buy a home for the female party and the two common children. The reasoning was that the male party was of independent means before they met and during the cohabitation. The female party had not contributed to increasing or preserving the male party's property, since she had a job on her own, neither had she taken care of the family home to a considerable extent. Furthermore, the transfer or the amount did not happen immediately after the dissolution of cohabitation. The Supreme Court considered the transfer a gift, which made the transfer taxable.

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91 Irene Nørgaard, Caroline Adolphsen and Eva Naur: *Familieret* (3rdedn., Jurist- og Økonomforbundets forlag 2017), p. 288.

4.2.4 Minimising level of conflict

The new Act on Family Law House emphasises the importance of reaching an agreement between the former cohabitees whenever possible[92] to ensure the minimal level of conflict in the newly divided family. An agreement is pursued through counselling and mediation. Only if the parents cannot reach an agreement, the Family Law House will make a ruling.

The Act on Family Law House introduces a screening system where the cases are divided into categories depending on their level of conflict. The purpose of the screening system is to solve the cases more rapidly.

If the level of conflict is low, the case will be categorised as green[93] and the parties will be offered mediation and counselling. In Denmark mediation and counselling are always on a voluntary basis. The idea is that alternative dispute resolution can only work if both parties are willing. Mediation can solve some issues out of court and make the cohabitees come to an agreement on areas such as issues of ownership, compensation etc. This will be beneficial for the child, who will experience less conflict between the parents after the dissolution of cohabitation.

If the level of conflict is high combined with other risk factors (for example one of the parents being violent), the case will be categorised as red.[94] Mediation will then most likely fail, and the family is more likely to reach a solution in court. The focus on the pace of the case is to ensure that the family—including especially the child—gets clarification and stability as soon as possible after the break-up.

5. Most problematic issues in Denmark

5.1 Unequal right to social benefits

The right to receive social security is upheld by the Danish Constitution.[95] But, the Constitution also states that the right to receive social security depends on the recipient not having anyone who is legally obligated to provide for him or her. The question who are legally obligated to provide for one another is decided by the legislature. As explained in section 1.1.1, the obligation to maintain one another during cohabitation has shifted back and forth during the last decade.

When the legislature decided to introduce an obligation to maintain each other during cohabitation, one of the main reasons was to make cohabitees and spouses equal in regard to social benefits.[96] One of the political parties later elaborated on their opinion on the subject. In their view, social benefits should only be available to people who could not support themselves or be supported by their family. In this modern society, cohabitees are often as much family as married couples, and therefore they should also

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92 The Act on Family Law House (LOV nr 1702 af 27/12/2018), § 1, stk. 3, 1. pkt. and the Legislative proposal (L 90 – 2018-19), section 3.2.3.2,setting the tasks of the Family Law House (*Familieretshusets opgaver*).

93 Ibid (LOV nr 1702 af 27/12/2018). § 5.

94 Ibid. § 7.

95 The Constitutional Act of Denmark (LOV nr 169 af 05/06/1953,*Grundloven*) § 75, stk. 2.

96 Legislative proposal: L 224 – 2012-13 as submitted, p. 18.

be obligated to take care of each other. When the law was changed two years later, the reasons were that it had created too severe consequences for some cohabitees, and that it had created extensive difficulties for the municipalities that were to judge whether or not a couple was cohabiting. Another concern was that cohabitees and spouses were not equal on other financial matters. Spouses can exploit each other's unused tax relief, but such opportunity was not given to cohabitees.[97] It seemed unfair to equalise cohabitees and spouses on areas that worsened their financial situation, but not on areas that would benefit their financial situation.

Even though the legal position is back to status quo, the discussion shows that equalising cohabitees and spouses must happen on all coherent subjects. If an obligation to maintain each other in cohabitation is reintroduced, the legislature must also take a look at the tax laws and make sure that equalisation is not just happening on one front. Another solution could be to remove the obligation to support each other from spouses, but that is more a political question than a legal one.

It is important to note, that a number of different social benefits depends on recipient being single or in a cohabitation, even though this report focusses on social security. Other examples are child maintenance payments, housing benefits etc.

5.2 The problem of defining cohabitees

One of the main problems addressed in section 1 of this rapport is that there is no official, united definition of cohabitees—instead, different areas have different definitions. Many laws and regulations describe the cohabitation as being "marriage-like", but their understanding of a marriage-like relationship differs. In relation to social benefits, a marriage-like relationship can occur even if the couple lives on different addresses, as explained in section 1.1. In relation to inheritance, it is paramount that the couple lives on the same address, as explained in section 1.2. In addition to the problem of different definitions, some laws and regulations do not even specify which of the many definitions of cohabitees is used, and therefore make it even harder for cohabitees to anticipate their legal position.

A solution could be to decide on one definition by law. Such definition could be the beginning of a Cohabitation Law (*Sambolov*). The delimitation used in the Inheritance Law seems to capture two groups of cohabitees whose cohabitation is very similar to marriage, and who need a minimum of legal protection:

The first group is the cohabitees with children.[98] This group should capture two persons living on the same address who are either having a child, have had a child or expecting to have a child. Both the official address and the existence of children are objective criteria that can be investigated quite easily. In some rare cases, it should be possible to make an exemption from the requirement of shared address, since some families might have two addresses for practical reasons. Ingrid Lund-Andersen

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97 All views above stated by Lennart Damsbo-Andersen, Socialdemokratiet, during 1st reading of Legislative proposal: L 81 - 2014-15.

98 Ingrid Lund-Andersen: *Uddrag af Familieøkonomien* (1stedn., Jurist- og Økonomforbundets forlag 2019), p. 63.

suggests a clear exemption where a statement from two impartial persons about the couple can prove the cohabitees marriage-like relationship.[99]
The second group is the cohabitees who have lived together for two years or more in a marriage-like relationship.[100] The idea is that a requirement of a certain length of the cohabitation will exclude cohabitees who are in a new relationship and are just "trying it out". The expression—marriage-like relationship—is meant to include couples of similar and different genders, but at the same time exclude persons closely related, for example. siblings living together. It is a requirement that the persons can marry according to Danish law. The criteria of two years of cohabitation is an objective criterion which can easily be stated through the official registry. The criterion of the cohabitation being marriage-like is more subjective, and the couple's own understanding of their relationship must be taken into consideration. Importantly, also the unitedness of their household can be observed, especially the common financial situation that often appears to be the case. If they do not have a shared economy, it will be easier to argue that their cohabitation is not marriage-like.
For some cohabitees, it will be important to anticipate their legal status. Ingrid Lund-Andersen has suggested to make it possible—but not obligatory—for couples to register as cohabitees.[101] If they are approved, they will know for sure that they are covered by the Cohabitation Law and are therefore able to anticipate their legal status.

5.3 Determining ownership of assets

When it comes to determining ownership of assets, it appears that the greatest problem for the cohabitees is that their legal position is obscure. In TFA 1999.101 V and TFA 1999.185 Ø the High Court ruled on the issue whether the ostensible registered ownership was to be set aside in favour of joint ownership with completely opposing results. In TFA 1999.101 V the court even asked that the ostensible registered owner carried the burden of proof while usually the party who challenges the ostensible registered ownership carries the burden of proof. When case law shows conflicting results like this, it indicates that the judiciary is unsure about how to rule in cases about determination of ownership of assets between cohabitees. The reason for this uncertainty might be that the issue is not regulated directly by law. The legal basis is the rules of property law which, however, seems insufficient. In turn, the judiciary often involves family law perspectives due to the many ways in which the nature of the cohabitation relationship is more similar to the relation between spouses than to the relation between regular contracting parties.

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99 Ibid. p. 63 f.

100 Ibid. p. 65.

101 Ingrid Lund-Andersen: *Familieøkonomien* (1st edn., Jurist- og Økonomforbundets forlag 2011), p. 251 and suggestion to a new § 2, p. 255.

5.4 Financial inequality between cohabitees and unjust enrichments

A major problem for cohabitees may occur if the cohabitation ends with one of the parties stands in a bad economic situation because they have arranged their financial situation in focus ones' career whilst the other would take care of the domestic chores, see above section 3. Today, general property law and its principles determine the financial legal status for cohabitees. Also, there are the special unjust enrichments that are mentioned above.[102] A suggestion for a solution can be found in Ingrid Lund-Andersen's draft of a Cohabitation Law, § 8.[103] § 8, subsection 1 deals with the property relations between the cohabitees and secures that there will not be an unfair division of the properties upon dissolution of the cohabitation—here on the regulatory front instead of a legal status based on case law, as mentioned in section 3. The rule, if implemented, would change the legal position so that financial contributions will no longer be the most important, so a right may more easily incur simply from the facts of the case. Because of this being a social protection rule, it is meant by Lund-Andersen to be mandatory.[104]

The suggested § 8, subsection 2 focuses on the 'participation situation' which is discussed in section 3: when one party has been able to amass a fortune on the cost of the other party. For instance, if one party has contributed to the household by carrying out domestic chores, contributed to common expenses or contributed to increase the other cohabitee's fortune essentially etc., this work can be put on an equal footing with the other party's paid employment.[105] This provision is different from the Danish Supreme Court's 'rules' about unjust enrichments, since the length of the cohabitation and the economic relations of the parties at the time of the separation are irrelevant based on a participation point of view.[106] Furthermore, it is suggested that the unjust enrichments should rather be indicated as remunerations (*godtgørelsesbeløb*) since this term covers the purpose better. The remuneration term emphasises a payment which is awarded without the occurrence of an economic loss and is typically awarded based on an overall evaluation.[107] Lund-Andersen argues that this rule of the Supreme Court is too permissive, because it mainly concerns property law.[108]

The suggested § 8, subsection 3, concerns couples who are cohabitees, but whom the law does not apply to—for example because they just recently moved in together—if there are some special considerations that weigh in favour of awarding a party a remuneration.

Introducing such legislation would bring more predictability and consistency to the legal position of cohabitees than the one created in case law. The considerations

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[102] Ibid. p. 559.
[103] Ibid. p. 597.
[104] Ingrid Lund-Andersen: *Familieøkonomien* (1st edn., Jurist- og Økonomforbundets forlag 2011), p. 580.
[105] Ibid. p. 577.
[106] Ibid. p. 579.
[107] Ibid. p. 576.
[108] Ibid. p. 580.

behind the current law for spouses can largely be transferred to the affairs between cohabitees. The idea behind § 8 is to place the male party and the female party on an equal footing upon dissolution of the relationship with regard to the personal and financial household community to which cohabitees may have adapted. Another purpose of § 8 is to give both parties a better fresh start after the cohabitation ends, for example. for common children as addressed below.[109]

5.5 The consideration of the child's interest in the family home

As explained in section 4.2.2. the interest of the child in the family home is not taken into consideration at the dissolution of cohabitation. If the family home is owned by one of the parents, he or she will be able to stay, while the other parent must move out. For some families this will matter a great deal for the child, who is forced not only to deal with the parents' break-up, but also with moving away, changing school, and saying goodbye to friends. The interest of the child is taken into consideration if the parents are married, cf. the Act on Financial Relations between Spouses between Spouses § 48, section 3, and a similar provision could be implemented in a Cohabitation Law. A proposal for such a provision can be found in Lund-Andersen's draft of a Cohabitation Law § 9.[110]

5.6 Arguments against a Cohabitation Law

Especially two justifications weigh against the establishment of a Cohabitation Law. Firstly, there should be a distinction between married couples—who have drawn up a marriage contract and made a promise that is legally binding—and couples who live together without any obligations towards one another. Secondly, the endorsement of marriage should be respected. These were the main counterarguments of the Danish Ministry of Justice against establishing a mutual inheritance right for cohabitees. Several political parties in Denmark stated that a legislative proposal of a Cohabitation Law would be like "forced marriage", and they underlined that unmarried couples who had actively rejected the marriage and the marriage-rules should not be made subject to legislation involuntarily. Another argument from the Ministry of Justice was that it is still possible for cohabitees to arrange inheritance of one another through wills and arrangements. In other words, cohabitees would be able to 'customise' their legal position to some extent and to arrange an inheritance which corresponds to the right of inheritance of spouses.[111]

In total, the problems about defining the cohabitees, awarding unjust enrichments, and considering the child's interest in the family home seem to be the biggest problems of this study. These problems could possibly be solved by implementing a Cohabitation Law, as suggested by Lund-Andersen. However, there are also arguments that weigh

[109] Ibid. p. 559.

[110] Ingrid Lund-Andersen: *Familieøkonomien* (1st edn., Jurist- og Økonomforbundets forlag 2011), p. 256.

[111] Ibid. p. 575.

against the implementation of such legislation, as mentioned above. At least one problem that should be solved first is the definition across legislation in order to create more clarity upon cohabitees' legal position. Problems that could be solved also without implementing a separate Cohabitation Law are those regarding ownership of assets and awarding of unjust enrichments which are both currently based on the principles and legislation of ordinary property law. However, since cohabitees are both individual legal persons, it still makes sense to apply ordinary property law for them.

6. Conclusion of the Danish report

The field of cohabitees and their legal position towards each other and towards the rest of the world has been discussed several times in Denmark.

6.1 Ownership of assets and household goods

Regarding ownership of assets, the issues are legally regulated by property law, but the judiciary seems to prefer to include family law considerations when ruling on the subject. Two factors are crucial when determining ownership of assets: the intended ownership and who contributed economically to the acquisition.

It is possible for the cohabitees to make agreements about the ownership of assets, such as an agreement on joint ownership of an asset or a cohabitation agreement. The important part of the agreements is the intentions of the cohabitees. If there is doubt hereto, the ostensible registered owner will be recognised as the beneficial owner. Economical participation to the acquisition of assets can be decisive for the ownership, for example if it is impossible to identify the intended owner according to the agreement between the cohabitees. The cohabitee who paid the purchase price, including the down payment, and who is liable for the outstanding debt, will usually be recognised as the beneficial owner by the court. In case the ostensible registered does not appear to be the beneficial owner, for example because of the cohabitees' common economy, it is unclear whether the court will rule in favour of or against joint ownership. TFA 1999.101 V and TFA 1999.185 Ø are examples of rulings on this matter where the results are opposite. Regarding household goods, the court will in most cases rule in favour of joint ownership, provided that the assets are acquired during the cohabitation because of the common economy. However, this is just a presumption based on case law, and therefore the cohabitees cannot rely on it to be true in every single case. If the cohabitees intend to transfer ownership of the family home, they must agree explicitly on the matter. Subsequent circumstances—such as contributions in form of paying dues or working on improving the property—will not lead to a transfer of the ownership. Neither will indirect contributions in any form, including housework, upbringing of children and payment of living expenses.

The result of this unclear legal position is that the judiciary are inconsequent in their rulings which makes it very difficult for the cohabitees to predict their legal position. This issue could possibly be corrected through regulating the area in property law.

6.2 Unjust enrichments

As for unjust enrichments, the economically weaker cohabitee has no statutory rules to rely on in order to award a financial compensation upon dissolution of the cohabitation. However, some important principles created in case law serve to compensate this more impecunious party for eventual work. It may be problematic if the working party has been able to amass a fortune on his or her own on the cost of the impecunious party. This situation is seen in various cases that are mentioned in section 3. The principles have changed over time. In the 1970's, there was a consistent practice of establishing co-ownership over assets—so the economically weaker party came to own a share of given assets, for example the family home—in order to decrease the financial imbalance between the parties. However, this practice was changed in the case of U 1980.480 H.

In U 1980.480 H the Supreme Court did not establish co-ownership of a house for the economically weaker party. Instead, they awarded an amount of money, fixed on a discretionary basis, which was a share deriving from the sale of the cohabitees' house. This judgment became the basis for the special unjust enrichment between cohabitees based in the doctrine of unjust enrichment as well as in the "reasonable expectations" which serves to meet a party's legitimate presumptions that he or she will not be practically without means in case of discontinuation of the relationship.

However, parties are not in all cases awarded compensation. Some of the most important conditions for a unjust enrichment include 1) that the party has contributed financially to the common expenses and to the wealth gain of the other party, and 2) that the party has legitimate expectations of not being practically without means upon discontinuance of the cohabitation. For instance, in U 1980.601 H these conditions were not fulfilled, and compensation was not awarded. However, this is always a concrete assessment, varying from case to case.

In some cases, there may be doubt about the nature of a transfer of property. It can either be 1) a part of a bilateral contract between parties, 2) a contribution to common maintenance, 3) a loan, or 4) a gift. Since only a loan will have to be paid back, this often causes various problems with proving a loan agreement. When determining the status of a transfer, relevant elements include the parties' action patterns during the cohabitation, the length of the cohabitation and the length of the period between the payment from one party until the repayment or claim for repayment. If something is not a loan, there may still be grounds for an unjust enrichment (*beriqelseskrav*). The legal position for cohabitees regarding unjust enrichments and repayments of loans is clear enough in theory, even though it is not implemented in legislation.

Therefore, a Cohabitation Law could be a way of clarifying the legal position, as suggested by Lund-Andersen. However, it is also not problematic to uphold the current legal position based in case law and general property law, because the legal position is quite clear.

6.3 Agreements between cohabitees

Cohabitees can make agreements on the same terms as persons who do not live together. These can be implied as well as explicit—although very often they are unwritten, because couples might not have thought about the importance of documentation, and because it might be an emotional topic.
Implied agreements are often derived from the cohabitation itself, and they often cover the distribution of household tasks, economy and ownership of assets.
Explicit agreements between cohabitees are mostly written legal documents, such as documents on joint ownership of an asset (*samejekontrakt*) for example regarding a house. Cohabitees can also make a general cohabitation agreement (*samlivskontrakt*) which regulates the conditions for the cohabitees during the cohabitation and in case of dissolution. However, the cohabitation agreement cannot establish community of property in general, since this is the legal status upon marriage, cf. U 1979.808/1 where a couple was denied enforcement of their agreement to the same legal status as if they were married. Another problem is that unmarried cohabitees do not have an automatic right of inheritance, unless they draw up a will. Cohabitees can also benefit each other on their insurances directly. If they have children, they can agree on how to "divide the children" in case of separation, however with the exception that the Family Law House (*Familieretshuset*) can dismiss the agreement, if it is in the best interest of the child. If there is no agreement, the parents must find a solution, potentially with help from the Family Law House. The interest for the child is the most important.
The content and date of establishment of a cohabitation agreement can be influential on whether the agreement is legally binding or not, because the conditions of the agreement may breach upon dissolution of the relationship. Cohabitees can agree in advance on how to divide finances in case of dissolution— unlike spouses before separation—however, the agreement becomes invalid if the parties' reasonable expectations is not met and the agreement becomes unreasonable, cf. Law on Contracts § 36.

6.4 The need for a Cohabitation Law in Denmark

In different areas, the legal position is unclear for cohabitees, and although they may experience many of the same problems as married spouses do, the same legislation cannot be applied. A Cohabitation Law (*Sambolov*) could be qualified as a solution to fix these problems and to clarify their legal position. However, this is a difficult discussion with arguments that weigh in favour of and against the need for a Danish Cohabitation Law.
First of all, a law on cohabitation could help defining who are cohabitees and who are not. Currently, there is no official definition of the cohabitant term, and in 2019 there is a great difference in how couples live their lives—together or apart. Moreover, the definition "marriage-like relationships" differs from law to law. Furthermore, the unequal right to social security has been a political problem in Denmark, as it was firstly problematic for the municipalities to judge who were cohabitees and who were not, and secondly, it seemed unfair to put cohabitees and spouses on equal terms in

areas that would worsen their financial situation without change of the areas they could benefit from.

As for the ownership of assets, the greatest problem is the unclarity of the legal position. The legal basis of this field is general property law, but case law shows that the judiciary is unsure about the legal position as well. The regulation could be a paragraph in some of the property laws or in special legislation. However, from a more individualistic point of view, applying general property law seems logical—although it is more complex—because the cohabitees are still individual legal persons.

Addressing financial inequality between cohabitees through unjust enrichments, written legislation could be a replacement for the principles derived from case law about special unjust enrichments for cohabitees. If the suggested rule of Lund-Andersen's draft for a Cohabitation Law § 8 is implemented, it may make financial contributions less important and establish a claim from the facts of the case. A paragraph upon compensation and remunerations (*godtgørelsesbeløb*) could be a useful tool in clarifying the legal position about unjust enrichments and remunerations in case of financial inequality between cohabitees.

Cohabitees with children may also stand in an unlucky situation, for example if the family home is owned by a parent that does not receive custody over the child. This may put a lot of emotional stress on a child, as the other parent will have to bring the child along. This could also be prevented with a Cohabitation Law or a paragraph in other legislation in order to secure the interest of the children.

Finally, it is unsure, whether there is an urgent requirement for a complete Cohabitation Law at this moment. However, some of the suggested paragraphs in Ingrid Lund-Andersen's draft for a Cohabitation Law could be useful in clarifying the legal status of cohabitees in the area of compensation rules.

The Finnish Report

1. Status quo of unmarried cohabitation in Finland

During the last decades the number of people cohabiting in an informal relationship has increased in Finland similarly to many other European countries. This trend raised the question of whether cohabitation should be regulated and to what extent.[1] However if we look at recent statistics in 2017 the number of cohabiting couples began to decline after having been slowly increasing in recent years. As in the previous year, the relative share of cohabiting couples in all families was 23 per cent. Most of cohabiting couples are without children 15 per cent. Cohabiting couples with children now make up eight percent of all families.[2]

The regulation of cohabitation is relatively a recent development in Finnish law. The legal situation of unmarried cohabitees is mainly regulated by the Finnish Act on the Dissolution of the Household of Cohabiting Partners[3], entered into force on 1 April 2011. As the name implies, it regulates only issues related to the dissolution of the joint household when an informal partnership comes to an end. Unlike the Finnish Marriage Act, the purpose of the Cohabitation Act is not to regulate comprehensively every aspect of cohabitation. In Finland it was decided to enact the Cohabitation Act because cohabitation is regular and many cohabiting families also have children. The Legal Affairs Committee *(lakivaliokunta)* noted the need for legislation is based on the fact that the legal situation, based on unrecorded general civil law principles and case law, is only at a satisfactory level in terms of clarity, comprehensibility and predictability. The fact that the current legal situation is largely dependent on unwritten provisions may also, in practice, create a high threshold for the weaker party to claim his or her rights.[4] A general definition of cohabitation is a relationship where two spouses live together but are not married to each other. The condition of a person to not be married is included in the definition of "a partner in cohabitation" by the Cohabitation Act. Thus, a person shall not be married in order to be considered a

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1 Ministry of Justice of Finland. *Yhteistalouden purkaminen avoliiton päättyessä. Yhteenveto kansalaispalautteesta. Lausuntoja ja selvityksiä 2009:10, Oikeusministeriö.* Available online: <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/76454/omls_2009_10.pdf?sequence=1&isAllowed=y> (accessed June 17 2019).

2 Suomen virallinen tilasto (SVT): Perheet [verkkojulkaisu]. ISSN=1798-3215. Vuosikatsaus 2017, 1. Lapseton aviopari on yhä yleisin perhetyyppi . Helsinki: Tilastokeskus. Available online:
http://www.stat.fi/til/perh/2017/02/perh_2017_02_2018-12-05_kat_001_fi.html (accessed November 21 2019).
Announcement of the Annual Report on Families 2018, dated 21.11.2019, will be postponed. The data will be released in January 2020.

3 Later referred to as "the Finnish Cohabitation Act".

4 LaVM 23/2010 vp - HE 37/2010 vp Available online:
https://www.eduskunta.fi/FI/Vaski/sivut/trip.aspx?triptype=ValtiopaivaAsiakirjat&docid=lavm+23/2010 (accessed November 21 2019).

cohabiting partner for the purposes of the Act.[5] Section 3 of the Cohabitation Act further defines cohabiting partners as "partners who live in a relationship (*cohabiting partnership*) in a shared household and who have lived in a shared household for at least five years or who have, or have had, a joint child or joint parental responsibility for a child." Cohabiting partnerships with duration of less than five years or without children remain subject to the existing legal regime. From the point of view of property law, cohabitees are thus divided into two groups (regulated cohabitation and unregulated cohabitation), which, in the light of the clarity and comprehensibility of the legal situation, cannot be considered as an ideal outcome. However, the Legal Affairs Committee supported the introduction of a minimum duration because it considered that there was no need to extend regulation to short-term or experimental cohabitation for law enforcement purposes. The five-year time-limit is supported by the fact that cohabitation, which has lasted so long, can be considered to have resulted in joint ownership of property, joint use of money and division of labour, such that the proposed provisions can be considered necessary.[6] In Finland, cohabiting relationships are not registered with any authority. Cohabitees have no maintenance liability towards each other, they have no right to inherit from each other and they cannot receive any pension upon the death of their partner.[7] Yet the legal provision can be waived, and these rights may be obtained by the partners upon reaching a mutual agreement[8].

Other laws and administrative regulations may have binding effect on the way legal relationships are regulated during and at the termination of cohabitation. The extents to which these laws regulate a cohabiting relationship depend on the very definition of cohabitation and its application for the purposes of these laws. Some legal provisions refer to the legal definition of a cohabiting partner given by the Cohabitation Act[9]. On the contrary, the definition of cohabitation may be different from law to law. To name one the minimum time required to establish a legal cohabitation by the laws regulating social care differs from those regulating other fields of law[10]. Sometimes there is no specific time limitation, and it is sufficient that the nature of the cohabitation is

5 Act on the Dissolution of Household of Cohabiting Partners 26/2011, section 3 *(laki avopuolisoiden yhteistalouden purkamisesta)*.

6 Report of the Legal Affairs Committee, Parliament of Finland, LaVM 23/2010 vp - HE 37/2010 vp Available online: https://www.eduskunta.fi/FI/Vaski/sivut/trip.aspx?triptype=ValtiopaivaAsiakirjat&docid=lavm+23/2010 (accessed November 21 2019).

7 The InfoFinland website is published by the City of Helsinki, and it is funded by the state and the InfoFinland member municipalities. <https://www.infofinland.fi/en/living-in-finland/family/common-law-relationship> (accessed June 17 2019).

8 Act on the Dissolution of Household of Cohabiting Partners 26/2011, section 2 *(laki avopuolisoiden yhteistalouden purkamisesta)*.

9 This is the case regarding the Finnish Code of Inheritance 27/2011 section 2 *(perintökaari)*.

10 The Finnish Inheritance and Gift Tax Act 378/1940, section 11 *(perintö- ja lahjaverolaki)*.

deemed continuous[11]. The National Pensions Act, the Social Assistance Act and the Health Insurance Act apply to cohabiting partners, who are not married to each other, and cohabit in joint household in circumstances akin to marriage.[12] There are specific legislative provisions where laws other than family law apply in cohabitation.
In principle, entering into cohabitation does not require age of majority. If one of the cohabiting partners is a minor, it does not prevent him or her to be a cohabitee. However, according to the Finnish Guardianship Services Act (*Laki holhoustoimesta 442/1999*) when a minor cohabitee wants to enter into an agreement with his or her partner, it may require that his or her legal guardian signs the contract.[13] A cohabitee does not acquire a right to inherit unless there is a will made for them. However, the Inheritance Code has established a right to get support from the estate of the deceased partner.[14] When applying each law, it must be ascertained whether the persons are "cohabiting partners" within the meaning and for the purposes of that law. If so, they are subject to the provisions of that law. If not, the provisions do not apply.

2. Joint ownership of assets—Circumstances under which it applies

As a general rule, property is acquired by the person who was a party to the sales contract or agreement. This general rule is known in Finland as *nimiperiaate* ("name-principle").[15] A party to a sales contract is presumed to be the owner of the property, unless the contrary is proven. According to the Finnish legal system, the owner is considered to be the person who has the right to acquisition to a property. A title to property can be acquired by sale, trade, gift, or other conveyance. The name-principle, in turn, sets a strong presumption as to who has this right to acquisition. However, this presumption may be rebutted. Therefore, the ownership is always based on the right to acquisition, not the name-principle.
Finnish family law has long presumed movable, personal property bought by a spouse to be co-owned, but this presumption has not been applied analogously to cohabitees until the second decade of the new century.[16] The Finnish Act on the Dissolution of the Household of Cohabiting Partners (Cohabitation Act) passed on 2011 defined the circumstances under which two persons are considered cohabiting partners and regulated the ownership of their assets with the limitation of having effects only at the

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11 The Finnish Act on the Protection of the Livelihood of Unemployed Persons 1290/2002 section 7 paragraph 1 *(työttömyysturvalaki)*.

12 The Finnish National Pensions Act 568/2007, section 5 (repealed 13.1.2017/10) *(kansaneläkelaki)*; The Finnish Health Insurance Act 1224/2004, section 4 *(sairausvakuutuslaki)*; the Finnish Social Assistance Act 1412/1997, section 3 *(laki toimeentulotuesta)*; the Finnish Act on a General Housing Allowance 938/2014 (*asumistukilaki)*.

13 Salla Silvola, National Report: Finland (January 2015), p. 2.

14 The Inheritance Code 40/1965, chapter 8 section 2 *(perintökaari)*.

15 John Asland and others, Nordic Cohabitation Law, p. 60.

16 Ibid. p. 61.

common household's dissolution.[17] It is important to note that the aforementioned legal provision does not extend rights and duties of married couples to cohabitees - for instance cohabitees are not required by law to maintain each other.[18] Similarly, unmarried persons do not have a right akin to a marital right to each other's property. In addition to that, Cohabitation Act provisions are usually not mandatory, and cohabitees can agree mutually to derogate from the provisions - exercising their freedom of contract.[19] Cohabiting partners' disputes over property are resolved by applying the general rules of property law; however, as previously mentioned, property disputes arising out of the dissolution of cohabitation are resolved using the provisions of the Cohabitation Act. The Act extends family law's presumption of co-ownership of movable assets to cohabiting partners unless they have expressly agreed on the contrary or so indicated by the circumstances.[20]

Acquiring immovable property - and some other assets such as cars, boats and motorcycles - usually entails some kind of formal registration that gives a strong presumption of ownership; hence, whoever is registered as the owner of that property is deemed to be its owner. The Cohabitation Act is silent on the joint ownership of immovable assets by cohabitees and the owner of a property can freely dispose of it "even when the property that is being disposed of is used as a common home of the family".[21] Partners in a common household can become joint owners of immovable assets only by acquiring and registering the property jointly or showing in court the intention to buy the property jointly.[22]

Yet case law has given many examples where courts have recognised co-ownership obtained by cohabitees regardless of the type of disputed property, and regardless of whether formal requirements were met.[23] The Supreme Court - when solving issues in relation to the ownership of property between former cohabitees - has not limited its analysis to the title, but also considered the intention of the partners and the payments made by them.[24]

In case KKO:1992:48, the Supreme Court was called to resolve two former cohabitees' dispute over the ownership of two cars. The two acquired the cars together and made payments jointly. However, the vehicles were registered under the name of one cohabitee only. The Court took the parties' intention into consideration and found their joint efforts in buying the cars to be sufficient ground to rule in favour of common ownership.[25] This decision is particularly important when considering that the name principle has been set aside by the circumstances of the actual case - and specifically to honour the common intention of the cohabitees. In an earlier case,

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17 The Finnish Act on the Dissolution of the Household of Cohabiting Partners 26/2011.

18 Tuulikki Mikkola, Family and Succession Law in Finland, p. 54.

19 The Act on the Dissolution of the Household of Cohabiting Partners 26/2011, section 2.

20 Ibid. section 6.

21 Tuulikki Mikkola, Family and Succession Law in Finland, p. 54.

22 Salla Silvola, Q26.

23 John Asland and others., Nordic Cohabitation Law, p. 62-64.

24 Salla Silvola, Q28.

25 *KKO:1992:48* [1992] Supreme Court *(Korkein oikeus)*.

KKO:1988:85, the Supreme Court ruled against the cohabitee who claimed co-ownership of a property. One cohabitee owned a farm upon which the cohabitees had built a detached house where the couple lived with their children. At the time of the dissolution of their cohabitation, the claimant - the other cohabitee who was to leave - claimed co-ownership of the house, arguing that the house was used as their family house, and that he had contributed to its construction and maintenance. The Supreme Court judges rejected the arguments because, in their view, they were insufficient to prove the parties' common intention at the time of acquisition to own the property jointly.[26] KKO:1985-II-167 The cohabitants had purchased the shares in the housing company as joint property by paying the purchase price with the funds they had each received by selling the shares of the housing company that they had previously owned. The absence of any other agreement indicates that they had the intention of owning a dwelling in proportion to their performance. Living together for a few years, together with the resulting costs, may not, in view of the high age of the parties concerned, justify the purpose mentioned above. The minority of members of Supreme Court *(oikeusneuvokset)* considered that A and B have not expressly agreed on the distribution of the ownership of the shares in question. There is no other direct explanation which would suggest that they intended the ownership to be distributed in a particular way. It has been a matter of getting a shared dwelling for 'cohabitation'. Such common living, which is usually intended to be permanent, has common costs other than the costs of acquiring and living in a dwelling. Therefore, in the absence of any other explanation, it is not possible to deduce the intent of the unmarried partners from the amount of money invested in the jointly acquired dwelling.[27]

As it generally happens in a relationship, one of the partners will contribute economically to the household, and that partner should - at the dissolution of the household - be entitled to compensation for his or her contributions. Section 8 of the Cohabitation Act states that a cohabitee is entitled to compensation at the moment of the dissolution of the household provided that separation of property based solely on the ownership would result in an enrichment of the other cohabitee. The provision then expressly enlists three circumstances that constitute a contribution to the benefit of the household: "Work done by one cohabiting partner for the benefit of the shared household or property owned by the other", "use of funds for the shared household" and "investment of funds by one cohabiting partner in property owned by the other".[28] The list is not to be considered exhaustive as the law also includes "any other similar contribution".[29] Contributions deemed to be insignificant do not entitle any compensation. This topic will be discussed in more detail in the next chapter.

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26 *KKO:1988:85* [1988] Supreme Court *(Korkein oikeus)*.

27 *KKO:1985-II-167* [1985] Supreme Court *(Korkein Oikeus)*.

28 The Finnish Act on the Dissolution of the Household of Cohabiting Partners 26/2011 section 8 (Laki avopuolisoiden yhteistalouden purkamisesta).

29 Ibid.

3. Grounds to claim compensation upon dissolution

3.1 Intro

The dissolution of an unmarried cohabitation can happen in three ways. Firstly, the cohabitation breaks when the cohabitees cease living together permanently. A temporary change - such as moving abroad for a fixed term or living temporarily in a different city for studying purposes - does not constitute dissolution. This also means that staying for a prolonged time in a hospital; prison etc. does not break the cohabitation. The effects of separate living on the ending of the cohabitation have been weighed in the case KKO:2019:69. A and B had been cohabiting at least since 1989. The cohabitation ended in 2012, after which there has been a separation of assets. A and B had been living apart for seven months, from December 2007 to July 2008, due to the breakdown in the relationship, and the parties had conflicting perceptions of their relationship during the break. Neither partner had requested a separation of assets during the interruption, which contributed to the temporary nature of the separation. A had been living in his/her own flat for about seven months. This could not be considered a short separate living. On the other hand, given the duration of the cohabitation of about 18 years before the interruption, separation could not be regarded as long enough to clearly demonstrate the intention of the parties to move apart. A's apartment had not been purchased during or as a result of the interruption. Thus, A's housing arrangement was not a strong indication of the purpose of the termination of the partnership. The ending of the relationship and the purpose of the cohabitation were supported by the fact that A had been dating with a third person for about three months during the breakup. On the other hand, this issue was not decisive in the overall consideration, since the relationship had begun again relatively shortly thereafter and continued for four years. No further analysis of the parties' joint economy had been submitted during the interruption. It was not alleged that the interruption had an effect on the family's finances or the care and care of the common child. In any event, A had continued to work for B`s company for this period. It did not appear from the statements of colleagues or other witnesses at the hearing that A or B told the others that they had moved permanently. The majority of Supreme Court members considered the above circumstances as a whole, assuming that the A and B cohabitation had not been terminated due to an interruption, and that the cohabitation commenced in 1989 therefore continued until its end in May 2012. Minority of legal counsellors *(oikeusneuvokset)* took a different view. In their view, it was undisputed that the condition of cohabitation required for cohabitation was not fulfilled during the intervening period, whereas A, claiming cohabitation, bore the burden of proving that the cohabitation continued apart. On the basis of the overall consideration, it was considered that the aspects supporting the dissolution and permanent separation of the cohabitation were weightier than the continuation of the cohabitation. This conclusion was supported, in addition to A's months of dating, by the prolonged duration of the interruption. Nor has A provided evidence of the parties' joint economy during the interruption. On these grounds, it was considered that the A and

B cohabitation ended in December 2007, when the unmarried partners were considered to be permanently separated.[30]
Secondly, cohabitation may break through the death of a cohabitee. Thirdly, a marriage breaks cohabitation. Usually the unmarried cohabitees end up marrying each other; however, marriage breaks the cohabitation even if an unmarried cohabitee marries an outsider.[31]
The way the cohabitation ends is not the only thing that affects the division of property and thus the possibility of compensation. The type of cohabitation - be it regulated or unregulated cohabitation - also affects the division of the property. If the cohabitees have children, they will also be considered. Here, the situation differs depending on whether the paternity of the father has been confirmed and whether the father has been appointed as the child's legal guardian or not. The existence of such a child matters especially when it is time to consider whether or not the cohabitation falls into the scope of the law on cohabitation. All these situations will be addressed in further detail below.

3.2 Basic Principles

In Finland, the basic principle regarding the ownership of the property is the name principle (*nimiperiaate*). It is commonly seen that a person who lawfully acquires the item in question is the owner of the gained assets. Normal ways to acquire an asset are through purchase, exchange, gift or inheritance.[32] It works similarly in marriages. According to the principle, a registered item belongs to the one whom it is registered. Unregistered items belong to the cohabitee who has bought or in other ways acquired the item in question. As most ordinary items are unregistered items, a large quantity of items fall into this category and it can be difficult to prove who owns what in that scenario. Of course, this does not mean that the cohabitees cannot become joint owners of assets – this question was addressed above.
In Finnish law, cohabitation is a very loose union between two people, and - once it dissolves - each half gets what belongs to them according to the name-principle. Sometimes this might result in an unreasonable result, in which cases the unreason ability of the solution can be addressed, while in other situations one or the other member of the cohabitation might be entitled to compensation. The law on the dissolution of cohabitations dictates in its third chapter on what basis this compensation must be paid. It is important to note that, unlike in marriage, the fact that one cohabitee is significantly wealthier than the other means nothing for the consideration of compensation. Compensation is neither a form to equalize the difference in wealth by the parties nor atonement for breaking the relationship, but a way to secure that cohabitees cannot enrich themselves at the expense of their counterparts.[33]

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30 *KKO:2019:69* [2019]Supreme Court *(Korkein oikeus).*
31 Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 263-267.
32 Tapani Lohi, *Aviovarallisuusoikeus* (Talentum 2016), p. 33-35.
33 Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p.302-304.

3.2.1 The law on the dissolution of cohabitation

According to its 3rd paragraph, the law governs cohabitations in which the cohabitees have lived together for at least five years, have or have had a child of their own together or have or have had a child in their custody together. A married person cannot be in a cohabitation. However, it should be noted that the law on the dissolution of cohabitations is entirely dispositional, according to the 2nd paragraph. The exception states that the cohabitees cannot bindingly give up certain rights. In other matters cohabitees can make a binding agreement on whether the law shall govern their cohabitation or not. The agreement can be made before or during the cohabitation, and it has no defined form in which it must be made, meaning it can be made either in spoken or written format. The cohabitees can also alter an existing agreement on cohabitation later.[34]

The 8th paragraph of the law on the dissolution of cohabitations states four different scenarios in which another cohabitant is entitled to compensation. They are all situations in which cohabitants have assisted their counterparts by their own effort or wealth to retain shared wealth or to accumulate more wealth in a way that the counterpart stands to gain unjust enrichment on dissolution.

The first scenario where a cohabitee is entitled to compensation is where a cohabitee has worked for either the jointly owned property or the property of the other cohabitee. The term work here can be interpreted in many ways, but the governmental proposal for the law has defined its meaning with examples. For example, taking care of the children constitutes such work, because it gives the other cohabitee a chance to focus on career and earn wealth, thus gaining unjust enrichment on the expense of the caretaker. Other examples include substantial renovations and repairs done - to the benefit of either cohabitees or only the other - and caretaking of the other cohabitee. Normal actions, such as housekeeping, are not considered as a work that can be compensated, unless the said work has been substantially one-sided or lasted for an especially long period.[35]

The second and the third scenarios are very similar in nature. The second is that a cohabitee uses his or her wealth for the common good of their joint wealth, whereas the third is that a cohabitee uses his or her wealth for the good of the other cohabitee. If instead of doing manual labour, the cohabitee pays for repairs to be done on assets owned only by the other cohabitee, this would form a basis for a compensation as well. If the asset in question is owned jointly, no cohabitee is entitled to compensation.[36]

The fourth scenario includes “other actions comparable to the previously listed ones”[37]. This category is meant to fill potential gaps in the legislation. In relation to unregulated cohabitation, the Supreme Court of Finland has ruled that inability to use jointly owned assets - such as the previous home of the cohabitees - can form a basis for compensation in certain situations. It would be fair to assume that this would form

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34 Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p.294-296.

35 Government proposal, 'HE 37/2010' (2010), p. 23 *(hallituksen esitys).*

36 Ibid.; Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 280-284.

37 The law specifically says “muu näihin verrattava toiminta”, the translation is not official.

a basis for compensation in regulated cohabitations as well and fall under the fourth category.

It should be emphasised that work or wealth put into jointly owned assets does not in itself constitute basis for compensation - the other cohabitee must in turn gain unjust enrichment. If the other cohabitee did not gain unjust enrichment, there is no basis for compensation. The maximum amount of compensation that can be gained is equal to the wealth the cohabitee lost when investing money or work put into the assets owned by the other. For example, if cohabitee repaired a house belonging to the other cohabitee, he or she is entitled to compensation when the value of the house has improved due to his or her work. If the price in value has nothing to do with the repairs, and is tied to other events, such as sudden interest in houses on the area where the house in question is located, he or she is not entitled to compensation. If there is no causality between the work done or the money invested and the increase of the value, there is no basis for compensation.

The law also states that if the unjust enrichment is not considered significant, the cohabitees lose grounds for their compensation. According to the governmental proposal for the law, the reason for this is to avoid having insignificant cases taken to court. If the amount of wealth in question does not have a meaningful impact on the economic well-being of the cohabitees, the sum can be considered insignificant.[38]

If both cohabitees have put work and wealth into their joint assets in equal amounts, neither party is entitled to compensation, because neither party has enriched themselves at the expense of the other. Only if the work or wealth put into joint assets is unbalanced between the cohabitees can compensation be regarded as a just response.[39]

The 9th paragraph states that the cohabitees can agree on the compensation or a claim can be made to the executor of the dissolvent. This actually means that an agreement made by the cohabitees forms a basis for compensation.[40] The agreement can be made before, during or after the dissolution of the cohabitation. Even though the cohabitees can make agreements on compensation, the monetary amount of the compensation must be based in law. The cohabitees cannot make agreements on compensation that exceeds the amount of compensation required in the law in a way that the agreement would bind the creditors of the cohabitees.[41]

The claims for compensation cannot be made during the cohabitation. The losing side can demand compensation only after the cohabitation has dissolved. The cohabitees can instead make an agreement on the compensation as it was previously stated, and they can pay it in advance, thus removing the need for filing a claim.[42]

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38 Government proposal, 'HE 37/2010' (2010), p. 22-23; Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 302-304.

39 Ibid., p. 303-306.

40 Government proposal, 'HE 37/2010' (2010), p. 23-24. *(hallituksen esitys).*

41 Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 303-306.

42 Ibid. p. 301.

3.2.2 Cohabitations that fall outside the scope of the legislation

As it was previously stated, not all cohabitations are governed by the law on the dissolution of cohabitations. If the cohabitation has lasted for less than five years or the cohabitees have not had a child or when such cohabitation dissolves, disputes related to property are usually dealt with via negotiations. Usually, negotiations go through peacefully, but sometimes the cohabitees are unable to reach an agreement on how property shall be divided. In such situations the property is divided according to the general civil law principles used in Finland. Any possible compensation is also based on such principles. It is also possible to settle disputes about compensation in arbitration, but because the monetary interest is usually low in unregulated cohabitations, and because the costs of arbitration are high, this option has remained relatively unutilised.[43]

One of the key features in Finnish civil law is the principle of return of unjust enrichment *(rikastumiskielto)* - a principle that also found its way to the law on the dissolution of cohabitations. Even though it will not have the impact of law in unregulated cohabitation, it does have the impact of a very strong and central principle. Thus, the situations in which the compensation would be justified are largely the same as in regulated cohabitations.[44] The law on cohabitation is not so impactful regarding the scope of the compensation. Even if the cohabitees have agreed not to be regulated by the law on the dissolution of cohabitations, these basic principles ensure that a ground for compensation can be found in cases of unjust enrichment. The main difference between these forms of compensation is that a claim based on the law on the dissolution of cohabitations can be filed at any time whereas a claim in the basic civil law principles must be filed within ten years of the deed on which the compensation is based.[45]

3.3 Case Law

Even though the written law and the drafting materials used in making new laws have a central role in the Finnish legal system, focusing only on the written law offers a limited perspective to cohabitations. Case law in Finland has filled various gaps in the legislation and defined the scope of the written law. Given the high amount of Supreme Court rulings in the field, it seems safe to say that the case law holds a very important position in the interpretation of the written law.

One of the finest examples of case law on the field is the Supreme Court's decision KKO 1993:168. In this case, A and B had lived in cohabitation for 27 years. They had three children when their cohabitation suddenly broke due to disputes between them. A had used most of her wealth from a secure job to carry the family through hard times. This ensured that B could, in the future, accumulate more wealth than A. The burdens and costs of the family had not been divided equally among the cohabitees. The Supreme Court ruled that it was not A's intention to allow B to accumulate wealth at her expense in a situation where the cohabitation would break. Because of this, the

43 Ibid. p. 280-284.

44 Ibid.

45 Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 303-306.

court decided that B should compensate A for her efforts and wealth that she put in for the common good of the cohabitation. The moderate compensation was decided even though the claim A had made did not directly refer to the justifications for compensation that had been written in law.[46]

A very similar case was addressed with the Supreme Court's decision KKO 1992:48, in which the cohabitees had bought a car together and registered it under the name of only one cohabitee. According to common legal principles used in Finland, the car effectively belonged to only that cohabitee. Nevertheless, because the car had been bought jointly - and because one cohabitee would undoubtedly benefit at the expense of the other, should the car only be given to one of them - the court decided that the asset was actually owned jointly. As a result, the cohabitee who had the car registered had to compensate the other cohabitee for not giving her access to the car, effectively disabling it from her use.[47]

Other key cases are the Supreme Court decisions KKO 1988:27 and KKO 1988:28. The cases have many similarities: The parties are in cohabitation; one cohabitee builds or spends wealth to build a building on a land owned by the other and the cohabitation breaks. The cohabitation in the 1988:27 case ended because the cohabitees had drifted apart, while in the 1988:28 case it was because of the death of a cohabitee. In the first case the court ruled that the contributing cohabitee was entitled to a fair compensation because the resources put into the building were substantial, and because he had lost all possible remuneration from the work he had performed - as he was no longer able to live in the house he had built. The court ruled that he was entitled to a fair compensation. The court took into consideration that the parties had been in a close relationship at the time of the construction.[48] In the latter case, the court ruled that a cohabitee who had put his wealth into the building was entitled to compensation because he - as the working cohabitee - had not intended to give the substantial wealth he put into the building as a gift to the other. He had contributed under the assumption that he would get remuneration from it through their lasting cohabitation, dissolved due to the death of the other cohabitee. The cases showcase the nature of the compensation well. At the time the cohabitees had lived together, one cohabitee had put resources into assets owned by the other cohabitee. At the time the transfer of wealth was meaningful, but due to subsequent change in conditions the basis of the transfer had been lost. Another thing that should be mentioned is that the Supreme Court avoided using the term “unjust enrichment” in these cases. However, the term has subsequently been used in similar cases, thus the linguistic distinction has no direct effect in Finnish case law.[49]

A different result occurs when the unjust enrichment does not appear to have occurred at the expense of the other cohabitee. In case KKO:2019:69 the Supreme Court considered that both parties had contributed to the joint home. A has had a

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46 Ibid.; p. 253*KKO 1993:168* [1993] Supreme Court *(Korkein oikeus*).

47 *KKO 1992:48* [1992] Supreme Court *(Korkein oikeus).*

48 *KKO 1988:27* [1988] Supreme Court *(Korkein oikeus).*

49 Olli Norros, *Velvoiteoikeus* (Sanoma Pro 2012), p. 94-95.

greater responsibility for the care of the home and children, while B has, among other things, been responsible for the cost of living and has also financed A's share in the housing stock. A has been employed by B`s company during their cohabitation. The Supreme Court notes that the work contribution made by one spouse to the business of the other spouse may in itself constitute ownership to the property owned by the other if the business owner obtains an undue advantage from the work contribution. However, according to the information provided, A received a higher salary than other persons in comparable positions and received a significant pension benefit. In addition to business, the improvement in B's wealth position has also been shown to be partly due to B's investment activities. The Supreme Court found that it had failed to show that B had obtained an unjustified advantage at the expense of A. Accordingly; A was not entitled to compensation under Article 8 of Cohabitation Act.[50]

Expiration of claims is a very important gap in the legislation that has been fixed through case law. The case KKO:2010:66 was settled in the Supreme Court after a cohabitation had broken apart due to death of one cohabitee. The heirs of the deceased cohabitee were allowed to make a claim for compensation on the basis of unjust enrichment as long as the claim was made within ten years.[51]

One of the most recent cases in the Supreme Court is the decision KKO 2018:5. In that case, the father of a cohabitee had performed substantial renovations to a jointly owned asset. After the cohabitation broke, the cohabitee was not entitled to compensation for the work her father had done. The case reflects the *inter partes* nature of compensation: In order for compensation to be viable, the enrichment of assets must come from a cohabitee. However, the court in this situation ruled that it does not matter whether the father of the cohabitee would have given the sum of money to a cohabitee in order to repair the house or whether he did renovations himself, as there is no basis for treating the scenarios differently. The main question was, whether the father performed the renovation as a gift to his daughter, in which case the daughter would be entitled to a compensation, or whether he did it for the common good of both cohabitees, in which case there would be no basis for compensation. The father had not specified at any point to whom he was actually working and none of the parties had ever even discussed the matter. The court considered the subjective side of the case, where the evidence was the father-daughter relationship, and the objective side of the case, where the evidence was the target of the renovation and the circumstances in which the renovations had been done. The court ruled that the objective side was more important, denying any possibilities for compensation.[52]

However, the court decision does have some major problems. As it has opened the possibility for compensation in situations where relatives have worked for cohabitees, the ruling can have several major implications in common situations, for example when grandparents assist the families of their children in various ways, for example, in

50 *KKO:2019:69* [2019]Supreme Court *(Korkein oikeus).*

51 *KKO 2010:66* [2010] Supreme Court *(Korkein oikeus).*

52 *KKO 2018:5* [2018] Supreme Court *(Korkein oikeus).*

taking care of the children. With this rule, the cohabitees would have to work as bookkeepers for all the assistance provided to them by friends and family. It can be questioned whether this was the intended meaning of the resolution.[53]

In the Finnish legal system, the role of the case law is not as emphasised as it is in common law systems. The biggest weight is on Supreme Court decisions, but cases solved in lower courts also hold some weight. The case Rovaniemen HO 2009:2 from the Court of Appeal of Rovaniemi is one such case. In the case, cohabitees A and B had worked together on a farm which belonged to B. The income from said farm was put to a jointly owned bank account, but some of the money was later moved to B's private account. The income was mainly used to improve the infrastructure of the farm and to upgrade the equipment. The cohabitees received EU subsidies on a bank account owned by B. Other subsidies, such as child benefit, were also paid to B's account. When the cohabitation broke, the court had to decide whether the property should be considered jointly owned or whether A was only entitled to compensation. The court decided on the latter, meaning that B was required to pay a rather sizeable amount in compensation to A.[54]

While the case in Rovaniemi Court of Appeals is one of the more complicated ones in terms of substance, similar cases have been solved in other courts of appeal. For example, the case S 14/2512 solved in the Helsinki Court of Appeals had similarities, but also two key differences. Firstly, the cohabitees had worked in a company, and secondly, the cohabitation ended due to the death of a cohabitee. Despite these differences, the court ruled that the surviving cohabitee was entitled to compensation. This means that the form in which the cohabitees work together is not decisive, and thus all types of jointly done work could fall into the scope of compensation. This seems a rather reasonable interpretation of the law.[55]

4. Cohabitation agreements—frequency, limitations, typical clauses

4.1 Freedom of contract in cohabitation

In Finland, there is contractual freedom between cohabitees, which allows them to enter into various agreements on their economic relationship and to seek in advance how to arrange the distribution of their property at the end of the cohabitation.[56] Cohabitees may agree, for example, that a summer cottage purchased from the parents or other relatives of one cohabitee is left to that cohabitee at the dissolution of cohabitation. It may also be agreed beforehand how the cost of renovating a jointly acquired dwelling will be reimbursed in the event of the dissolution of cohabitation if,

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53 Tuulikki Mikkola, 'Avoliiton Aikaiset Panokset Ja KKO 2018:5: Havaintoja Hyvitys Oikeuden Edellytyksistä' (2018) 22 Edilex <http://www.edilex.fi/artikkelit/18889>. (accessed 13 June 2019).

54 *Rovaniemen HO 2009:2* [2009] Rovaniemi Court of Appeal *(Rovaniemen hovioikeus).*

55 *Helsingin HO 2015:1544* [2015] Helsinki Court of Appeal *(Helsingin hovioikeus).*

56 Tuulikki Mikkola, *Yhteisomistus* (Alma Talent 2017), p. 155; Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 271.

for example, one cohabitee has contributed more than the other to the cost of the inheritance.[57] As a cohabitee may also be under the age of 18 i.e. a minor, he or she may need a trustee to enter into a contract.[58]

Cohabitees are not liable for maintenance obligations to each other.[59] If the partners have entered into an agreement on maintenance but this is not happening for one reason or another, the other cohabitee can bring the other to court.[60] However, due to the inherent partnership assumption, cohabitation involves both participating in the common economy.[61] Since there is no maintenance obligation between cohabitees, there is no obligation to pay maintenance to the former cohabitee. However, the law does not prevent voluntary maintenance from being granted to a former cohabitee. An agreement whereby the cohabitee agrees to give up part of his or her property to his or her cohabitee in the event of a termination of cohabitation is to be treated as a gift depending on the value of the property. The pledge is also binding on the pledger if given along the document to the pledgee.[62]

Cohabitees' distribution agreement may specify the property to be covered and the ownership of the property, the principles to be followed in the distribution of movable property, the debt relationship and the compensation for the use of a shared dwelling after the dissolution of cohabitation. There is no obligation to enter into such agreements.[63] If the term of the contract for the dissolution of the cohabitation is unfair, or if its application would lead to it being unreasonable, it may be mediated under section 36 of the Contracts Act 228/1929 in the same way as other property contracts.[64]

Cohabitees can, for example, make bonds and deeds with one another and give each other gifts.[65] If a loan is granted to a cohabitee, it is advisable to draw up a bond between the cohabitees. Creating a standard formula and paying down debt is important if a cohabitee wants to avoid for example unexpected tax consequences. A loan between cohabitees can be assessed by the tax authorities as a gift, unless the loan has a real repayment purpose. For example, debt forgiveness or excessively long payment terms can lead to a loan being valued as a gift. In this case, the gift tax will be assigned. As a result, the loan will be covered by a bond evidencing a genuine debt obligation. The loan does not have to be interest-bearing, but the repayment schedule must be realistic for the tax authorities. Cohabitee should be prepared to prove the repayment. In such a situation, the whole is assessed on the basis of the actual circumstances and not on the basis of formal considerations. The conversion of an

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57 See *KKO 2010:66* [2010] Supreme Court *(Korkein oikeus)*.

58 Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 266.

59 Ibid. p. 274.

60 Aulis Aarnio and Urpo Kangas, *Perhevarallisuusoikeus* (Talentum 2010), p. 245.

61 Government proposal, 'HE 37/2010' (2010).

62 Ibid. p. 244.

63 Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 273 - 274.

64 Eva Gottberg, *Perhesuhteet Ja Lainsäädäntö* (Painosalama Oy 2011), p. 82.

65 Eva Gottberg, *Perhesuhteet Ja Lainsäädäntö* (Painosalama Oy 2011), p. 82; Tuulikki Mikkola, *Yhteisomistus* (Alma Talent 2017), p. 159.

indebtedness relationship into a gift for tax purposes is assessed on a case-by-case basis. The debt will remain in effect beyond the cohabitation or death of the other cohabitee.[66]

When it comes to gifts between cohabitees, Gift Promises Act 625/1947 applies in the case of movable property and real estate gifts are regulated according to section 4 provision 2 of the Code of Real Estate 540/1995.[67] Movable property may be donated freely, and the effectiveness of the donation is not conditional to the making of a written deed of a gift or its registration. In order to be effective in relation to third parties, the donated movable property must be handed over to the recipient. According to Gift Promises Act sections 2 and 3 possession has a similar publicity effect with third parties as with legal confirmation of possession of real estate. Under possession, the third party can determine to whom the particular movable property belongs.[68]

It is worth to note that when a cohabitee gives a gift of movable property to the other cohabitee, a special gift announcement must be made in order for the recipient to be protected against bankruptcy and attaching creditors of the gift-giving cohabitee. According to Gift Promises Act section 6 announcement is made to city administrative court.[69] From the gift acknowledgment begins a recovery period, during which the recipient of the gift may have to give up his or her gift for the benefit of the donor's creditors. Regular anniversary gifts are not subject to recovery, which can sometimes lead to an assessment of which gift is reversible and which is not. Case-by-case relationships, as well as the value of the gift relative to the gift-giver's financial position, are decisive.[70] If the donation was made with the intent to defraud the creditors and the recipient was aware of it, there is no time limit for recovery if the recipient is a person close to the donor.[71] Presents in anticipation of death are forbidden in Finland and *mortis causa* legal proceedings for death are always compulsory, i.e. they must be done in accordance with the form of a will.[72]

4.2 End of Cohabitation

4.2.1 Distribution of assets after the end of cohabitation

At the end of cohabitation, the cohabitees can agree on the distribution of assets. The distribution can be done either by agreement distribution (*sopimuserottelu*) or delivery distribution (*toimituserottelu*). Only cohabitees who have lived in a shared household

66 Website of Tax Authority of Finland. Available online: https://www.vero.fi/henkiloasiakkaat/omaisuus/velat_ja_korot/velka_tuloverotuksessa/> (accessed August 1 2019).

67 Tuulikki Mikkola, *Yhteisomistus* (Alma Talent 2017), p. 21.

68 Ibid. p. 109; 115.

69 The register of donation matters is further regulated by Law on certain personal registers of the city administrative court 57/2005, sections 7-9 *(Laki maistraattien eräistä henkilörekistereistä).*

70 Tuulikki Mikkola, *Yhteisomistus* (Alma Talent 2017), p. 115 - 116.

71 Government proposal, 'HE 102/1990' (1990), p. 45.

72 Tuulikki Mikkola, *Yhteisomistus* (Alma Talent 2017), p.118.

for at least five years or who have or have had a joint child or joint parental responsibility for a child, can apply District Court to appoint an executor of the distribution of an estate *(pesänjakaja)* according to Cohabitation Act section 7. Also the successors of the deceased cohabitee have the right to apply court-appointed executor. When cohabitation ends to death of a cohabitee and assets are distributed, it is called estate distribution (*jäämistöerottelu*). However, distribution of assets is not mandatory by legislation.[73] Distribution agreement is a contract between the cohabitees. The agreement must be made in writing and signed by two witnesses without restriction. Since this is an agreement accepted by the cohabitees themselves, the agreement can be challenged in court only on the basis of a formal error.

The delivery distribution is performed by a court-appointed executor of the distribution of an estate. In these cases, executor of the distribution of an estate decides on the contents of the distribution and signs the distribution document. The rules of procedure for share of inheritance shall apply *mutatis mutandis.* According to Cohabitation Act section 10 delivery distribution can be challenged for both form and content errors. Statutory time limit to avoid both agreement distribution and delivery distribution shall be six months from the date of distribution. Since, at the time of dissolution, certain assets may have changed hands, the distribution document, whether signed by the cohabitees themselves or by the insolvency practitioner, acts as the proof of title.[74]

During cohabitation, each cohabitee may purchase, sell or make other decisions concerning their own property without the consent of the other. Cohabitees are not directly liable by law for each other's debts.[75] The exception is shared rent, which is payable by both parties, and can only be terminated jointly even if the lease is in the name of only one cohabitee.[76] If they take out a credit together, they are both responsible for paying the entire debt unless otherwise agreed with the lender. However, the parties may, if they so wish, jointly take up the debt, in which case the joint and several liability shall be based on the terms of the debt and not cohabitation. Often cohabitees also acquire common property, such as household goods. When buying a home, a car, or other valuable property, it is important to agree whether the property is acquired jointly or only by the other cohabitee. The use and sale of jointly owned assets can continue to be decided only jointly.[77]

4.2.2 Inheritance after the death of cohabitee

In Finland, non-family members have no inheritance rights and cohabitees falls to this

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73 Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 296.

74 Urpo Kangas, *Perhe- ja perintöoikeuden alkeet* (Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisuja, 2012), p. 339 - 344; Eva Gottberg, *Perhesuhteet Ja Lainsäädäntö* (Painosalama Oy 2011) p. 68 - 69.

75 Urpo Kangas, *Perhe- ja perintöoikeuden alkeet* (Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisuja, 2012), p. 330.

76 Act on Residential Leases 481/1995 (*Laki asuinhuoneiston vuokrauksesta*); Eva Gottberg, *Perhesuhteet Ja Lainsäädäntö* (Painosalama Oy 2011), p. 89.

77 Act on Certain Joint Ownership Relationships 180/1958 (*Laki eräistä yhteisomistussuhteista*).

category. The only exception is the widow of deceased spouse. Non-family members who have had the closest relationship to the deceased are also excluded from the heir circle.[78] Inheritance is the primary right of direct heir.[79] Thus in terms of preparing for death, agreements must be made in the form of a will, as the surviving cohabitee is not a partner in the estate of the deceased's cohabitee, and as such has no right to participate in the administration of the estate. The cohabitee can only gain from the estate as a creditor or if the deceased has made a will for the cohabitee.[80]

A surviving cohabitee is not entitled to a survivor's pension after the death of his or her deceased cohabitee or the right to remain in the family home. If a cohabitee wants to make sure that the longer living can stay in a common home, they need to make a will. When drawing up a will, it is necessary to take into account that giving the surviving cohabitee a right of possession does not guarantee that he or she will in practice be able to stay in a shared dwelling. This can happen if the first deceased has children who are claiming their compulsory legal share of an inheritance. To pay compulsory legal share of an inheritance, the apartment may have to be sold if the surviving cohabitee cannot afford to pay it.[81] It may be more sensible for cohabitee to grant, for example, right of possession (*hallintaoikeus)* in the will rather than ownership of the dwelling *(omistusoikeus)*. In particular, if one wants to bequeath on the ownership of a dwelling to their cohabitee and to their own children after his or her death, they will have to pay twice the inheritance tax, the first time at the heavier tax rate. In the case of marriage, the widow is usually entitled to a widow's pension, up to a maximum of about half the deceased's earnings-related pension. Cohabitation does not have this right, but the children of cohabitee may be entitled to a child's pension from Social Insurance Institution of Finland *(Kela)*.[82] Cohabitees economy after deceased can be covered by life insurance.

However, if the cohabitees have lived together for at least five years or have or have had a joint child or joint parental responsibility for a child, the surviving cohabitee may be granted a discretionary grant if the survivor's support is necessary to secure his or her subsistence and his or her livelihood due to death of his or her cohabitee.[83] For example, the grant may take the form of a fixed-term access to a dwelling used by the cohabitees. In a rare but possible situation, the longer living cohabitee's grant may violate the compulsory legal share of an inheritance of the direct heirs.[84] When determining the grant to longer living cohabitee, things to be taken into account are the possibility to secure his or her livelihood with his or her own resources, his or her age, the duration of their his or her relationship and other factors according to the

78 Janne Kaisto and Tapani Lohi, *Johdatus Varallisuusoikeuteen* (Talentum 2013), p. 342.

79 Ibid. p.343.

80 Urpo Kangas, *Perhe- ja perintöoikeuden alkeet* (Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisuja, 2012), p. 345.

81 Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 471 - 472.

82 Kela.fi available online: https://www.kela.fi/leskenelake-kuka-voi-saada?inheritRedirect=true (accessed November 21 2019).

83 Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 471 - 472.

84 Aulis Aarnio and Urpo Kangas, *Perhevarallisuusoikeus* (Talentum 2010), p. 278.

Code of Inheritance section 8 paragraph 2 part 4. The claim must be filed before the inheritance.[85] The purpose of the cohabiting grant is not to replace, for example, the livelihood provided by the social security system, but to facilitate the change in life situation caused by the death of the cohabitee. The status of the longer living cohabitee in the event of death of another cohabitee is also influenced by the social welfare regulations of subsistence security, the civil liability system and voluntary insurance.[86]
After the dissolution of cohabitation that has lasted less than five years ending due to death of another cohabitee, the longer living cohabitee is not entitled to assistance from the estate of the deceased partner. However, the heirs of the deceased cohabitee can provide assistance from the estate to the surviving cohabitee, regardless of the duration of the cohabitation. The grant is voluntary in situations outside Cohabitation Act and it does not oblige the heirs of the deceased cohabitee whatsoever. When it comes to situation where heirs give voluntary grant to the surviving cohabitee, it is not considered as grant in the eyes of tax authorities but as a gift for the surviving cohabitee and thus he or she has to pay the gift tax according to second tax category.[87]

4.3 Restrictions on freedom of contract in cohabitation

Cohabitation does not have the same binding force as marriage. Cohabitation is primarily based on informal verbal agreement. Generally, the cohabitees have expressly chosen cohabitation because they do not want the legal effects of marriage to bind their relationship. The law did not seek to create a separate system comparable to marriage but encouraged spouses to exercise their freedom to conclude agreements with each other.[88] However, there are some restrictions on the contractual freedom of cohabiting partners, which cannot be decided by mutual agreement. Cohabitees cannot waive the right to claim property separation pursuant to section 4 of the Cohabitation Act. In addition, the cohabitee may not waive his or her right to apply court-appointed executor of the distribution of an estate under section 7 paragraph 2 of the Act for the purposes of the separation of assets.[89] Issues of a regulatory interest other than the organization of relations between the parties shall also be binding. In this respect, the preparations of the law refer to the form of the distribution document, the procedural rules applicable to the claim for compensation and the provisions on appeal.[90]
By their mutual agreement, cohabitees cannot weaken the position of the third party.[91] Case KKO:2001:23 concerned the protection of a creditor. A and B were cohabiting.

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85 Urpo Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 473.
86 Tuulikki Mikkola, *Lesken Asema Jäämistö- Ja Vero-Oikeudessa* (WSOYpro OY 2010), p. 139.
87 Aulis Aarnio and Urpo Kangas, *Perhevarallisuusoikeus* (Talentum 2010) p. 255.
88 Report of the Legal Affairs Committee, Parliament of Finland, LaVM 23/2010 vp.
89 Tuulikki Mikkola, *Yhteisomistus* (Alma Talent 2017), p. 159.
90 Eva Gottberg, *Perhesuhteet Ja Lainsäädäntö* (Painosalama Oy 2011) p. 20; Government proposal, 'HE 37/2010' (2010).
91 Urpo Kangas, *Perhe- ja perintöoikeuden alkeet* (Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisuja, 2012), p. 375.

A was in arrangement of debt *(velkajärjestely)* and was living in cohabitation in an apartment owned by B. In addition to the actual cost of housing, FIM[92] 382,95 the proposal for a payment scheme had taken into account half of the monthly maintenance cost of A's cohabitee B`s monthly mortgage maintenance costs, FIM 829, in addition to the actual housing cost. X corporation was A`s creditor and opposed the approval of the payment program proposal as proposed. The creditor considered that only the actual cost of living, which was divided between the partners in half, could be considered as an acceptable cost of living for the applicant. For the creditor, it was unreasonable for the applicant to participate in the acquisition of the assets of his or her cohabitee, although the assets were outside the scope of debt settlement. According to the Supreme Court, cohabitees are not liable for each other's debts and since mortgage is the sole debt of B, A is not at all liable for the debt. As a result, A's imputable expenditure does not include the imputed interest on B's debt and repayments. To take these costs into account, even in part in A's payment program, would effectively mean that A's own creditors' chances of obtaining payment would be reduced, since A's imputed payment margin would be reduced by the amount of expenditure to be taken into account. Therefore, the mortgage costs could not be taken into account in the payment program for A.[93]

Distribution of assets or compensation can only be withdrawn if the debtor has given up more assets than he or she would have been obliged to. Thus, the distribution of assets or compensation would not be withdrawn if the debtor had waived his or her claim for his or her contribution to the other cohabitee or his or her heirs or, in the case of the distribution of assets, waived the right to property which was unclear or under the joint ownership presumption under Cohabitation Act section 6. In addition, the debtor is required to dispose of his assets to a significantly greater extent than he would have been obliged to. Given the nature of the asset distribution or compensation, it does not make sense for minor deviations from the segregation principles to result in withdrawn.[94] Recovery Act section 9a paragraph 2 provides for the protection of cohabitee or cohabitees' heirs against claims of creditors in the event of bankruptcy and enforcement. In such cases, the property distribution document or the compensation contract or other document must be submitted to the city administration court for registration.[95]

There are also some other restrictions for cohabitees opportunities to act. According to chapter 13 of the Code of Inheritance 40/1965 the provisions concerning the invalidity of a will limit the wills of cohabitees. Cohabitees do not have the right to adopt together. Also, adoption within the family is not possible, that is, one of the partners would adopt the child of their cohabitee, whereby the child would become a

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92 In Finland, the currency changeover from FIM to euro was first made on 1 January 1999 as the functional currency and on 1 January 2002 as the cash currency.

93 *KKO:2001:23* [2001] Supreme Court *(Korkein oikeus)*.

94 Act on the Recovery of Assets to Bankruptcy Estates 758/1991 section 9a (*Laki takaisinsaannista konkurssipesään*).

95 Tuulikki, Mikkola, *Avio- ja avopuolisoiden yhteisomistukseen liittyvistä kysymyksistä* (Edilex, 2010), p. 115.

joint child.[96] However, both parties to the cohabitation have independent adoption rights i.e. they can adopt alone. For all that, the consent of the partner is required.[97]

4.4 Children and cohabitation

4.4.1 Ensuring custody is key to continue as a family of two addresses after cohabitation

In Finland, the biggest difference between children born in cohabitation and children born in wedlock is how parenting and custody are determined. The mother of a child is a woman who gave birth to him or her. Both parents are custodians of their children if they are married at the time of birth.[98] A child born out of wedlock, on the other hand, is considered to be in the care of the mother alone, even if the child's father acknowledges paternity. Parental responsibility i.e. custody must be agreed or decided in addition to the recognition of paternity, if the mother does not wish to be the sole carer of the child.[99] At the time of the child's birth or later, parents may agree otherwise on the child's custody, by agreement or court order, for example, that the child is in joint custody.[100] If a cohabitee has no custody of child when cohabitation terminates, the parent of the child cannot, contrary to his or her will, be designated as the guardian or joint guardian of the child.[101] If the parents have previously agreed on joint custody of the child and want the custody to continue after dissolution of cohabitation, no changes in custody are required.

Changes have been made to the Act on Child Custody and Right of Access 361/1983 recently, entering into force on 1 December 2019. Thereafter, the law includes a new section 6a which states that if a parenthood is recognized before the birth of the child by section 16 of the Paternity Act (11/2015) or by section 14 of the Maternity Act (253/2018), the confessor will also become the guardian of the child once parentage has been confirmed.[102] Also after 1 December 2019, a person who has acknowledged

96 Urpo Kangas, *Perhe- ja perintöoikeuden alkeet* (Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisuja, 2012), p. 86.

97 Adoption Act 22/2012 (*Adoptiolaki*).

98 Urpo Kangas, *Perhe- ja perintöoikeuden alkeet* (Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisuja, 2012), p. 42 - 50.

99 Ibid. p. 59.

100 Oikeus.fi is joint website of the Finnish Ministry of Justice and the judiciary. <https://oikeus.fi/fi/index/tietoaarjenongelmiin/avioliittojaavoliitto/lapset.html> (accessed August 9 2019).

101 Family Federation of Finland (*väestöliitto*), is a family welfare organization working in social and health sector. <https://www.vaestoliitto.fi/parisuhde/tietoa_parisuhteesta/avio-ja_avoliiton_lakitieto/lakitietoa-erosta/lapsen-yhteishuolto-avoerossa/> (accessed August 1 2019).

102 Government proposal, 'HE 88/2018' (2018); Suvianna,Hakalehto, *Lapsioikeuden perusteet* (Alma Talent 2018), p. 119 - 135.

maternity or paternity has custody of the child. Thus, parenthood and custody are not separate things after December 2019 according to the new Act.[103]

4.4.2 Making sure that children have good living conditions after termination of cohabitation

As the parents move apart, the issues of living with the child, the right to meet their distant parent and the child's maintenance needs to be resolved. Parents should agree on which parent the child is registered with.[104] This affects the location of the child's day-care and the school district. Additionally, when determining various social benefits, such as child allowance, housing allowance and subsistence allowance, the child is taken into account in the composition of the family, depending on where his or her official address is.[105] Contracts for child custody and right of access must be in writing, as well as a child support agreement, in order to be enforceable.[106]

According to the Act of Child's Maintenance 704/1975 both parents are responsible for the maintenance of the child. Maintenance is not imposed by any authority *ex officio* but must be claimed. In maintenance matters, the child is represented by the guardian with whom the child is registered. The maintenance agreement must be made in writing.[107] If the maintenance debtor neglects to pay maintenance, the parent can apply for a maintenance allowance from social insurance institution of Finland for which a confirmed maintenance agreement is required.[108]

4.4.3 Agreements are a way to prevent conflicts after termination of cohabitation

The enforceable custody and appointment agreement is drafted by child supervisor *(lastenvalvoja)* of the child's residence. Child supervisor will assist the parents in reaching an agreement and will consider that the agreement is in the best interest of the child. As part of the legal reform, the child custody and access agreement must be submitted for approval to municipal social welfare board of the municipality where the child is resident. Child supervisor or the person assigned to prepare the ratification of the agreements should discuss with the child personally if this is necessary to clarify the child's wishes and opinions.[109] The agreement must not be confirmed if neither of the parents of the child is the legal custodian of the child.

Approval of the custody and appointment agreement is subject to the consent of the person who has custody of the child along with the parent or parents, or from the

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103 Government proposal, 'HE 88/2018' (2018); section 3 on Child Custody and Right of Access (*Laki lapsen huollosta ja tapaamisoikeudesta annetun lain 3 §:n muuttamisesta 352/2019).*

104 Suvianna, Hakalehto, *Lapsioikeuden perusteet* (Alma Talent 2018), p. 195.

105 Urpo, Kangas, *Perhe- ja perintöoikeuden alkeet* (Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisuja, 2012), p.107.

106 National Institution of Health and Welfare in Finland, Handbook for Child Protection *(Terveyden ja hyvinvoinnin laitos, Lastensuojelun käsikirja).* Available online: https://thl.fi/fi/web/lastensuojelun-kasikirja/tyoprosessi/erityiskysymykset/lapsen-asema-erotilanteessa/lapsen-huolto-tapaaminen-ja-asuminen> (accessed August 9 2019).

107 Suvianna, Hakalehto, *Lapsioikeuden perusteet* (Alma Talent 2018), p. 233 - 234.

108 Eva Gottberg, *Perhesuhteet Ja Lainsäädäntö* (Painosalama Oy 2011), p. 208 - 210.

109 Suvianna, Hakalehto, *Lapsioikeuden perusteet* (Alma Talent 2018), p. 216 - 218.

person who has been given the right of access to confidential information concerning the child in the event of breach of this right by the contract, or of a person particularly close to the child[110], if the agreement may affect the exercise of the established right of access. The agreement approved by municipal social welfare board is valid and enforceable as a final court decision. If the parents fail to reach a settlement, a court decision must be sought. Even in court, there is still room for mediation.[111]
The purpose of the right of access is to ensure the child's right to contact and meet his or her non-resident parent, and after 1 December 2019, also a person particularly closest to the child. The parents agree on how the child spends time with both parents and how the child's right of access are exercised (e.g. every other weekend and holidays). When considering appointments, parents should consider the age of the child, the distance between the two homes and the relationship of the child to the other parent.[112]

4.5 Conflicts in cohabitation

A cohabitee is not entitled to claim the right to live in the apartment owned by his or her cohabitee. This is a disadvantage in comparison with cohabitation a spiral of violence. Unlike a marriage, where the family restraining order according to Act on Restraining Orders 898/1998 allows the person who is threatened to be removed from the common home without the right to return, even if he or she is the owner. In that case, one of the spouses may remain in that dwelling. However, no Act of Cohabiting can be found to support this, so the cohabitee cannot be prohibited from returning to his or her own dwelling, nor can the other cohabitee be allowed to remain in such dwelling; however inflamed situation between cohabitees is.[113]
Family mediation is a special social service provided by the Marriage Act[114] that is available in the event of a family conflict. Family mediation can also be used by cohabitees. Mediation can also be applied for after dissolution, for example in cases of conflict about visiting right. The mediator assists and supports the parties themselves in resolving their differences. The solution is sought through negotiations and agreements between the parties. The role of the mediator is to pay particular attention

[110] A person who is particularly close to the child means a person with whom he or she has an established relationship comparable to that of a parent. Act of adding section 9c to Act on Child Custody and Right of Access 190/2019 aims to take into account how the child's life can include other, especially close, person.

[111] Family Federation of Finland (*väestöliitto*), is a family welfare organization working in social and health sector. <http://www.vaestoliitto.fi/parisuhde/tietoa_parisuhteesta/avio-ja_avoliiton_lakitieto/lakitietoa-erosta/lapsen-yhteishuolto-avoerossa/> (accessed July 29 2019).

[112] Family Federation of Finland (*väestöliitto*), is a family welfare organization working in social and health sector. <https://www.vaestoliitto.fi/parisuhde/tietoa_parisuhteesta/avio-ja_avoliiton_lakitieto/lakitietoa-erosta/tapaamissopimukset-ja-poikkeusti/> (accessed July 29 2019).

[113] Tuulikki, Mikkola, *Yhteisomistus* (Alma Talent 2017), p. 129.

[114] Chapter 5 of Marriage Act (13.6.1929/234) sections 20 - 23 and 23a.

to safeguarding the position of the child. Participation in family mediation is voluntary. The discussion in conciliation is confidential. The conciliator shall not disclose to any third party or other authority what he or she has learned of the conciliation. The family mediator shall also not disclose information he or she has obtained in the course of the mediation if he or she wishes to be heard as a witness in court. Mediation is free of charge.[115]

5. Most problematic issues in Finland

5.1 Cohabitation in Finland

Legally speaking, a person's rights and obligations are linked to his or her marital status in Finland. This is the case, for example, with surname, maintenance obligations, divorce and many social benefits (such as entitlement to a survivor's pension) as well as inheritance law. Married spouses can have the same last name, mutual maintenance obligations, matrimonial property regimes and the resulting division of property, survivors' rights and death rights upon death. This is not the case in cohabitation. Cohabitation is indeed cohabitation similar to marriage, but cohabitation is legally a covenant without mutual rights and obligations. Culturally, the dating relationship can change from unnoticed to cohabitation, as a result of moving to one another. Moving together may be based merely on practical considerations (such as sharing of living costs) rather than a specific decision to precede relationship to the next level.

Finland has not collected research data on the prevalence of contracts for the termination of cohabitation.[116] However, it is possible to conclude that such agreements are not common, because they are not discussed in public and most cohabitees do not think much about it before they move to live together. Most people will not think about the economic consequences of the ending of their cohabitation before it arises. The consequences of dissolution on the death of a cohabitee may be especially surprising when death comes suddenly and when cohabitees have not prepared wills. It is also very common among couples living together to work for the common good, rather than to prepare actively for cohabitation to end in the future.[117]

Nevertheless, cohabitees in Finland have freedom of contract enabling them to enter into various agreements on their economic relationship and to seek to pre-organise—among other things—the division of their possessions with a view to the possible dissolution of their cohabitation. From the point of view of drafting those agreements, it would be wise to conclude them before the parties disagree with each other, since the conclusion of a valid agreement requires the consent of both parties. When the termination of cohabitation is close, the cohabitees may be in dispute to such an extent that they can no longer agree. Noteworthy, people in Finland are not used to entering into agreements before or during cohabitation—unlike in other parts of Europe, such

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115 Urpo, Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 30.

116 Working group memo of Ministry of Justice of Finland. (*Oikeusministeriön työryhmämuistio)* 2008:10 p. 26.

117 Ibid. p. 37.

as the Netherlands and France, where various agreements in the sphere of coexistence are more common and people are more accustomed to entering into them.[118]

5.2 We just moved together—problems that occur when the cohabitation ends

For a long time, cohabitation was perceived as a voluntary choice to avoid the legal consequences of marriage.[119] People who were not married were assumed to have made their choice willingly—for example to avoid the possibility of matrimonial rights forming on one's property. Marital right entails that the property of the spouses are equalized upon dissolution of the marriage by the division of property according to Marriage Act 324/1929 section 35. The arguments weighing against regulating cohabitation were based on the right to self-determination, freedom of contract, and the freedom of the will. Behind this reasoning was the assumption that people know how social risks should be divided.[120] However the case law reveals a very different picture than the assumptions behind such reasoning.

5.2.1 Human factor in cohabitation

There are several Supreme Court rulings mentioned above (chapter 3) that illustrate how people have turned to courts to object to—what they have felt were—unfair results from the application of the general principles of civil law to separate joint property of cohabiting partners on dissolution of the cohabitation. The Cohabitation Act did not create rules regarding joint ownership in cohabitation which means that disputes concerning joint ownership between cohabitees—whether they are in regulated or unregulated cohabitation—are still decided according to civil law. Civil law does not take into consideration how common ownership in close relationships, such as cohabitation, differs from joint ownership between strangers. This is problematic, because cohabitation is a close relationship which often involves economic partnership, and that should be given legal significance, especially when it is dissolved.[121]

During cohabitation, the parties commit themselves to a joint life in a more interdimensional and holistic way than the joint ownership of an object or property between two strangers. Simply put, cohabitees' work for a common good in many ways of life contrasts with the idea of contracting parties who are committed only to own something together, but do not share their lives in other respects. In addition, it is quite difficult from the point of view of everyday life that—while living together in a common law relationship—the cohabitees should simultaneously collect evidence of their contribution to the common economy, for example by keeping receipts of purchases with a view to any difference. Indeed, cohabitation is considered to require a

118 Ibid. p. 33.

119 Anu, Pylkkänen, *Vaihtoehto avioliitolle* (1st end, Vastapaino 2012), p. 92; Urpo, Kangas, *Perhevarallisuusoikeus* (3rd edn, Alma Talent 2018), p. 286.

120 Ibid. p. 286.

121 Tuulikki Mikkola, *Avio ja avopuolisoiden yhteisomistukseen liittyvistä kysymyksistä* (Edilex 2010), p. 9.

close relationship between the cohabitees, because it is not intended that cohabitation be for example between roommates.
During the cohabitation, the parties could make a decisive contribution to the acquisition of the property by means of providing a home, caring for the other, doing construction work, or by any other means. Thus, the owner cohabitee often benefits from the other when the asset is distributed in accordance with the name-principle. Situations in which the property is only in the name of one party can be problematic. This can happen when cohabitees register a car, even if the cohabitees have bought the car together. Generally, a registry entry creates an assumption that the property solely belongs to the person in whose name the property is registered. This is the naming principle which is based on the idea of legal certainty—In other words; third parties must be able to rely on written evidence such as a vehicle registration certificate.[122]
The joint ownership relationship is covered by the Act of joint ownership 180/1958. The joint owner has the right, without consulting the other co-owners, to surrender their stake and otherwise order it. Also family home unlike a marriage where spouse may not, without the consent of the other spouse, assign or transfer to another: shares, lease or other rights in a joint stock company which control the use of an apartment exclusively or principally intended for use as the spouses' common home *(vallinnanrajoitus)*.[123]
He or she may also use the common object in such a way that his actions do not infringe the respective interests and rights of other co-owners. A co-owner who—by his own use—prevents another from using the common property in an amount equivalent to his shareholding may have to pay compensation for this violation, as this decision shows. However, the cohabitee does not gain special rights to property accumulated during cohabitation simply by invoking the cohabitation. Equally, financial participation alone is not enough to strengthen ownership.[124]

5.2.2 Were we cohabiting?

During the drafting of the law, feedback from the consultation round was critical for the definition of cohabitation, as it is not very specific. In Finland, cohabitation is defined as a close relationship where one lives together and works for the common good.[125] The sexual orientation of the cohabiting partners does not matter and in Finland there is no requirement for sexual intercourse between cohabitees, which is equal[126] and leaves room for privacy. So far, case law has not revealed situations where a court would have had to decide whether or not a partnership was involved, so concerns about the exact definition of cohabitation has not become a concrete legal issue at the level of Supreme Court decisions. However, judge *(käräjätuomari)* of Pirkanmaa District Court *(Pirkanmaan käräjäoikeus)* Riikka Meroma told in her lecture

122 Tuulikki, Mikkola, *Yhteisomistus* (Alma Talent 2017), p. 5.
123 Marriage Act 234/1929 section 39.
124 Ibid. p. 148 - 164.
125 Government proposal, 'HE 37/2010' (2010), p. 18 - 19.
126 When it comes to asexual or people with conditions like vulvodynia, endometriosis etc. it is unequal to require sexual intercourse between cohabitees as definition of cohabitation.

at the Attorney Conference held by Finnish Bar Association January 12 2018 that problems have arisen in the District Court, inter alia, because the Act of Cohabitation only allows for a remedy if the partnership has lasted five years or more if the couple has no children. Even external witnesses are needed to determine whether it was a partnership or not.[127]

5.2.3 Gendered division of labour in relationships

Another problematic issue—which may lead to the actual accumulation of assets in the name of the other cohabitee—is linked to the practical management of the household. Families often still follow the traditional model where cost within the family is divided in a way that women are mainly responsible for maintaining the family and parenting while men are mainly responsible for home electronics, motor vehicles and mortgage.[128] In practice this leads to a situation where men have accumulated wealth by paying home loans and women has not accumulated wealth because their income has been spent on the family's daily expenses such as food and other daily expenses.[129] Secondly major social influence is the gender impact of legislation. Gender impact assessment *(sukupuolivaikutusten arviointi)* in the preparation of the law means, that the effects of the law on women and men are investigated beforehand so that, when the law is applied, it does not directly or indirectly discriminate against either sex.[130] Although, none of the proposed provisions do not tied a specifically to gender, it was estimated that the proposed legislation has a significant impact on women's economic opportunities improvement.[131] Based on statistics from the Social Insurance Institution of Finland`s e.g. parental leave between the sexes is unequal. For example, maternity leave is 105 working days whereas paternity leave can be 1-54 working days. In sum, there is 158 working days of parental leave, which can be shared between parents.[132] In most cases, families choose a woman as the parental leave holder because men earn more than women on average, which makes it financially better for a less earning woman to stay home to look after children. Having children will interrupt women's career development which leads to long-term, financial losses, compared to an uninterrupted career.

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[127] Turun Sanomat, January 12 2018. Available online: <https://www.ts.fi/uutiset/kotimaa/3798952/Tuomari+avoliittolain+vuoksi+oikeudessa+riidellaan+jopa+siita+onko+edes+oltu+parisuhteessa> (accessed 10 September 2019).

[128] Government proposal, 'HE 37/2010' (2010); Eva, Gottberg, *Perhesuhteet Ja Lainsäädäntö* (Painosalama Oy 2011), p. 66.

[129] Anu, Pylkkänen, *Vaihtoehto avioliitolle* (1st end. Vastapaino 2012), p. 147.

[130] Ministry of Social Affairs and Health of Finland. Available online: <https://stm.fi/tasa-arvo/lainsaadannossa> (accessed August 22 2019).

[131] Working group memo of Ministry of Justice of Finland. *Oikeusministeriön työryhmämietintö* 2008:10, p. 47.

[132] Chapter 4 section 1 Employment contracts Act 26.1.2001/55 *(Työsopimuslaki).*

5.2.4 Unregulated cohabitation

In Finland, childless cohabitees are deprived of the protection of cohabitation legislation for a long time compared to other Nordic countries. Cohabitees, who are not covered by cohabitation law, ownership is still in an uncertain situation when it comes to dissolution of cohabitation. Unlike cohabitees subject to Act of Cohabitation people living in unregulated cohabitation they cannot claim compensation according section 8th of Cohabitation Act. Unregulated cohabitees cannot ask the court to order an executor of the distribution of an estate. When there are difficulties to get into agreement executor of the distribution of the estate is more affordable and less inconvenience than take legal action in court. When unregulated cohabitation ends only option to get compensation if the other one disagrees about it is to take legal action in District Court. In practice financial considerations may limit it and then weaker may left without compensation. Aim of Cohabitation Act is balancing cohabitation through economy in proportion to actual inputs. Unregulated cohabitees are left subjects of civil law which does not, in principle, take into account the differences between the parties, such as those of the social structures nor how intimate cohabitation is compared to other forms of contract.[133]

5.3 No right to inheritance when death do us part

In Finland, the status as the remaining cohabitee after the decease of the first cohabitee is most problematic. A cohabitee does not have a relative, value-based inheritance or a right to certain property after the counterpart. Nor does the remaining cohabitee have a right to control the estate undivided after the first deceased cohabitee—which affects the joint home for cohabitees.[134] The status as remaining cohabitee is particularly weak compared to that of a widow in Finland. For example, the widow receives the right to dispose of the dwelling shared and the property of the deceased spouse—the estate— in undivided possession which creates financial security for the surviving widow by virtue of the marriage, cf. the Code of Inheritance, section 3: 1a. When cohabitation breaks due to death—whether it is unregulated or regulated cohabitation—the cohabitees' housing is affected by their ability to continue living in the same dwelling.[135]

In the case of owner-occupied dwellings, it is necessary to sell the dwelling used as a family home in order to divide the estate of the first deceased cohabitee. The law does not entitle the remaining cohabitee to redeem the share of the dwelling owned by the deceased cohabitee. Instead, the property of the first deceased cohabitee—including the purchase price corresponding to the ownership interest in the jointly owned dwelling—shall be divided among his or her legal heirs, subject to the will.

In the case of rental—according to Act on Rental of Apartment 481/1995 section 11 and 46—protection is provided to the remaining cohabitee who has the right to continue the housing after the deceased. Such a special rule is not included in the Law

133 Government proposal, 'HE 37/2010' (2010).

134 Urpo, Kangas, *Perhevarallisuusoikeus* (3rd. edn, Alma Talent 2018), p. 284.

135 Ibid.

on Residential Dwellings 650/1990 section 31 according to which the right to reside belongs to the estate after the death of the holder of the dwelling.

A significant exception to the right to a survivor's pension is the Occupational Injury and Disease Act 24.4.2015/459 *(Työtapaturma ja ammattitautilaki)*. Under section 100 paragraph 2 the survivor is also entitled to a survivor's pension if he or she has common child or with whom the injured party has a mutual notarization agreement certified by a notary public. The widow's pension is also payable when the common child was born after the injured person died. According to Article 102, the spouse is entitled to a widow's pension if the cohabitation has resulted in a child or the marriage has lasted for at least three years.

In connection with the enactment of the law of cohabitation, cohabitees were included in the Code of Inheritance section 8:2, whereby a remaining cohabitee out of regulated cohabitation is entitled to a discretionary allowance for the estate of the first deceased spouse. On the contrary, a remaining cohabitee out of unregulated cohabitation—who does not have such a statutory right—may be granted voluntary assistance from the estate. However, such voluntary contribution is subject to gift tax under the second category of gifts—that is as a non-family member, not as a close relative—meaning unregulated cohabitees pay more tax.[136]

In the case of unregulated cohabitation, the succession can only be based in a will. For this inheritance, remaining cohabitees of unregulated cohabitation must pay more than double the inheritance tax as compared to the widow. If the remaining cohabitee is eligible under cohabitation law, he or she instead pays inheritance tax according to first category—same as widows, according to the Income Tax Act 1535/1992 section 7:3. For those cohabitees left outside of Cohabitation Act, inheritance tax is quite harsh as they fall into the second category of inheritance taxation. For example, an inheritance tax of € 100,000 will be paid in the first tax bracket of € 8,700 and in a second tax bracket of € 20,500.[137]

Cohabitees who has not been cohabitation for five years and who are still waiting for their first common child are in a particularly vulnerable position. If the cohabitee dies when the other cohabitee is pregnant, the pregnant one is not entitled to claim aid from estate.[138] Unlike for example in Sweden, which guarantees to the cohabitee at least a certain basic amount determined by the government to which the remaining cohabitee is entitled *(den lilla bassbeloppsregeln)*.[139] This situation needs legislation if

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136 Tax Administration of Finland about gift taxation. <https://www.vero.fi/henkiloasiakkaat/omaisuus/lahja/lahjaverolaskuri/#lahjaverotaulukot>. (accessed 25 July 2019).

137 Tax Administration of Finland about inheritance tax. <https://www.vero.fi/henkiloasiakkaat/omaisuus/perinto/perint%C3%B6verolaskuri/> (accessed 20 August 2019).

138 Urpo, Kangas, *Perhe- ja perintöoikeuden alkeet* (Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisuja, 2012), p. 346.

139 Swedish Government proposal RP 2002/03:80, p.73; Swedish Act on General Insurance *(Lagen om allmän försäkring 1962:381)*. In 2019 bassbeloppsregeln is 2 x SEK 46 50. <http://www.basbeloppet.se/> (accessed 20 August 2019); Eriksson 2011, p. 76.

we want to improve remaining cohabitees' status, because it is not possible to remedy the by interpretation. The tax consequences are also stricter than in other Nordic countries.

5.4 Suggestions of improvements for future

5.4.1 Looking at other Nordic legislations

In Finland, it is usual to examine the legislation of other Nordic countries in the course of drafting law. When the Cohabitation Act was drafted, Swedish law on cohabitation was examined. Thus applying for a legislative model of another Nordic country could give us better model to secure cohabitees' status in the event of death. In 2009, the Norwegian Act of Succession (*Arvelova 1972:4*) provided for an amendment to the law governing the succession of cohabitees. A cohabitee who has or has had a child with the deceased cohabitee, or who is expecting a child to the deceased cohabitee is entitled to four times the basic contribution determined by the Norwegian Social Insurance Institution for the estate of the deceased cohabitee.[140] A cohabitee may also have a similar inheritance right under the same law, even if the cohabitee has been living in the joint economy for at least five years, and the cohabitee has expressly made a will. In accordance with the above criteria, in the event of the death of the cohabitee, the surviving cohabitee shall also have the right to take possession of the cohabitees housing and other movable property of the cohabitee.[141] This approach would provide clear relief to the survivor, as he or she would not have to worry about arranging housing. In addition, at this point of legislation the definition of cohabitation in Norwegian law is very similar to that in Finland—living five years together or a common child.

In Denmark, the 2008 reform of the Inheritance Act gave cohabitees an opportunity to make a will for cohabiting couples Inheritance Act sections 97 - 89 (*arveloven)*[142]. In the will to cohabitees, they can determine their inheritance, so that they inherit each other in the same way as if they were married. According to section 88 the couple may not be married and most of the conditions for marrying must be met. The will is only valid if the couple lived together at the time of the death of the first deceased partner and had or have had a common child, or had lived together for the last two years.[143] The advantage of the Danish model is that the cohabitees can secure the status of the other cohabitee in the event of death, so that they can still decide for themselves whether they want the legal effects to take effect or not. Thus, implementation of the

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140 Norwegian Inheritance Act chapter IIIa section 28b *(Lov om arv LOV-1972-03-03-5).* Since May 2019 Grunnbeløpet i folketrygden is NOK 99 858 /year. <https://www.skatteetaten.no/satser/grunnbelopet-i-folketrygden/> (accessed 20 August 2019).

141 Norwegian Inheritance Act chapter IIIa section 28c *(Lov om arv LOV-1972-03-03-5).*

142 Danish Inheritance Act LOV nr 259 af 22/05/1974 (arvelove). Amendment to Inheritance Act LOV nr 515 af 06/06/2007.

143 Godsk Pedersen, Hans Viggo, and Lund-Andersen, Ingrid, *Family Law in Denmark.* (Wolters Kluwer 2011), p. 164 - 165.

Danish approach would foster the aim of our legislators, to leave the decision whether the legislation has influence among cohabitees or not, to each couple on their own.
The priority would be to correct Finnish legislation in order to prevent a pregnant cohabitee from being completely deprived of the estate. If we look at the situation from this point of view the benefit of the Norwegian and Swedish models is the certainty of getting a basic payment. In Finland, the cohabitee only has the right to claim discretionary allowance from the estate, but there is no minimum amount. And in cases where Cohabitation Act does not apply, the surviving cohabitee is solely on the goodwill of the heirs.
Legal acts concerning cohabitation largely based on general civil law principles, because it has been wanted to be separate from marriage law in Finland as in other Nordic countries.[144] However, according to the legal literature, cohabitation has still been regarded as "marriage like cohabitation"[145] or "second-class marriage".[146] Cohabitees relationship has also been like fundamental foundation to our legislative point of view, for example, the first Swedish law on cohabitation was only for heterosexual couples because at the time it was enacted homosexuals relationships were not allowed.[147] Relationship regulation has become established in marriage law, which in turn has contributed to the way in which relationships like cohabitation have been regulated.[148] In other words the forms of regulation have not been called into question. At the same time, however, life forms have become more diverse and this development has been taken for granted.[149] As a result, it might be time to develop a new kind of regulation that would not be based on the institution of marriage and thus not establish a partnership as the starting point for a joint economy.

5.4.2 Reaching out to the future—collaborative economic agreement model

In Finland, Anu Pylkkänen has proposed a collaborative economic agreement model that would shift the focus from traditional property regulation to the greater consideration of care and nurture. The joint economy model is the most Nordic, as it approaches the need for regulation from a very practical point of view and the key is to protect the weaker parties—factors that are considered as pioneering in international comparisons and are characteristic for Nordic legislation.[150]
In short, the collaborative economy model consists of directly based on statutory status and independent of their contracts as well-established collaborative economies

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144 Sörgjen, Caroline, *Reconstructing Marriage, the legal status of relationships in a changing society* (Intersentia 2012), p. 136; 149.

145 Ibid. p. 135.

146 Ibid. p. 164.

147 Swedish Act of the Joint Dwelling of an Unmarried Couple 1973:651 (*Lag om ogifta samboendes gemensamma bostad).*

148 In Finland Cohabitation Act was enacted gender neutral and Sweden changed its Cohabitation Act to gender neutral in 2003. This shows how society has changed compared to 70s when Sweden enacted its first Act about cohabitation.

149 Pylkkänen, Anu, *Vaihtoehto avioliitolle* (1st edn Vastapaino 2012), p. 160.

150 Sörgjen, Caroline, *Reconstructing Marriage, the legal status of relationships in a changing society* (Intersentia 2012), p. 272.

as in the current Cohabitation Act; the specific model agreement—the agreement about collaborative economy and the general principles of civil law—other than contracts, inheritance or wills. In addition, defining:

- The minimum protection area which cannot be deviated from so that the benefits of a party to a contract will be significantly worse than others;
- The form of the agreement (written);
- rights to withdraw from this agreement;
- Rules on invalidity and rationalization of the contract.

In case there is absence of contract, provisions on segregation of assets in the event of the dissolution of cohabitation could be followed, as in the current Cohabitation Act.[151]

The overriding principle of regulation would be the protection of trust, that is, its purpose is to ensure that investments in cohabitation cannot lead to a situation where the actor of the common good is left without compensation. A mandatory minimum protection area could be, for example, securing housing for a fixed period and providing reasonable compensation in the event that someone has significantly benefited others at their own expense in matters of the common economy. It is also important that parents decide in a concrete way how to care for and raise their children into adulthood, whatever happens to the relationship between parents.[152]

The contract about collaborative economy should be made in writing and deposited with the local registrar (in Finland to City Administrative Court). The agreement would define who will be involved, and how the financing and ownership of the shared dwelling will be, who will have a maintenance obligation and to whom. Except for child support, this is subject to its own rules. The parties to the agreement would, among other things, negotiate; how the time spent on caring for children and any other care needing persons is shared, whether other financial benefits such as insurance benefits, etc. are shared, whether part of the assets are jointly owned or controlled, which debts are common, and housing arrangements for dissolution of agreement or death.[153]

Also, the notice period would be defined. For the sake of security, it could be specified that the common housing should not be required to be sold until a reasonable time has elapsed in order to give everyone a realistic opportunity to acquire a new one. The agreement could also determine the contribution to be made to the financing and ownership of children's homes after the break-up of the economy. It would be possible to change the agreement as circumstances change. If someone gives more of their time, the financial effort can offset it, at least until the time bets may become similar again. This would be different from schematic matrimonial law in that it would take better account of individual and changing circumstances and make all types of resources in the joint economy visible.[154]

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151 Pylkkänen, Anu, *Vaihtoehto avioliitolle* (1st edn Vastapaino 2012), p. 151.

152 Ibid. p. 155.

153 Pylkkänen, Anu, *Vaihtoehto avioliitolle* (1st edn Vastapaino 2012), p. 156.

154 Ibid.

As with any proposal, there are both pros and cons—when it comes to collaborate economy agreement model. Existing property distribution provisions (discussed earlier in 4.1) and mediation are strictly linked to formal ownership, as name principle. The weaker party may be compensated if he or she has, through his or her own actions, improved the position of the other. The collaborated economy agreement would seek to agree more broadly on the contribution of both material and ideal contributions to the dissolution of the economy. The focus would be on the conclusion and termination of the agreement—the real needs of the people and the legitimate expectations that people may have when entering into cohabitation. Legislation would be left with the task of providing a minimum level of protection and protection for the weaker party. The purpose of the agreement would not be to justify wrongdoing, which would not allow the parties to degrade each other's position in situations such as domestic violence or to commit to unfair terms. There would be no real limitation on the number of parties, but the registration of contracts would allow others to verify whether a person is already a party to another agreement. Thus others could conclude on the reliability of one party and to consider the ability of him or her to contribute to the common economy.[155] Pylkkänen's proposal is, in a way, close to the legislation currently in force in Norway— the law on joint housing[156] whereby two or multiple persons over 18 years of age are living together in the same household. It might be a pitfall if people can enter into several collaborative economies thus it might make sense to regulate this same way as marriage impediments nowadays—already existing marriage prevents person to entering into another one.[157]

As Nordic societies became more and more diverse, it has been argued that if we move away from marriage as basic way of organizing intimate relationships in society, there is a risk that religious communities will once again take a firm stance on defining the content of marriage, which may in some cases lead to the erosion of women's rights in particular.[158] On the other hand, the collaborative economy agreement model would also emphasize neutrality *vis-à-vis* different religions and reduce the conflict between individual rights and religious freedom. Consequently, the formation of a family and a community economy is an agreement between free and equal individuals and that in no circumstances may the family or religion restrict or violate the inalienable rights or sexual integrity of individuals.[159] It is already a reality in many people's lives that close relationships do not follow biological family relationships, for example in blended families. There are also people who may take care of other people's livelihood even when it is not based on legislation i.e. children help their parents economically. Collaborative economy agreement would make these arrangements more visible and

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155 Ibid. p. 140 - 141.

156 Norwegian Act on the Right to Joint Housing and Housing When Households Expire 1991:45 (Lov om rett til felles bolig og innbo når husstandsfellesskap opphører).

157 This idea is also included in the current Finnish Cohabitation Act—according to section 3 "a person who is married shall not be deemed a cohabiting partner".

158 Sörgjen, Caroline, *Reconstructing Marriage, the legal status of relationships in a changing society* (Intersentia 2012), p.331.

159 Ibid. p.149.

help society to distribute social support more evenly. Thus, its starting point is in practicality and aim is to protect weaker parties.

6. Conclusion of the Finnish report

Cohabitation had long been unregulated in Finland. The problems arising from the dissolution of the cohabitation were then resolved in accordance with the general principles of civil law. Applying the name-principle creates a strong presumption of property ownership. Thus, cohabitees must be careful when they contribute to the financing of the common property—making sure that they also have a title to said property. Another way to get compensation of money once purchased to common property i.e. buying a house to live in cohabitation, when cohabitation ends, is to make a claim based on recovery of unjust enrichment. However, a claimant has the burden of proof when it comes to recovery of unjust enrichment. This can be tricky if the claimant as former cohabitee has mainly taken care of running household costs and or duties like nurturing of children, because people might disagree with the value of said expenses when cohabitation is ending.

As a result of decades before Act of Cohabitation, there were several Supreme Court rulings on cohabitation, restitution, and compensation. Accumulated case law served as a basis for the preparation of the law on cohabitation. According to the preliminary work of the law, many parties who expressed their opinion on the draft law were critical of the enactment of the law and partly questioned its appropriateness. This is explained by the long prevailing notion in Finland that cohabitation is a matter of personal privacy and that the legislature should not intervene separately. Cohabitation was seen as an alternative to marriage in that it was seen as a way of living in partnership but avoiding the legal effects of marriage.

Finland has always followed the development of legislation in the other Nordic countries, so the introduction of the Swedish Cohabitation Act also had an impact on the debate in Finland. Increased cohabitation also led to the need for regulation. As was the case in other Nordic countries, Finland was concerned that cohabitation could lead to situations that seemed unreasonable and where legislation was needed to protect the weaker party. In addition, before the Cohabitation law, it was difficult to dissolve cohabitation if the partners disagreed strongly on the ownership of the jointly bought and used property. It was possible to bring the matter to court, but the reform made it easier to dissolve cohabitation by providing for the right to appoint an executor of the distribution of an estate, so that the court would not be the only option for resolving conflicts. The status of remaining cohabitee at the time of the death of the other cohabitee was also very insecure, and inheritance tax was harsh because the cohabitee was not considered a person close to the deceased.

The Act on the Dissolution of the Household of Cohabiting Partners 26/2011 came into force in 2011 and has slightly improved the status of cohabiting partners compared to a completely unregulated situation. The law recognized, at the legislative level, that cohabitation is a much more holistic commitment to living with another person than in situations where, for example, an object or building is jointly owned. As

a result, when cohabitation is dissolved, the weaker party is usually in a financially vulnerable position because—for example in the event of cohabitation break after the acquisition of a new home. However, not everything was remedied with the cohabitation law, as it remained quite narrow and cohabitees were free to deviate for the most part by agreements. The only limitation to the will of cohabitees is that neither the remaining cohabitee nor the heir of the deceased cohabitee can validly waive his or her right to claim separation of property within the meaning of section 4 or the right to apply for court-appointed executor of the distribution of an estate under section 7 (2). The purpose of this provision was to ensure that cohabitees were dissolved in order to have their property separated, even in the event of a dispute between the partners. As legislators aim was to keep the cohabitation regulation minimalistic, protection of the weaker party remained poor in some cases.

Despite of cohabitation law there remains problem about short-term cohabitation because law in question concern only those who have lived in a relationship in a shared household for at least five years or who have, or have had, a joint child or joint parental responsibility for a child. Thus much cohabitation is left without legislation to help in case of dissolution of cohabitation. As a result of chosen legislation path, things will be resolved in Finland mostly when things have progressed to contradictions between cohabitees, even if it would probably be easier to agree on things before entering into cohabitation.

When it comes to children Finland has managed to eliminate inequalities related to parents' marital status. Children born to cohabitees have the same rights as children born in wedlock. Amendments to the Child Custody and Access Right Act which are coming into force December 1st 2019 with Maternity Act and Paternity Act simplifier cohabitee fathers and same sex parents path to parenthood and guardianship by combining the recognition of paternity or maternity with the granting of custody.

The Nordic legislative tradition is characterized by efforts to protect the weaker party. The distribution of resources has also been a central value in Finland, where taxation aims to balance income disparities and allocate common funds from the community to those most in need. In Finland, legislation has also made it possible to achieve effective gender equality, for example, in protecting motherhood and working full time for women. As a result, regulation of cohabitation that protects the weaker party is justified. The next step, like Denmark and Norway, could be to improve the status of cohabitees in the event of death. Further development of the joint economy model presented by Anu Pylkkänen could be considered later, as it is very likely that in the future, families, relationships and shared economies will become more diverse and the value of care and nurture will increase.

The Norwegian Report

1. Status quo of unmarried cohabitation in Norway

1.1 Introduction - The legal situation of unmarried cohabitees in Norway

An increasing number of Norwegian couples choose to show their commitment through simply living with each other rather than being joint in matrimony. Unmarried cohabitees have become a widely more common form of living, and it has in later decades challenged the more traditional form of marriage.

The statistics below represent the percentage of unmarried cohabitees from different age-groups in the last twenty years.[1] While the larger part of the population still choose marriage as their form of living in today's society, the development has shown a significant increase in the total amount of cohabitees in Norway. The statistics also show that the percentage of cohabitees among the age-group ranging from twenty to thirty years old have remained stable in the last two decades, while it has become more and more common to be unmarried cohabitees in the older age-groups as well.

The development seems to indicate a consensus that matrimony does not have the same status of importance as it used to. This is likely connected to increased social acceptance of unmarried cohabitees. It is also clear that the Norwegian society in general has become wealthier and—as a result—there is a more apparent need to keep values secured from the legislation regarding marriage. This is particularly connected to the fact that the main rule for the division of wealth by separation is that each of the spouses receive half of their joint total wealth, cf. §58 (1) of The Marriage Act of 1991.

Andel samboere i ulike aldersgrpper. Prosent				
	1993-1995	1999-2001	2005-2007	2014-2016
20-24	25	22	30	23
25-29	35	39	40	39
30-34	24	30	31	37
35-39	15	20	24	31
40-44	10	16	20	22
45-49	8	11	160	20
50-54	6	8	10	17
55-59	4	7	8	14
60-69	3	4	6	8
70-79	1	2	2	4

[1] Statistics Norway, Samboere, <https://www.ssb.no/samboer/>. (accessed June 13 2019).

It is, however, important to state that this does not include values a spouse acquired before entering into marriage, as well as values acquired through inheritance and as gifts from people other than the spouse, cf. §59 (1) of The Marriage Act of 1991. But while most couples contribute more or less equally after entering into marriage, this isn't always the case. If for instance one parts income is significantly higher than the one of the other, the loss for one of the spouses when dividing joint wealth can potentially be significant. Table 1.Statistics Norway, Samboere:[2]

Even though the modern society of today in general has a lawfully and socially acceptable view towards unmarried cohabitees, this has not always been the case. When the number of unmarried cohabitees first began to escalate in the late 1960`s, this particular form of living was in principle still punishable by law, according to section 379 of The Penal Code of 1902.[3] The revocation of the law in 1972—while it had not been enforced in the previous decades—could indicate a more accepting legal perspective on cohabitation not based on marriage. However, there was a significant legal distinction between the two forms of living, and—even though the legal situation of cohabitees today has come a long way compared to the late 1960´s—unmarried cohabitees still don´t have the same legal protection as their married counterparts.

There are several legislative provisions in Norwegian law which to some extent regulate the cohabitees' legal situation, as will be presented throughout the report. However, there exists no statutory law regulating the legal situation directly—while that exists for the legal situation between spouses, cf. The Marriage Act of 1991. This results in an often unclear legal situation based on non-statutory law and discretionary compensation rules. The decreasingly frequent distinction between cohabitees and married couples may nevertheless paint an inaccurate picture of the cohabitees' legal protection being similar to that of spouses.

As will be explained further in detail under point 2 and 3 of this report, the outcome when a joint cohabitation ends will therefore often result in a surprising and unfair outcome for one of the parties, some cases potentially leaving a part empty-handed after a long-term relationship. It is therefore important for the ordinary citizen to be aware of their actual legal protection and the results that follow the termination of cohabitation.

In this report we will address the legal situation of unmarried cohabitees in Norway, and further examine the division of property between unmarried cohabitees on the termination of cohabitation based on Norwegian law.

1.2 Definition of "Cohabitation"

1.2.1 Introduction

Norwegian law has no general definition of "Cohabitation". The definition is fragmented, and the specific act in which "Cohabitation" appears will provide a definition. In order to get a general sense of what "Cohabitation is", it must be investigated how each act defines "Cohabitation".

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2 Ibid.

3 Peter Lødrup and Tone Sverdrup, Familieretten (2 nd sup, 8th edn, Calax AS 2016) 344.

1.2.2 Norwegian family law

Since Norway does not have an act regulating the division of property between cohabitees by the termination of the cohabitation, other sources establish what "Cohabitation" is in this situation. In the Official Norwegian Report on cohabitees and society from 1999, the committee assumed that cohabitees are two people living together in a "marriage-like relationship". The Ministry of Children and Family upheld this description in the Meld. St. 29 (2002-2003) (white paper).[4]

Legal literature defines "cohabitation" as two people living together in a "marriage-like relationship". This term delimits to friends living together. In addition, it is argued that that the characteristics of "cohabitation" is that the parties constitute an established emotional unit—a couple—who wants to live together for a longer period.[5]

1.2.3 The Household Community Act (1991)

The Household Community Act gives members of a joint household the right to take over the common residence or household goods to market price, under certain conditions.

The act applies when two or more unmarried people live together in a joint household, if they have lived together for the last two years, or if they expect, have or have had children together.[6] A joint household can consist of family members, friends or couples living together. Here, it is not necessary to establish that they live in a "marriage-like relationship". The important factors are the length of the joint household or common children.

1.2.4 The Inheritance Act (1972)

The Inheritance Act, section 28a, defines "Cohabitation" as two people over the age of 18 living together in a "marriage-like relationship". Further, the section states that the cohabitation does not cease even if the cohabitees live apart for some time, for example due to education, labour or sickness.[7] A condition is that they are unmarried, do not have a registered partner and are not in a cohabitation with someone else. This definition is upheld in the new inheritance act, section 2, paragraph 3 (not yet in force, most likely in force by 01.01.2021.

Only a cohabitee who expects, have or have had children with the deceased cohabitee has a right to inheritance.[8] Nevertheless, cohabitees without common children who have lived together for the last five years can bequeath the right to inheritance for their partner in a will. [9]

1.2.5 The National Insurance Act (1997)

The National Insurance Act, section 1-5, paragraph 3 states that the sections for

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4 Ministry of Children and Family, about family – committing cohabitation and parenthood (White paper, Meld. St. 29, 2003-2004) p. 65.

5 Peter Lødrup and Tone Sverdrup, Familieretten (2nd sup, 8th edn, Calax AS 2016), p. 348.

6 The Household Community Act 1991, section 1.

7 Inheritance act 1972 section 28 b, para 2.

8 Ibid. Para 1.

9 Ibid.

spouses applies for some couples in cohabitation. Cohabitation is further defined as two people over the age of 18 living together if they either have or have had children together, or if they were previously married to each other. Cohabitees within this definition are equated with spouses in the National Insurance Act.[10]

Spouses and couples in "cohabitation" may qualify for survivor´s benefit if their partner dies. For example: the Norwegian Labour and Welfare Administration can grant benefit if the cohabitees have or had children together.[11]

On the other hand the applicant´s marital status can influence negatively on the size of disability benefit. The marital status matters if the applicant falls within section 1-5 or lived with the partner for a given number of months.[12] Marital status determines the minimum income level applied for calculating the benefit and also the minimum the size of the benefit. If the applicant lived together with a partner 12 out of the last 18 months, the size of the disability benefit might be smaller the benefit for single applicants in the same economic position.[13]

1.2.6 The Act on document tax (1975)

The Act on document tax, section 8, para 2 defines "Cohabitation" as two people living together in a "marriage-like relationship" that either are registered on the same address in the National registry for at least two years or expects, have or have had children together.[14]

1.2.7 Common characteristics

Even though the acts state their own definition of "cohabitation", there are some common characteristics. The most common feature is that "cohabitation" only includes couples living together in a "marriage-like relationship". Different factors presented in the different acts determine when shared household is enough "marriage-like" to be a "cohabitation".

Firstly, couples living together who have or have had common children will often be defined as cohabitees automatically. It seems as if the legislator acknowledges these couples as serious enough or enough "marriage-like". Secondly, the length of joint household between couples constitute a reoccurring factor.

1.3 Proving cohabitation

There is no registry for cohabitation—while spouses must follow formal proceedings before marriage can be entered.[15] Therefore, registration is not a condition for cohabitation. The important criteria is whether the couple is *actually* living together in a "marriage-like relationship". It must be established that the parties are cohabitees, before cohabitation law is applied.

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10 The National Insurance Act 1997 (*Folketrygdloven*).

11 Ibid. section 17-5, section 17-3 para 2.

12 Ibid. chapter 12.

13 Ibid. section 12-9 para 2, section 12-13 para 2.

14 The Act on document tax 1975.

15 The Marriage Act 1991, chapter 2.

Proof can be made via witnesses, financial documents, registration on the same address in the National registry etc. The National registry issues a residence certificate, which contains information about which address a person is registered to and for how long he or she has resided there. Even without this residence certificate, problems with submitting proof for cohabitation are few.

1.4 The Norwegian Family Law Regime

Before examining the various research questions regarding the division of property upon termination of cohabitation, it is insightful to present a brief overview of the Norwegian family law regime. Although, as mentioned above, the definition of a cohabitee, or a spouse is provided through various legislative provisions relating to also other areas than family law, Norwegian family law has traditionally been classified as a special legal regime. [16]

Likewise, with other special legal regimes, such as for instance tort law or criminal law, Norwegian family law has its own distinctive features that points to it being its own regime. Perhaps, this is most evident when it comes to spouses or cohabitees becoming joint owners of assets—which we will elaborate further on in the report—and that points to one distinctive feature of this area of law, namely that family law disputes are sought to be solved with a life community perspective.

Traditionally, Norwegian family law has concerned the rules regulating marriages and the legal relationship between parents and children. However, the change in family patterns—especially with regards to cohabitation becoming a more mainstream way of living together—has resulted in a family law regime that also includes cohabitees and registered partners.[17] In addition, Norway legalised same-sex marriage in 2009, which has broadened the scope of the family law regime even more.

On the other hand, there exists a debate among legal scholars in Norway, that although the Norwegian legal family law regime has its distinctive features, this area of law has apparently grown closer to the general law of properties.[18] Hence, by taking such views into account, one could question if Norwegian family law still remains a special legal regime.[19] Some scholars also claim that there has been a shift in case law towards solving family law disputes in light of the general law of properties.[20] However, this debate will not be elaborated on any further in the current report. Nevertheless, it is important to keep in mind that certain family law disputes are indeed regulated by the general principles of the law of property. For instance, when determining who owns what on the termination of a marriage or a cohabitation.

In the following pages this report will examine and discuss the various questions regarding cohabitation and the division of property on the termination of cohabitation, taking a Norwegian perspective into account.

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16 Tone Sverdrup, Peder Lødrup *Familieretten* (7th ed, Calax AS 2016), p. 22.

17 Ibid.

18 Tarjei Bekkedal, *Kontraktsrettens betydning på familierettens område* (2015) p. 151.

19 Kristin Strøm Bull, *Avtaler mellom ektefeller* (Tano Aschehoug1993) p. 16.

20 Tarjei Bekkedal, *Kontraktsrettens betydning på familierettens område* (2015) p. 164.

2. Joint ownership of assets—Circumstances under which it applies

2.1 Introduction

As will be explained further throughout this report, the ownership of different assets in cohabitation are of relevance both during and after the cohabitation ends. It is therefore important to establish what assets a cohabitee is the sole owner of, and what assets a cohabitee can become joint owner of, during the relationship.

When comparing cohabitees and married couples, there are no significant differences between the two forms of living when it comes to becoming joint owners of assets. Co-ownership is therefore one of the few areas where the law is similar between cohabitees and spouses.

In Norwegian law, becoming joint owners of assets are in general decided on the basis of common property law.[21] The deciding factor will be the actual ownership of the asset, not the formal ones – for example in registers etc. Cohabitees can, through a contract or a cohabitation agreement, decide between each other what will be owned by whom. A lot of cohabitees in present society do not have these types of agreements, making it harder to establish the actual ownership of the different assets in the cohabitation.

There are, however, other principles in property law that can shed light upon the ownership shares of an asset. For example, it is a common principle in property law that the person who buys—or otherwise acquires—an item becomes the owner of said item. If a person buys a TV, that person becomes the owner of the TV, regardless of cohabitation status. The same goes for money acquired from work on the basis of a labour contract. Only the party to the labour contract becomes the owner of the money earned.

It is also a common principle in property law that another party than the one in the contract can become co-owner of an asset when contributing with funds, making it possible for the first party to acquire an asset. Although in some cases the funds contributed can be meant as a loan, a gift to the other person, or something else, it is a common presumption that a big contribution to the acquired item signifies shared ownership if nothing else is agreed. The parties have entered into a tacit agreement – an agreement that does not explicitly state the ownership shares.

Even though the common principles in property law can be used as guidance when it comes to ownership of different assets, cohabitees and their married counterparts have some distinctive rules when it comes to establishing ownership compared to other co-owners.[22] This is mainly connected to a cohabitees indirect contributions in the form of housework, upbringing of children and covering of living expenses, as will be presented further down in the report.

In summary, cohabitees can become joint owners of an asset on the basis of a contract or a cohabitation agreement – both written and tacit. A cohabitee can also become

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21 Peter Lødrup and Tone Sverdrup, Familieretten (2 nd sup, 8th edn, Calax AS 2016) p. 351.

22 Peter Lødrup and Tone Sverdrup, Familieretten (2 nd sup, 8th edn, Calax AS 2016) p. 352.

joint owner on the basis of directly or indirectly contributing to the acquisition of an asset, which is what this point in the report will explain in further detail.

2.2 Joint ownership on the basis of contribution

2.2.1 Introduction

As seen in the example above, a cohabitee can become joint owner of an asset based on that person's contribution to the acquisition of the asset. In Norwegian law, ownership is not necessarily based on who is registered as the owner in the Land Registry or other registers, but who is the actual owner.[23] Registers can, however, give an indication on ownership and what has been agreed between the cohabitees. Moreover, when considering ownership, it is natural to distinguish between direct and indirect contributions.

2.2.2 Direct contributions

When talking about directly contributing to an asset, one usually talks about the contribution to the payment. It can, however, also be other types of contributions, such as labour or work towards the asset, for example a house or a garage.[24] As mentioned earlier, bigger contributions usually signify shared ownership if nothing else is agreed. The exact amount required is, however, based on a concrete judgement.[25]

The question has been in front of the courts several times. For example, in Rt. 1984 p. 497 the Norwegian Supreme Court processed a case regarding ownership of a residential property that was built during the cohabitation. The house was partly built on property received by one of the cohabitees' parents, and the building plans were already clear before the cohabitation began. Furthermore, it was undisputed that the house was financed mostly by a loan that the cohabitee was solely responsible for, of NOK 235 500.

The counterpart in the case argued, based on construction costs amounting to NOK 13 000 which were covered from own pocket, that the house was owned jointly between the two. The Supreme Court, on the other hand, did not agree with the counterpart, saying that although it is of relevance that the cohabitee paid for the construction costs with own funds, it was insufficient to provide the basis to establish co-ownership.

The Court also considered the fact that the counterpart had contributed directly with some work on the house during construction. Even though this was also a relevant factor in the case, the Court decided that the effort on the house had a clear connection to the fact that it was done to a home they would both live in together, and which the counterpart had an interest in seeing finished. It was without regards to ownership, and therefore not a weighty argument for co-ownership[26].

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23 Ibid. p. 351.

24 Rt. 1984, p. 497.

25 Rt. 1984, p. 497 (503).

26 Rt. 1984, p. 497 (504).

The case resulted in sole ownership for the first cohabitee, and shows that—although it is possible for a cohabitee to become co-owner of an asset through direct contributions—the contributions have to be considerable, taking into account the value and cost of the asset. This is also connected to the common principle in property law explained above, stating that people are sole owners of assets they acquired themselves, regardless of cohabitation status.

2.2.3 Indirect contributions

That one part of the relationship can become joint owner of an asset on the basis of indirectly contributing to the acquisition was established by the Norwegian Supreme Court already back in the 70's, cf. Rt. 1975 p. 220. The court rejected one of the spouse's claim to sole ownership with reference to the other spouse's efforts—regarding housework and upbringing of their three children—making possible the construction of the building for the first spouse.

The assessment of a spouse's work in the home was gradually changing, and the judgement laid basis for indirect contributions becoming a factor that needed to be considered in future situations of ownership. The court did, however, clarify that the decisive weight of indirect contributions through work in the home would depend on a specific assessment of the situation.[27]

Even though the above-mentioned case was about spouses, some of the same principles were also established three years later regarding cohabitees, cf. Rt. 1978 p. 1352, which will be addressed in detail further down. Examining previous case law, there are mainly two ways of becoming joint owner through indirect contributions; covering living expenses, and/or doing housework.

2.2.4 Living expenses

With regards to common living expenses between the cohabitees, the principle is that each of the cohabitees are responsible for half of the living expenses each.[28] It is only when one of the cohabitees have covered more than his or her share of the living expenses that this part can become joint owner on the basis of indirect contributions, cf. Rt. 1984 p. 497 and Rt. 2011 p. 1168.

This does, however, not mean that a cohabitee automatically becomes a joint owner by covering more than half of the common living expenses. When considering an indirect contribution to the acquisition, it is also relevant where the direct contribution of the other cohabitee comes from.

If, for example, a cohabitee acquires a house with funds received as a gift or inheritance before the start of the cohabitation, the other cohabitee cannot become joint owner of this house. It is only when a cohabitee frees up capital for the other cohabitee in the form of paying for living expenses that joint ownership is relevant.[29] In other words; when the cohabitee would not have been able to acquire the asset if not for the other cohabitee paying for living expenses.

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27 Rt. 1975, p. 220 (226).

28 Rt. 1984, p. 497 and Rt. 2011, p. 1168.

29 Peter Lødrup and Tone Sverdrup, Familieretten (2 nd sup, 8th edn, Calax AS 2016) p. 355.

As mentioned, when examining Rt. 1984 p. 497 above, the court laid emphasis on the fact that the house was partly built on property received by one of the cohabitees parents as a gift. Furthermore, the court argued that the first cohabitee was able to cover his share of the common living expenses, and still invest into the house. The other cohabitee had therefore not made it possible for the first cohabitee to build the house, since she had not covered more than half of the living expenses.[30]
Another important point which the court considers in these types of situations is the cohabitees living expenses with regards to rent. In Rt. 2011 p. 1168, the Supreme Court laid emphasis on the fact that one of the cohabitees had lived in the other cohabitee's house for free under their relationship. She had therefore not paid living expenses in the form of rent, which had counted towards significant savings.[31]

2.2.5 Housework and upbringing of children

For married couples, the Marriage Act of 1991 explicitly states that—when assessing who has acquired an asset that have earned for the spouses' joint personal use—emphasis must be placed on a spouse's work in the home, cf. §31 (3). Cohabitees do not have the same statutory protection, but it has been shown through case law that the same principle is also applicable to the unmarried counterparts.
Seeing that indirect contributions towards housework and upbringing of children results in the same outcome for both cohabitees and married couples, it is a common mistake to think that §31 (3) of the Marriage Act is used analogously in cases regarding cohabitees. It is, however, important to stress that this is not the case, and that the legal basis for indirect contributions for cohabitees is case law.[32] This is also linked to why many choose to become cohabitees instead of spouses, namely making the choice of not being bound by the Marriage Act of 1991.
In Rt. 1978 p. 1352, the Supreme Court considered a case regarding the size of ownership between cohabitees. The first cohabitee accounted for most of the direct contributions, while the other cohabitee had paid living expenses and done housework. The case resulted in equal shares of ownership where each cohabitee was considered to own half.
In the judgement, the Court compared the situation to that of spouses in Rt. 1975 p. 220, saying that the housework clearly had to be emphasized when considering the ownership shares. The house was not big, and the cohabitees did not have children, but the other cohabitee had made the first cohabitee's work effort on the building possible, leading to significant savings every year. The efforts in the home did not only contribute to the acquisition of the building, but also to the maintenance and increase of value of the general assets in the co-ownership.
It is, however, important to state that there are only few cases where a cohabitee has become joint owner of an asset solely based on housework.[33] Usually only when combined with upbringing of children or covering of living expenses can housework

30 Rt. 1984, p. 497.
31 Rt. 2011, p. 1168.
32 Rt. 1978, p. 1352.
33 Peter Lødrup and Tone Sverdrup, Familieretten (2 nd sup, 8th edn, Calax AS 2016) p. 354.

be relevant to the ownership. In Rt. 1978 p. 1352 above, the cohabitee had covered the living expenses, but the other cohabitee had made a greater financial effort during the relationship. It was therefore the housework that tipped the scale, and the combination of the two that led to ownership of one half each.
As seen in Rt. 1975 p. 220 above, the Court laid emphasis on the fact that one of the spouses had made the efforts towards housework, but also the upbringing of their three children. The presumption has been made through case law that the upbringing of children below school age counts for about half of the other spouses normal income, and therefore also half of the other spouses direct contributions from this income, cf. Rt. 1980 p. 1403.
Children below the school age usually needs continuous supervision, and a cohabitee's care and supervision of the child enables the other cohabitee to work outside the home. In principle, the cohabitee that is responsible for care and supervision of the child therefore frees up half of the other cohabitee's working hours. When the child reaches school age and the need for continuous supervision disappears, however, the argument for upbringing of children becomes less and less relevant.[34]
From the above-mentioned case law regarding indirect contributions, there is a need to outline what assets a cohabitee can become joint owner of. All of the cases mentioned have been about assets for common personal use. These assets can include the common residence, other buildings such as cottages, boats, cars, household goods, etc. Seeing that there is no statutory limitation when it comes to cohabitees, it is natural to limit the assets to the same of the ones in §31 (3) in the Marriage Act of 1991 – namely assets for common personal use. This also correlates well with the existing case law regarding indirect contributions.[35]

2.3 Closing

As seen above, there are several ways for a cohabitee to become joint owner of an asset, both with direct and indirect contributions. It becomes clear from the case law mentioned that the key criteria in the assessment of joint ownership are the cohabitee's direct or indirect contributions to the acquisition, and the common planning and use of the asset.[36] When deciding on a result, the Court firstly needs to find out what has been contributed directly and what has been contributed indirectly, and thereafter consider whether the acquisition has been a common project between the two cohabitees. The overall outcome is decided on the basis of a concrete assessment.

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34 Peter Lødrup and Tone Sverdrup, Familieretten (2 nd sup, 8th edn, Calax AS 2016) p. 155, 156, 356.
35 Ibid. p. 355.
36 Ibid. p. 354.

3. Grounds to claim compensation upon dissolution

3.1 Introduction

The main rule is that a cohabitee cannot expect repayment for contributions that are made during the cohabitation. Therefore, a cohabitee can normally not have eligible expectations to receive compensation upon the dissolution of the cohabitation. A compensation claim is an exception from this main rule and is only exceptionally awarded by the court.[37] This should reflect the requirements to receive compensation.
In the judgment Rt.1984, p. 497 the Supreme Court for the first time stated that a cohabitee has a possibility to claim compensation upon the termination of the cohabitation. The Supreme Court concluded that compensation can be awarded based on the general principles of unjust enrichment and restitution. [38]
The Supreme Court has further clarified the conditions for compensation claims in two judgments from 2011: Rt. 2011, p. 1168 and Rt. 2011, p. 1176. There are two cumulative conditions for compensation claims: 1) Significant financial benefit. 2) Reasonableness. [39]
A financial benefit means that a cohabitee through the other cohabitee's contribution achieve an enrichment or savings. When the literature explains how the benefit is determined, it distinguishes between the situations where enrichment leads to investment and where enrichment leads to savings.[40] This will report will apply the same distinction.
The compensation awarded can maximally correspond with the enrichment provided. [41]

3.2 Typical situation

Upon dissolution of the relationship, one cohabitee might realise that he or she is left with limited assets, even though he or she contributed a lot to acquisitions during the cohabitation. One example is that this cohabitee is not a joint owner of the common residence or other big assets. One solution is to argue joint ownership. Another possibility is to claim compensation. Often when a cohabitee claims compensation, it is because he or she contributed directly or indirectly to the acquisition of an asset, but not enough to become joint owner, or because the cohabitees already have an agreement on ownership.

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37 John Asland, Margareta Brattström, Göran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, Nordic Cohabitation Law (Intersentia Ltd 2015), p. 125.

38 Rt.1984, p. 497 on p. 503.

39 John Asland, Margareta Brattström, Göran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, Nordic Cohabitation Law (Intersentia Ltd 2015). p. 126.

40 Peter Lødrup and Tone Sverdrup, Familieretten (2nd sup, 8th edn, Calax AS 2016), p. 361, 363, 365.

41 Rt.2011, p. 1168, section 29.

First, the cohabitee should try to make an agreement with the other cohabitee. The agreement might constitute a fairer division of assets or compensation for contributions.
If the cohabitees do not come to an agreement, the cohabitee claiming compensation can take the case to court. The courts can award compensation. As this report will address later, an agreement by the dissolution of the cohabitation affect the possibility for the court to award compensation.
Another situation is upon the death of one of the cohabitees. If the remaining cohabitee contributed to the other's savings, this cohabitee may claim compensation from the heirs.[42] The Supreme Court stated in Rt.2011 p, 1168 s 27 that there are lower requirements to claim compensation upon the cohabitee's death.

3.3 Capacity principle v. Half-share principle

In order to assess whether a cohabitee has received a financial benefit, it must be clarified how much the cohabitees are expected to contribute to the common household expenses. Should they contribute equally or on basis of capacity?
The Capacity principle argues that each cohabitee should contribute the same percent of their income to the family's household expenses. The Supreme Court stated in Rt. 2011, p. 1168 that this principle is more suitable for spouses, because they have a mutual duty of care.[43]
In the same judgment, the Supreme Court concluded that the half-share principle applies for cohabitees. This principle entails that household expenses should be divided equally between the cohabitees. This means that a cohabitee should contribute to cover half of the household expenses. There cannot be any financial benefits for one of cohabitees before the other has covered more than his or her half. [44]

3.4 The financial benefit lead to investment

In this situation the contribution of one cohabitee, lead to investment by the other cohabitee. The core of this situation is to investigate whether the contribution made the investment possible; if not, it is not necessarily a contribution. [45]
In the following, the report addresses different kinds of contributions:

- Money and labouring for acquisition or improvements;
- Paying for living expenses; and
- Housework and upbringing of children.

3.4.1 Money and labouring for acquisition or improvements

Payments, such as capital transfers and taking up or paying down a loan, constitute direct contributions to acquisition or improvements of assets. Self-building, for

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42 Rt.2000, p. 1089.
43 Rt. 2011, p. 1168 section 30.
44 Ibid.
45 and Tone Sverdrup and Peder Lødrup, Familieretten (2nd sup, 8th edn, Calax AS 2016), p. 363.

example acquisition by building the house themselves, and providing the materials for the building, are also considered direct contributions.[46]

If a cohabitee provides the other cohabitee with capital for acquisition or improvements of property, it is relevant to ask if the money is a loan, a gift or a deposit. In RG.1998, p.1524, a cohabitee had paid some of the other cohabitee's debt. The District Court ruled that the receiving party had to return the money. Therefore, if the capital provided is a loan, it is possible to claim the money back. Contrarily, if the transaction was a gift, it is normally not possible to claim the money back. [47]

If a cohabitee has directly contributed to acquisition or improvements of the other cohabitee's property, the question is how big the enrichment amount is.

The enrichment does not equal the value of the contribution for the contributing cohabitee. The enrichment is the value the contribution had for the receiving cohabitee. For example, if one of them contributes with labour or building materials to the building of an annex for the other´s house, the enrichment is not the value of the labour or materials. Instead, to estimate the enrichment, the value of the property with the annex is compared to that of the property without the annex.[48]

Not any increase in value will provide basis for compensation. Normally, capital used for maintenance is considered to be consumed and does not result in increased value. Therefore, contributions to maintenance are not an enrichment for the owner. [49]

In Rt. 2011 p. 1168, the Supreme Court states that an increase in value due the positive development in price level or the market is not enrichment provided by the other cohabitee. Therefore, this kind of increase in value does not give basis for compensation.

3.4.2 Paying for living expenses

Paying for living expenses for common household or common holidays can be an indirect contribution to acquisition or improvements of property. [50]

If a cohabitee has provided indirect contributions by paying more than his or her share of the living expenses, this party might have made the other cohabitee's acquisition or improvement of property possible. As stated earlier in the report, "more than his or her share" of the living expenses, is more than half of the total common living expenses.

In order to make the acquisition or improvements possible, the cohabitee's payment of the living expenses must have given the other cohabitee capital to invest.

In Rt. 2011, p. 1168 the Supreme Court assessed whetherone of the cohabitees had contributed to the others acquisitions. At the beginning of the cohabitation, she had no assets. Her cohabitee had a residence with a big loan. During the cohabitation she paid for all the common household expenses, did the housework, and took care of their children. The Supreme Court stated that he "has been able to use his income to pay

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46 Ibid. p. 147, 351, 363.
47 Ibid. p. 363.
48 Ibid. p. 363.
49 Ibid. p. 363.
50 Ibid. p. 355.

down the loan on the residence […and] because she paid more than half of the common household expenses, she made the down payment possible".
For comparison, in Rt. 2011 p, 1176, the claimant only stood for a quarter of the household's income and all of it was used to pay for joint living expenses. The Supreme Court held that her contribution did not exceed "what was necessary to cover her own living expenses". Therefore, she was not awarded compensation.

3.4.3 Housework and upbringing of children

Housework and upbringing of children (childcare) can also be an indirect contribution to acquisition or improvement of property. [51]
Housework and childcare may give grounds for compensation, if the cohabitee—by taking on more of his or her share of this work—liberated time for the other cohabitee. Liberation of time makes it possible for the cohabitee to work more for increased income, or time to increase the fortune by self-building. [52]
In Rt. 2011 p, 1168 the claimant and her cohabitee had two children together. For five years, around the time when the children were born, the claimant had taken full responsibility for the childcare and household. The Supreme Court stated that she had thereby "made it possible for him to spend time building his company". As mentioned above about this judgment, she also made it possible for him to use his income for down payment. The cohabitation lasted for 16 years. On the termination of the cohabitation, she had no fortune and his assets were worth 5 000 000 NOK.
In cases where the cohabitees do not have children, it is difficult to get compensation. In Rt. 2011 p, 1176 the claimant had not done any childcare, and she was not awarded compensation.
Literature argues that childcare for children below school age contributes to half of the other cohabitee's income. This only applies if the income is average. If the cohabitee's income is particularly high, or if the property acquired is quite expensive, the contribution is less than half of the income.[53] In addition, the contribution should be less than half if the child goes to kindergarten. If the child is in kindergarten, the cohabitee is not actually performing the childcare. The children should be considered a smaller and smaller contribution when the children start school. This is because the school has the responsibility of taking care of the child, and the child becomes more and more independent.

3.5 The financial benefit saved the receiving cohabitee money

In Rt. 2000, p. 1089, the cohabitees had lived together for 13 years. From 1993 to 1998, when the male cohabitee died, the female cohabitee provided round-the-clock care of her partner. She gave up work in order to look after him. He had an alcohol problem, was violent, and refused treatment. The Supreme Court awarded her 400 000 NOK in compensation for the financial benefit she gave him.

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51 Ibid. p. 355, 356.
52 Ibid. p. 140, 154, 356.
53 Ibid. p. 356.

The judgment made it clear that compensation may be awarded even though the respondent did not increase his fortune due to the enrichment. It is enough that the respondent saved money due to the financial benefit from the other cohabitee.
Extraordinary medical care of the cohabitee can result in a financial benefit, as the judgment shows. Paying living expenses could also be a financial benefit that leads to savings, and therefore basis for compensation. The financial benefit does not have to be intact, for example saved in the bank. The contribution from the cohabitee must have saved the other cohabitee of expenses he or she otherwise would have.[54] In the mentioned judgment, the Supreme Court states that "if the cohabitee needs care due to sickness, injury or other circumstances, will daily nursing and care that goes further than what is expected in a cohabitation, normally have to be recognised as given the cohabitee a financial benefit".[55] The judgment reflects that a claim for compensation is an exception and not easily awarded. As mentioned earlier, the contributing cohabitee cannot have an eligible expectation to get compensation. [56]
In Rt. 2000, p. 1089 the contributing party was awarded 400 000 NOK in compensation. The Supreme Court does not provide guidelines for working out the amount. In that case, the amount was probably based on fairness and reasonableness.
In the judgment, the Supreme Court emphasises that the determination of the amount is an objectified norm.[57] The literature argues that the compensation will be determined based on the cohabitee's financial position with and without the financial benefit provided by the other cohabitee. In the situation where the cohabitee has received care and nursing from the partner, it could easily be invoked that—without the cohabitee's contribution—the state or municipality would provide free or cheaper treatment. If this argument leads forward, it would not be a big deviation between the financial positions. The literature concludes that, by applying an objectified norm, this sort of unsecure assumption will be denied. [58]

3.6 Reasonableness

In addition, to the cumulative condition regarding the respondent receiving a significant financial benefit—whether it is a financial enrichment or a saving—the awarding of compensation must also be reasonable. The general norm of reasonableness is dictated by an overall assessment.[59] Moreover, Norwegian courts

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54 Ibid. p. 365.

55 Rt. 2000, p. 1089 p1095: "Dersom samboeren er pleietrengende på grunn av sykdom, skade eller andre forhold, vil daglig omsorg, stell og pleie som går lenger enn det som hører med i samboerforhold, normalt måtte anses for å tilføre den pleietrengende en økonomisk fordel" (own translation).

56 Rt. 2011, p. 1168 section 31.

57 Rt. 2000, p. 1089 p. 1095.

58 Peter Lødrup and Tone Sverdrup, Familieretten (2nd sup, 8th edn, Calax AS 2016), p. 365.

59 John Asland, Margareta Brattström, Göran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, Nordic Cohabitation Law (Intersentia Ltd 2015), p. 124.

have a discretion to decide whether a compensation should be awarded or not based on namely the norm of reasonableness.
However, the assessment of reasonableness has played a modest role in Norwegian case law. In fact, there are no cases yet where the court has held compensation to be unreasonable, provided that the condition regarding the significant financial benefit was satisfied. Furthermore, it is vital to keep in mind that a cohabitee is not entitled to receive a compensation. This is mainly due to the nature of cohabitation, which implies contributions without hopes of repayment.[60] Hence, compensation becomes more of an exception, which the Supreme Court of Norway stated clearly in the mentioned case of Rt. 2011 p. 1168.
The question that thus remains is; what constitutes the threshold for reasonableness, or in orther words: In which situations would it be reasonable for the court to award compensation? The answer has been elaborated through case law, due to it not being regulated through statutory law. Hereunder, the Supreme Court of Norway has held that the overall assessment needs to take various elements into account, such as the size and the characterisation of the financial benefit, the economic position of the cohabitees, the duration of the cohabitation, and finally their own expectations.

3.6.1 The size and the characterisation of the significant financial benefit

It comes naturally that the greater the financial advantage through contribution from a cohabitee— whether direct or indirect to a financial benefit—the more likely is it that the court will award the claimant with compensation. In other words, if the respondent, through the cohabitation, is given a large financial benefit, it is not unreasonable to award the claimant a compensation.[61] Similarly, if the financial benefit is low, this naturally points to the opposite result. Hence, the size of the significant financial benefit becomes an important factor in the overall assessment of reasonableness.
In addition, the characterisation of the benefit can also play an important role when determining what constitutes a significant benefit, and thus increases the chances of compensation being a reasonable outcome. For instance, if the financial benefit came from an indirect contribution, the court will often require the contribution to be more comprehensive than if the benefit came from a direct contribution. This is simply because the indirect contributions—for example work at home—are considered to be a more natural part of the cohabitation, in contrast with a direct contribution such as a large transfer of a money sum. This type of reasoning is evident in for instance a case from the Courts of Appeal LA-2009-84965. Here, a cohabitee had transferred a large sum of money during a short cohabitation. The court held that this was an investment in the other cohabitee's economy, because the claimant had imagined that the relationship would be long-lasting. Thus, the court upheld the compensation claim, but at a much lower sum than transferred.

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60 Rt 2011 p 2000 para 1094.

61 Peter Lødrup and Tone Sverdrup, Familieretten (sup, 8th edn, Calax AS 2016), p. 278.

3.6.2 The financial position of the cohabitees

The financial position of the cohabitees and their need for means in the future is also an element to consider in the overall assessment. Furthermore, if a cohabitee has contributed to a lot of the acquisitions, but is yet left without any assets after a long-lasting cohabitation, this clearly points to granting a compensation, which was the case in the previously mentioned Rt. 2011 p. 1168. In addition, if a cohabitee is dependent on the compensation in order to buy a new house, this also points to the compensation being reasonable.

On the other hand, if the respondent does not have the financial ability to pay the compensation, this indicates that at a compensation claim may not be upheld, despite that it perhaps would be reasonable. Moreover, the literature argues that if an enriched cohabitee must sell his or her assets in order to be able to pay the compensation, this indicates that the court most likely will be more reserved on upholding the compensation claim. Unfortunately, the court will in some cases run the risk that the cohabitee who has contributed will struggle to establish him or herself again without compensation.

In a different case from the Court of Appeals, LB-2007-148064, cohabitee A won a compensation claim on the grounds of A's housework. The claimant was awarded 750 000 NOK in compensation. During the overall assessment of reasonableness, the court stressed that the relationship had lasted for 16 years, besides cohabitee B having a high revenue upon the termination of the cohabitation. The fact that the court awarded A a high compensation amount was perhaps justified by the fact that A had reduced her work load, and that she had the main responsibility for the kids. Due to this, B was able to earn a high revenue. Hereunder, it is evident that the financial position during the whole cohabitation has been taken into account by the court. Moreover, this way of reasoning, by taking an overall examination of the parties financial position into account, has been reaffirmed in subsequent judgements. [62]

3.6.3 The duration of the cohabitation

A long-lasting cohabitation indicates that cohabitees have a strong feeling of community, and most likely their finances will be commingled, in contrast to perhaps a short-lived cohabitation. The Supreme Court stressed in Rt. 2000 p. 1089, that the duration of a cohabitation which had lasted for 13 years pointed in favour of upholding the compensation claim. Norwegian case law does not provide any indication regarding what the limit is for a long-lived cohabitation versus a short-lived one.

However, case law stresses that the duration element will have a different influence on the overall assessment of reasonableness depending on whether the contribution is direct or indirect. In addition, one shall examine whether the contribution has resulted in an enrichment or a saving for the respondent.

Firstly, if an enrichment descends from an indirect contribution and the cohabitation can be characterised as long-lasting upon termination, this most likely points to rendering a compensation to the contributor.[63]As mentioned in Rt. 2011 p 1168, the

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62 Rt. 2000 p 1089, p 1094 and p 1095, and Rt. 2011 p 1168 p 32.

63 Lødrøp, (2011). p. 355.

relationship had lasted for 16 years, and during this time period the cohabitee had used her substantial part of time and money on the family. In this regard, she also contributed to increasing her cohabitee's financial wealth. Nevertheless, the court emphasised that usually one should not settle an account upon termination. [64] The judgement was given against her, but based on other reasons, while it is evident that the enrichment is influenced by an indirect contribution.

Secondly, if the cohabitation has been short-lived or if one party has given a direct contribution just before the termination, this will constitute elements that point towards a possible compensation. In LA-2009-84965 from an Appeal Court, these elements became applicable. The cohabitation only lasted 18 months, but during this brief period, one cohabitee transferred a considerably large amount of money to the other cohabitee. The intention was to invest in the financial position of the other cohabitee, thus revealing the expectation of the cohabitee to play an important role, which we will examine later. In contrast, a direct contribution during a long-lived relationship will point towards no compensation. For instance, in the case LH-2010-16682, one of the parties had paid 300 000 NOK more than the other cohabitee, but since the relationship was long-lasting, the court stressed that this constituted a community of interest which should not be evened out upon termination. This points back to the main rule: Contribution without expectation of repayment.

3.6.4 The expectations of the cohabitees

Finally, the expectation of the cohabitees also needs to be examined as an element. This is relevant if one of the cohabitees has died. However, the problem is often that an agreement on cohabitation upon termination by death is not common. Thus, in the lack of a will, it is important to pay attention to the expectation of the cohabitees. This was exactly the situation in Rt. 2000 p. 1089 where the deceased cohabitee had intended that the survivor would receive the compensation. In contrast, if there is an agreement between the parties that indicates that the enriched one shall be the sole owner of assets, this could preclude a compensation claim. This is a matter of judgment by the courts.

3.7 Agreements affecting claims for compensation

The cohabitees are, as a main rule, free to come to agreements about compensation. They can agree that one of them shall pay the other compensation, or that none of them can claim compensation.[65]

Agreements on compensation is a tool to protect the economically weaker party or protect the indirectly contributing cohabitee. Related issues will be addressed in question four of the report.

An agreement between cohabitees might affect the possibility to claim compensation. In Rt. 2011 p, 1168 the cohabitees made an agreement upon the dissolution of the cohabitation. According to the agreement, cohabitee A received an unsecured loan of

[64] Rt. 2011 p 1668 section 31.

[65] Peter Lødrup and Tone Sverdrup, Familieretten (2nd sup, 8th edn, Calax AS 2016), p. 370.

200 000 NOK. If some—yet vague— conditions were fulfilled, A would not have to pay back the loan to cohabitee B. The agreement also stated that the cohabitees did not have any more claims towards each other.

Agreements are as a main rule binding. In addition, unreasonable agreements are as a main rule binding.[66] In the Agreement Act, section 36, it is an exception for unreasonable agreements. If it would be unreasonable to demand the agreement fulfilled, the court may decide that the agreement—in total or in part—is invalid.[67] Whether the agreement is unreasonable depends on an overall assessment. According to the section 36, the content of the agreement, position of the parties, circumstances at the entering of the agreement and later occurred circumstances are weighted.[68] Both white papers and case law state that there are high requirements for invalidation due to unreasonableness.[69]

In Rt.2011 p, 1168 the Supreme Court asked two questions: 1) Can A claim compensation based on general principles of unjust enrichment and restitution? 2) Is it unreasonable to demand fulfilment of the agreement? Since the agreement was as a main rule binding, the court had to assess if the agreement could be set aside due to unreasonableness. To determine if the agreement was unreasonable, the Supreme Court had to compare the situation without the agreement (compensation based on general principles) with the compensation under the agreement.

On question 1, the Supreme Court concluded that A would have a claim for compensation estimated to 200 000 NOK, based on general principles of unjust enrichment and restitution. Because of the agreement between the parties, the court would only award this compensation if the agreement was invalid.

The Supreme Court referred to the loan, its conditions and the high requirements for unreasonableness. Based on this, the Supreme Court concluded that the agreement clearly could not be set aside, and stated that the conclusion would be the same even if the compensation would be 500 000 NOK based on general principles.

The judgment illustrates how an agreement between the parties might exclude a claim for compensation. Instead of receiving 200 000 NOK in compensation, cohabitee A was left with a loan with vague conditions after a 16 years long cohabitation.

4. Cohabitation agreements—frequency, limitations, typical clauses

4.1 Introduction

4.1.1 Agreement making

The main rule is that the cohabitees are free to make cohabitation agreements, both during the cohabitation and in conjunction with the termination of the cohabitation. An agreement can for example determine ownership, liability for debt or

66 Geir Woxholth, Avtalerett (9th edn, Gyldendal Norsk Forlag AS 2014), p. 294.

67 The Agreement Act 1918, section 36.

68 Geir Woxholth, Avtalerett (9th edn, Gyldendal Norsk Forlag AS 2014), p. 310.

69 Peter Lødrup and Tone Sverdrup, Familieretten (2nd sup, 8th edn, Calax AS 2016), p. 373.

compensation. An oral agreement is as binding as a written one.[70] Of course, a written agreement is to prefer, so the claimant has evidence.
There are mainly two exceptions from this main rule.
Firstly, a prior agreement about possession of the common residence or household goods is not automatically applied.[71] According to the Household Community act, section 4, prior agreements will only be taken into account when it is assessed whether the cohabitee shall have rights pursuant to the law.[72] These rights are accounted for in part 1 of this report.
The second exception is cohabitation agreements colliding with the Norwegian inheritance law.[73] According to the Inheritance Act, transactions intended to be fulfilled after the death of the cohabitee must be in accordance with the rules for inheritance to the children, and with formal requirements of wills.[74]

4.1.2 Statistics

In 1988 Statistics Norway asked cohabitees if they had a cohabitation agreement. Barely one out of ten had such an agreement. Later, in 1997 the Cohabitation committee, appointed by the Ministry of Children and Families, asked cohabitees the same question. This time two out of ten had a cohabitation agreement.[75]
In newer a study, from 2016, only 21 % of the couples had a cohabitation agreement.[76] Out of these couples, 68 % had agreements confirming what each of the cohabitees owned. This means that the agreements do not change the main rule for division of assets; that each cohabitee keeps its own assets.[77] In addition, 62 % answered that they never review and amend their agreement.[78]

4.2.1 Setting aside and amending agreements

As mentioned in part 3 of this report, unreasonable agreements can be invalid (set aside) or amended in total or in part. Please see part 3.7: "Agreements affecting claims for compensation".
If the cohabitees entered a prior agreement, the agreement might be unreasonable due

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70 Peter Lødrup and Tone Sverdrup, Familieretten (2nd sup, 8th edn, Calax AS 2016), p. 370.
71 John Asland, Margareta Brattström, Göran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, Nordic Cohabitation Law (Intersentia Ltd 2015), p. 155.
72 The Household Community Act 1991, section 4.
73 Peter Lødrup and Tone Sverdrup, Familieretten (2nd sup, 8th edn, Calax AS 2016), p. 370-371.
74 The Inheritance Act 1972, sections 35, 53, 29.
75 NOU: 1999: 25, Samboere og samfunnet (Cohabitation and society) p. 70-71.
76 Katrine Kjærheim Fredwall, "Jus og realitet i samboerforhold - Presentasjon av deler av en empirisk undersøkelse om par i samliv og ved brudd" (Idunn, 16 December 2016) <https://www.idunn.no/tidsskrift_for_familierett_arverett_og_barnevernrettslige_sp/2016/04/jus_og_realitet_i_samboerforhold_-_presentasjon_av_deler_av> (accessed 17 July 2019), 5.1.
77 Ibid. 5.3.
78 Ibid. 5.4.

to unexpected development in the relationship.[79] As the abovementioned study showed, agreements are rarely reviewed or amended. The agreement entered during the cohabitation might be unsuitable on the termination.

In addition, cohabitees might be in a pressured situation on the termination of the cohabitation or exposed to psychological pressure and therefore enter an agreement.[80] This might make the division of assets unreasonable.

As mentioned in part 3 of the report, the court will compare the legal situation without the agreement with the rights obtained by the agreement. The Agreement Act, Section 36 mentions some element for the assessment of unreasonableness. Additional elements include also the cohabitees' contributions during the cohabitation, their needs for funds, the length of the cohabitation, their understanding of the agreement, and whether the parties have different economic strengths—the last is known as the relation of strength between the parties (*styrkeforhold)*.[81]

An unexpected development after entering the agreement is an element of the assessment. In RG 1998 p, 1014, the court partially set aside the prior cohabitation agreement due to development of the cohabitees' finances.[82]

4.2.2 Agreements to protect the economically weaker cohabitee

"The economically weaker cohabitee" is understood as the cohabitee with the less fortune and income. The economically weaker cohabitee, for example, will not have the possibility to provide big direct contributions to acquisition or improvements. This party might contribute indirectly or provide minor direct contributions.

The legal issue for these cohabitees is that they often would have to bring action before courts in order to receive any economical rights at the termination of the cohabitation, for example joint ownership or compensation. At the same time, they are a weaker party who cannot afford court proceedings. In addition, many do not know that it is possible to claim joint ownership or compensation.

4.2.3 The content of an agreement

As the study shows, most cohabitation agreements just state what each of them own. Agreements with such a content rarely protect the economically weaker party. Based on the previous parts of this report, there are several ways to secure a reasonable division of assets.

First, an agreement stating the ownership of different assets can protect the economically weaker cohabitee. They might agree on ownership based on both direct and indirect contributions. An agreement can also contain compensation for the indirectly contributing party.[83]

Before entering an agreement stating the ownership proportions or compensation, the

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79 Peter Lødrup and Tone Sverdrup, Familieretten (2nd sup, 8th edn, Calax AS 2016), p. 373.

80 Ibid 373 and John Asland, Margareta Brattström, Göran Lind, Ingrid Lund-Andersen, Anna Singer and Tone Sverdrup, Nordic Cohabitation Law (Intersentia Ltd 2015), p. 157.

81 Peter Lødrup and Tone Sverdrup, Familieretten (2nd sup, 8th edn, Calax AS 2016), p. 375.

82 RG 1998 p 1014.

83 Peter Lødrup and Tone Sverdrup, Familieretten (2nd sup, 8th edn, Calax AS 2016), p. 371-372.

cohabitees should keep in mind that the future will not always be as they expect. The case LE-2017-37807 is illustrative of this. The cohabitees had a detailed agreement on establishment of joint ownership by down payment of mortgage. There were no conditions for how much the party needed to pay on the mortgage to establish joint ownership. The cohabitee did not pay down mortgage correlative to the value of the ownership interest achieved by the agreement, but—in accordance with the wording of the agreement—the cohabitee became joint owner.

Instead of agreeing on certain ownership proportions or compensation in advance, the cohabitees can agree on more flexible solutions.

One basic problem is the half-share principle. For the economically weaker cohabitee it might be impossible to follow the high consumption of the higher paid partner. This principle increases the threshold for joint ownership and compensation claims. A way to protect the economically weaker cohabitee is to agree on the capacity principle for the expected contribution.

In the decision Rt. 2011, p. 1168 the Supreme Court concluded that the compensation claim was less, because the claimant did not pay the other cohabitee rent. If one cohabitee is not supposed to pay rent, it could be reasonable to state it in an agreement. An agreement—clarifying what each of them is expected to contribute—might lower the threshold for joint ownership or compensation.

Indirect contributions to acquisition or improvements might result in joint ownership or compensation, but the threshold is high. An agreement stating recognition of indirect contributions to acquisition or improvements might lower the requirements. It can be argued that such an agreement shows that both cohabitees took for granted that indirect contributions should be compensated in some way, either joint ownership or compensation claim.

A good solution might be to agree on progressive ownership which means that the economically weaker cohabitee's ownership interest in an asset increases over time. For example, it can be agreed that cohabitee A's ownership interest in the common residence increases with 5 % each year until A has achieved 50 % ownership. The progressive ownership can be based on the length of the cohabitation or the amount of contributions, either directly or indirectly.

4.2.4 The form of the agreement

As mentioned earlier, an oral agreement is as binding as a written one. An oral agreement might cause evidential issues. For example in both LB-2015-200457 and LH-2018-62848 one of the cohabitees claimed that they had an oral cohabitation agreement, but the court did not find sufficient evidence to support it.

4.2.5 Dissolution by death

When one cohabitee dies, the division of assets happens the same way as by termination. The assets of this party will become his estate.[84]

One cohabitee's death can cause the dissolution of the cohabitation. As previously mentioned, only cohabitees with common children automatically inherit from each

[84] Peter Lødrup and Tone Sverdrup, Familieretten (2nd sup, 8th edn, Calax AS 2016), p. 358.

other.
In LH-2018-151052, the remaining cohabitee brought action before court against the deceased cohabitee's heirs. The parties disagreed on how much of the asset that belonged to the deceased's estate. The claimant succeeded joint ownership by the court, but not 50 %.
A cohabitation agreement that provides a reasonable division will protect the remaining cohabitee. In addition, the agreement can prevent conflict between the remaining cohabitee and the heirs.

4.2.6 Agreements to avoid possible conflict

A cohabitation agreement provides predictability, and disputes on the termination of the cohabitation might be avoided. In both LG-2015-83481 and LG-2014-143591, one cohabitee claimed joint ownership and compensation. In both cases the claimant achieved joint ownership. An agreement could have prevented court proceedings. On the other hand, in Rt. 2011, p. 1168 the cohabitees had an agreement and that did not prevent court proceedings.
Perhaps the best way to avoid possible conflict is to make sure that each of them understands what the agreement entails. First, they will have to know the legal position without any agreement. Secondly, they must understand the rights and responsibilities of the suggested agreement.

4.2.7 Agreements concerning children

Cohabitees with common children under the age of 16 must attend mediation on the termination of the cohabitation.[85] The purpose of the mediation is to get the parents to come to a written agreement on parental responsibility, custody and access/contact.[86] The agreement should be based on the best interest of the child.[87]
It is crucial for both the parents and the children to achieve suitable arrangements for the family. This can avoid conflict and ensure successful collaboration between the parents. That will be in the best interest of all parties, including the children, and ensure that they can continue as a family, without unnecessary conflicts.
Normally, the child will have two residences after the termination of the parents' cohabitation. If they do not agree otherwise, they have joint parental responsibility.[88] They will have to come to an agreement on the custody of the child—Custody means the child's place of residence and entails decision-making authority for parent(s). The parents may agree on sole custody or joint custody. [89] The parent without custody will have a right to access or contact.[90]
Joint custody does not mean that the child shall spend the same amount of time with each parent. Regardless of sole or joint custody, they will have to agree on how much

85 The Children Act 1981, section 51.
86 Ibid. section 52.
87 Ibid. section 48.
88 Ibid. section 35.
89 Ibid. sections 36-37.
90 Ibid. section 43.

time the child shall spend with each of them.[91]

4.2.8 Ensure children good living conditions

In accordance with the Household Community Act, a cohabitee can have right to take over the common residence or get right of usage. The cohabitee must pay market price for the common residence. Strong reasons must exist before the rules apply. [92] A strong reason can be if the cohabitee shall have most of the daily childcare.[93]

Both prior agreements and agreements on the termination of the cohabitation can affect the children's' living conditions. An unfair division of assets affects the economically weaker cohabitee and his or her opportunity to support the children. The division of assets can ensure residence of the parent with most of the daily childcare, or it can ensure that parent economy to buy or rent residence.

The written agreement concerning custody and access or contact should coincide with the exercise of the agreement. Such agreements entail economic consequences to ensure the child good living conditions.

The parent without custody should pay fixed contributions to the child's maintenance (child support). The contribution belongs to the child and shall support the child. Therefore, the parents cannot agree that no one shall pay child maintenance.[94] If the parents have agreed on joint custody, it is assumed that the child spends equal time with them both and that the parents have the same expenses for child maintenance. In this situation, the main rule is that none of the parents pay child support.[95] The child support is based on both the parents' income and the expenses to child's maintenance. If there is disproportionality between each of their income and expenses, one of them can be responsible to pay child support to the other.[96]

Parents that take care of children can also receive child benefit from the state. When the parents agree on joint custody, each of them have a right to receive child benefits. The state can only divide the child benefit equally between the parents. [97]

As mentioned above, custody entails decision-making authority for parent(s) and does not mean that the child spends the same amount of time with both parents. This is unfortunate, because it has big economic consequences. If they agree on joint custody, but one parent in reality takes all the daily care of the child, it can be challenging to claim child support or child benefit. Moreover, if the parents split the childcare 40/60, the child benefit is still divided 50/50 between them.

Before entering an agreement during mediation, the parents should be informed about the economic consequences of the agreement.[98] Even if the parents agree on an

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91 Ministry of Children and Family, Changes in The Children Act (Equal parenthood) (White paper, Prop.161 L, 2015-2016), section 7.10.3.

92 The Household Community Act 1991, section 3.

93 Peter Lødrup and Tone Sverdrup, Familieretten (2nd sup, 8th edn, Calax AS 2016), p. 369.

94 The Children Act 1981, section 67.

95 Regulation on ascertain and changing child support 2003, section 8.

96 Ibid. section 2.

97 The Child Benefit Act 2002, section 2.

98 The Children Act 1981, section 52.

arrangement, it is not ensured that the parents exercise the agreement. It is unfortunate that the rules on custody and access or contact do not collaborate well with the rules on children's maintenance, because the economic situation around children's' maintenance affect the children's' living conditions.

5. Most problematic issues in Norway

5.1 Introduction

Even though, the legal rights of cohabitees have been strengthened in Norway, there are still some problematic issues remaining. This part aims to highlight a few taking a *de lege ferenda* view into account.

5.1.1 The absence of statutory regulation

Perhaps, the most problematic legal issues the fact that Norway has no written law that directly regulates the legal relationship of cohabitation. Moreover, as we have examined in part 1, there is no uniform definition of "cohabitees", although the word is placed in various acts. Thus, cohabitees, are often exposed to an unclear legal situation based on non-statutory law and discretionary compensation rules. Moreover, the division of property upon termination relies upon, as we have seen, the general law of property. The possibility to regulate the legal relationship between cohabitees through statutory law is a delicate matter in Norway and has been since the 1980s.

Even though the Norwegian cohabitation committee from 1999, suggested to codify the discretionary compensation rules, this suggestion was not brought forward in the next report on the same matter published by the Ministry of Children and Family in the Meld. St. 29 (2002-2003) (white paper). [99] Instead, the Ministry stated in the white paper that matrimony is still the most desired way of living together. Hence, the white paper seems to suggest that this is the reason for not passing a separate statute on cohabitation. In contrast, the white paper claims that—should there be a need to regulate cohabitation through a statute—this should be justified in the best interest of the child. Furthermore, the government also mentioned that the rules in the Marriage Act regarding the financial settlement upon the termination of a marriage prevent conflicts in the family, while they do not mention what consequences such rules could have for cohabitees.

Another, widespread argument against legal regulation in Norway, is based on the fact that marriage is always an option, such as the white paper stated. Thus, legislation is not needed at all, since the cohabitees can decide whether to marry and hence acquire protection through the marriage legislation.[100] Hence, if one uses statutory intervention, one could end up with reducing a cohabitee`s self-determination. But, an objection to this argument from scholars, is that it takes two to marry; one party will always have the veto. Moreover, the party that does not want the relationship

[99] NOU: 1999: 25, Samboere og samfunnet p. 19.

[100] Tone Sverdrup, «Statutory Regulation of Cohabiting Relatiobships in the Nordic Countries – Recent Developtments and Future Challengens" (European Family Law 2014), p. 65.

regulated, is the only one that has his or her self-determination protected. Hence it is not about couple autonomy, but rather individual autonomy.[101]

5.1.2 Lack of access about financial positions

Another issue that is problematic in Norway is that the cohabitees do not enjoy the right to access information about the other cohabitee`s financial position, as opposed to spouses who enjoy this right in line with the Marriage Act section 39. Moreover, this can become an issue if the cohabitees decide to create an agreement about division of assets in the possible event of the cohabitation being terminated. The creation of such an agreement naturally relies on the parties' voluntariness. However, when one cohabitee lacks the right to inspect the other's financial position, it can be difficult to establish a safe agreement. In this regard, one could ask if the lawmaker should establish the inspection right for cohabitees, so that they can enjoy the same right as spouses have in this area. On the other hand, a counterargument against an inspection right, is that it is difficult to determine which cohabitees should enjoy this right, as there is a great variety in how in discriminated the finances are for each cohabitation couple. The Norwegian cohabitation committee suggested that the inspection right should be limited to those couples that have lived together for at least two years or have children together.[102] But this suggestion was not brought forward.

5.1.3 Can the absence of statutory regulation be solved through cohabitation agreements?

As mentioned previously in part 4, a study from 2016 showed that only 21 % of cohabitees in Norway have a cohabitee agreement. Public information sharing about the importance of making such agreements does not seem to have any large effect.[103] The creation of a contract often implies that the parties are equal with limiting one`s freedom in a way where both parties would expect to gain some benefit. This is particularly visible in a commercial contract where contract creates reliability and predictability and the parties expect to gain profit. This is not the case for cohabitees, as no new values are generated in the agreement. Hereunder, the aim of the agreement is to regulate the financial settlement, normally by establishing the ownership. In other words, it is already a "baked cake" which will be divided by the agreement.[104] Furthermore, this implies that one party has to win and the other one has to lose. Hence, agreement making cannot solve the problem regarding the absence of statutory regulation alone.

Besides, when the cohabitees are left to regulate the agreement making process, they are in addition left to take complicated decisions regarding financial calculations. Hence, a cohabitee agreement that clarifies the ownership of the assets does not always reassure the cohabitees with the reliability and predictability that they intended

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101 Bea Verschraegen (ed.), *Family Finances* (Jan Sramek Verlag KG 2009), p. 357.

102 NOU: 1999: 25, Samboere og samfunnet p. 24.

103 Bea Verschraegen (ed.), Family Finances (Jan Sramek Verlag KG 2009), p. 355.

104 Ibid.

to have.[105] Neither can cohabitees choose their contracting party. Hence the whole market mechanism, where one can chose the party that will provide the best terms and conditions for the agreement, is not functional for a cohabitee agreement. At the same time cohabitees have sentimental bonds and are aware of the other party`s weakness and strength. The points towards the lawmaker being cautious with recommending a cohabitee agreement instead of a possible statutory regulation.

5.2 Statutory regulation is needed

Inhabitants of the Norwegian welfare state have an expectation of being protected against financial predicament as long as they obey the rules of the state. But as we have seen throughout this report there are certain factors concerning cohabitation that in fact result in financial predicament. The non-statutory rules regarding the establishment of ownership, which can result in good solutions in many cohabitation relationships, seem to be demanding to achieve. Especially, the cohabitee who has indirectly contributed, and might have a week financial position from the beginning, will often struggle even though an agreement has been made (with the complications mentioned above). The contributors to this report hence strongly believe that statutory intervention is needed from the lawmaker.

6. Conclusion of the Norwegian report

Even though cohabitees do not have the same legal protection as their married counterparts in Norway, cohabitees still have some legal rights that have been developed through case law. As seen from the examples above, cohabitees can become joint owners through both directly and indirectly contributing to the acquisition of an asset.[106] They can also receive compensation upon the dissolution of the cohabitation if certain strict conditions are fulfilled.[107]

Regardless, the best way of making sure not to leave the relationship with less than hoped for is by making a cohabitation agreement. This way, both parts can agree on what will be jointly owned and what will be owned solely by one of the parts, potentially making the outcome of the termination of cohabitation predictable and unsurprising. As seen in examples above, however, it is important to make the agreement with the future in mind, seeing that the future is not always as expected in the moment. The wording of the agreement is usually decisive when considering ownership after the termination of cohabitation, so if not worded as intended, the result can potentially be unexpected and unfair.[108]

While cohabitation is not protected through a statutory law, the Court often has a tendency to land on a fair outcome for both parties. It is, however, important to state

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105 Olav Halvorsen Rønning (ed.), Med loven mot makta. Juss-Buss 40 år (Novus Forlag 2011), p. 13.

106 Rt. 1984, p. 497 and Rt. 1978, p. 1352.

107 Rt. 2000, p. 1089.

108 LE-2017-37807.

that the basis of cohabitation as a form of living still differentiates itself from matrimony. This is important because many couples, as mentioned throughout the report, choose cohabitation to escape the legislation that comes from The Marriage Act of 1991. So even though the results of the Courts are usually fair, the legal protection of married couples still surpasses the protection of cohabitees in significant ways.

Even though there is case law guarding some legal rights for cohabitees, the common person is usually not familiarized with these. As stated in the introduction of this report, the decreasingly frequent distinction between cohabitees and married couples can often paint an inaccurate picture of the cohabitees' legal protection being similar to that of spouses.

One can therefore argue that the need for a statutory cohabitation law based on judgements and modern legal theory, lex lata, is necessary. This will clarify the legal protection that covers cohabitees, make it significantly more available to the common person—potentially clearing up misunderstandings—and prevent cohabitees from leaving empty-handed after a long-term relationship.

The Swedish Report

1. Status quo of unmarried cohabitation in Sweden

1.1 National cohabitee legislation and complementing legislation

Since the 1960s the family formation has been changed in Sweden.[1] One of the changes was the increased level of cohabitee relationships that transformed the family patterns and it became more common for two people to live together without being married.[2] Statistic from 2001 and 2013 illustrates the increased level of cohabiting couples. During 2001 about 30 percent (all statistics must be read with caution) were cohabitees in relation to couples living together (as married couples or partners). In 2013 the proportion of people in cohabitee relationships increased to 40 percent (all statistics must be read with caution).[3]

Changed moral perceptions and the different forms of marriage-like relationships required neutral legislation according to the Minister of Justice. Although marriage may still have a central role in the family law, the Swedish legislatures aimed to avoid provisions that complicated for unmarried couples to form a family. The ideology of neutrality has given rise to two different methods of interpretation, which has been used by the Swedish legislatures in their legislative work. One interpretation is that it should be possible for the parties to set up their own standards in their relationship. Another is that there should be no distinction in the applicable provisions between married and unmarried couples. Both methods are used today, but in different areas of law.[4]

The definition of cohabitation has undergone reformations in line with societal changes and prevailing norms.[5] The main Swedish legislation regarding cohabitation, the Cohabitees Act (2003:376) (*Sambolagen*), was introduced in 2003. In essence, the former Cohabitees Act was passed over to the current Cohabitees Act. Thus, the preparatory work of the former Act is, to a large extent, still relevant and will be considered through this research. Cohabitation refers, in simple terms, to the situation when two people are living together under marriage-like conditions and share a joint household without being married, art.1 of the Cohabitees Act.[6] According to art. 1, none of the cohabitees may be married or live in a registered partnership.

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1 For a detailed description of cohabitation and non-marriage relationship from a legal-historical perspective, see part 1 section 2 of Kajsa Walleng's thesis *Att leva som sambo* from 2015.

2 Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 260.

3 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 88–89.

4 Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 263-264.

5 Ibid. p. 260.

6 For further information, see Swedish Government Offices, *Family Law – Information on rules*, 2013, p. 22.

Before the introduction of the Cohabitees Act in 2003, the cohabitees' private rights were regulated through previous acts. The first was the Act of Unmarried Cohabitants' Joint Dwelling (1973: 561) (*lagen om ogifta samboendes gemensamma bostad*), which regulated the right to take over the joint dwelling, upon termination of the relationship. The Act of 1973 was later replaced by more comprehensive legislation when the Cohabitees Joint Home Act (1987: 232) (*lagen om sambors gemensamma hem*) entered into force, which provided a right for the cohabitees to share the net value of the joint dwelling and household goods acquired for the joint use, upon termination of the relationship. The provisions of the Act of 1987 were transferred into the Cohabitees Act of today. The reform was mainly made to ensure clarifications.[7] Pursuant to the preparatory work, the main purpose of the Cohabitees Act is to ensure minimum protection for the weaker party at an eventual dissolution of the relationship. The legislation is based upon the fact that an actual intertwining of the cohabitee's economy occurs through a joint home.[8] Thus, the cohabitee legislation is mainly based on practical and protective aspects[9], since the general private law rules do not contain sufficient guidance upon the termination of a cohabitee relationship. However, in relation to the protection of married couples, the protection provided by the Cohabitees Act is limited. Unlike married couples, there are no provisions on the right to marital property, maintenance or inheritance obligations for cohabitees.[10]

Another important aspect of the legislation reformation is that the previously applied the Homosexual Cohabitees Act (1987: 813) (*lagen om homosexuella sambor*) was expired, through the introduction of the currently applicable Cohabitees Act.[11] A special law for same-sex couples had obvious shortcomings in terms of clarity and transparency, and there was no need to maintain special provisions regarding same-sex cohabitees.[12] Today, the Cohabitees Act is applicable on all cohabitees, irrespective of the couples' sexual orientation.

Basic protection is provided for all couples considered as cohabitees under the Cohabitees Act. However, the lack of specific provisions in the Cohabitees Act is complemented by other legislative provisions in other areas than in family law, in both private law and public law. The economic situation in cases where the cohabitation is dissolved can, thus, be legally determined by different laws, principles, and agreements.[13]

<https://www.government.se/4a767e/contentassets/1e0263a0318e47b4b8515b535925941b/family-law.pdf> (accessed 3 June 2019).

7 Maarit Jänterä-Jareborg, Margareta Brattström, Lisa Marie Eriksson, *National report: Sweden*, Mars 2015, p. 8. <http://ceflonline.net/wp-content/uploads/Sweden-IR.pdf> (accessed 18 July 2019).

8 Prop. 2002/03:80, p. 25.

9 Ibid. p. 25.

10 Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 268.

11 Ibid. p. 260.

12 SOU 1999:104, p. 20.

13 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 221.

In different areas of law, the approach to cohabitation, as a form of relationship, has been shifted over time. In the late 1960s, it became more common to actually equalize the gap between parties living in a cohabitee relationship and a married couple. Today, the legislation that has a quite large impact for cohabitees, apart from the Cohabitees Act, are for instance found in the Marriage Code (1987:230) (*Äktenskapsbalken*) by references from the Cohabitees Act, the Inheritance Code (1958:637)(*Ärvdabalken*), the Children and Parents Code (1949:381) (*Föräldrabalken*), the Land Code (1970:994) (*Jordabalken*), the Enforcement Code (1981:774) (*Utsökningsbalken*), the Social Insurance Code (2010:110) (*Socialförsäkringsbalken*) and the Insurance Contracts Act (2005:104) (*Försäkringsavtalslagen*).[14]

In some areas of the law, legislative provisions entail the fulfilment of several conditions in order to be applicable in an individual case. The provisions do not differentiate marriage from marriage-like relationships, but still require mainly two prerequisites of which cohabitees must fulfil: a previous marriage between the parties or a common child. This simplifies the assessment of whether the parties' relationship is genuine.[15] The fulfilment of these prerequisites is required in the social law and the tax law, and in the system of public pension. In the system of public pension, however boundaries appear depending on the form of relationship. Unlike married couples, cohabitees do not have the same opportunity to transfer their premium pension to one another.[16]

1.2 Three criteria for being regarded as cohabitees

The first criterion of permanently living together in a shared dwelling means that the parties live together in a common residence, which constitutes their joint home (i.e. permanent residence).[17] The cohabitation must be continuous as well. Thus, it is a question of the duration of the relationship. The two prerequisites - a common residence and continuousness – are closely connected. The prerequisite of a relationship being continuous is to exclude temporary relationships from the scope of application of the Cohabitees Act.[18] However, there is no explicit requirement for how long the parties should have lived together to be counted as cohabitees. Pursuant to the preparatory work, six months can be seen as a point of reference in order for the cohabitation to be assessed as continuous. At the same time, the preparatory work emphasizes the relevance of an individual assessment. The duration of the cohabitation shall, therefore, be assessed together with other significant circumstances.[19] Circumstances that can be taken into consideration in order to disregard the six-month-period are for example that the couple share the same place of

14 Håkansson, Sambolag (2003:376) 1 §, Lexino 2017-03-01.

15 Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 264.

16 Ibid. p. 265.

17 Göran Lind, *Sambolagen m.m. – En kommentar*, Nordstedts Juridik AB, 2013, p. 47.

18 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 145.

19 Prop. 2002/03:80, p. 27; prop 1986/87:1 p. 253.

registration administered by the Tax Agency, an agreement between the parties, a common bank account etc.[20] Here, a relevant case is RH 2005:34[21], which emphasize the significance of an individual assessment. In the case, the Court of Appeal considered eleven weeks as enough to be considered as cohabitees under the Cohabitees Act. The time itself did not correspond to the permanence criterion, however, the length of the cohabitation as well as other circumstances was taken into account. The relationship between the parties had lasted a long time before the initiation of the cohabitation, the parties' economy was intertwined and there was a will. The case is from the Court of Appeal and does not carry the same weight as Supreme Court case law but can nevertheless be seen as an example of individual assessment.

The second criterion of two people living together as a couple means that the couple live together in a relationship, in which a joint sexual life normally forms part.[22] However, a joint sexual life is not an absolute criterion.[23] Even though there is a criterion of a couple relationship for establishing a cohabitee relationship, a joint sexual life does not have a great significance through a practical perspective, since it is not possible to investigate the parties' intimate life. Instead, the assessment should include the parties' behaviour and own view of their relationship, their intention of living together and the perception of the relationship from the surroundings.[24] An attempt to investigate the parties' intimate life could constitute a violation of the right to respect for private life according to art. 8 of the European Convention on Human Rights.

Through focusing on the close emotional relationship, the Swedish legislature aims to exclude other forms of cohabitation from the legislation's scope of application, for instance, the situations when relatives or friends are living together.[25]

There is no requirement of a common child. However, the presence of a common child constitutes a presumption that a couple relationship exists and signifies an important circumstance in the assessment of an established cohabitee relationship between two people.[26]

The third criterion of a joint household means that the parties cooperate in everyday home affairs, share chores and expenses. There should also be, to some extent, economic cooperation – a base for a household unity.[27] However, neither the legislative provisions nor the preparatory works offers guidance when it comes to the

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20 Prop. 1986/87:1, p. 253.

21 RH 2005:34.

22 Prop. 1986/87:1 p. 252; prop. 2002/03:80, p. 27.

23 Maarit Jänterä-Jareborg, Margareta Brattström, Lisa Marie Eriksson, *National report: Sweden*, Mars 2015, p. 5. at:<http://ceflonline.net/wp-content/uploads/Sweden-IR.pdf> (accessed 18 July 2019).

24 SOU 1999:104, p. 186.

25 Prop. 2002/03:80, p. 26.

26 NJA 1994, p. 256.

27 SOU 1999:104, p. 186.

extent of economic cooperation. It is an assessment based on the overall circumstances of the individual case.[28]

2. Joint ownership of assets—Circumstances under which it applies

2.1 Cohabitation property and co-owned property – not synonyms

Within a cohabitee relationship there are different ways by which ownership constellations may arise. Issues of cohabitation property and co-ownership (*samboegendom* and *samäganderätt*) are often interesting for several practical reasons. Usually, the issues are raised when a relationship is to be dissolved through separation or the death of one or both of the cohabitees, but it may also be relevant to determine the ownership rights in the case of distraint (*skuldutmätning*) during the cohabitee relationship.[29] Issues regarding ownership rights are crucial upon the termination of a cohabitee relationship as the property will be divided. Accordingly, each party will have the right to retain one's own property.

Rights related to property acquired for the joint use, during a relationship, is regulated by the Cohabitees Act. The rules cover only cohabitation property, which comprises the joint dwelling and household goods (*gemensam bostad* and *bohag*), according to art. 3 of the Cohabitees Act.[30] However, when it comes to issues related to the parties' mutual social and economic conditions, other provisions and general property law principles may also be applied.[31] The mutual social and economic conditions between two parties lead to difficulties in determining who of the parties own a certain property since it is common that parties within a joint home share chores and expenses.[32]

There is a difference between what is considered as cohabitation property and what constitute co-ownership. Cohabitation property is recognized as such, even if the property is not co-owned by the cohabitees. The reverse applies; other property, not recognized as cohabitation property, can be co-owned. To sum it up, cohabitees can co-own or not co-own cohabitation property as well as other forms of property. Although the Cohabitees Act applies on the division of the cohabitation property, it is limited thereof. The rules of the Cohabitees Act do not cover ownerships claims to other property. Properties that are primarily used for recreational purposes are for example excluded, art. 7 of the Cohabitees Act. In the committee report (*Kommittébetänkande*) to the Cohabitees Act, a possibility to expand the definition of cohabitation property was proposed. The proposal intended to include joint dwelling, household goods as well as motor-driven transport vehicles. The committee

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28 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 149.

29 Ibid. p. 222.

30 Swedish Government Offices, *Family Law – Information on rules*, 2013, p. 22.<https://www.government.se/4a767e/contentassets/1e0263a0318e47b4b8515b535925941b/family-law.pdf> (accessed 3 June 2019).

31 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 221.

32 Ibid. p. 227.

considered that an assessment of preference and need, that is carried out regarding the joint dwelling and household goods, should apply to motor-driven transport vehicles.[33]A car, for instance, is mostly used as a form of transportation in the daily life and signifies a natural relationship to the common household.[34] Since common motor-driven transport vehicles, such as boats and cars, are also used for recreational purposes, criticism was mainly directed to the boundary issues that could arise if the proposal went through. The complexity in determining the primary purpose of a motor-driven transport vehicle would be particularly clear in the context of property division.[35] With this said, cohabitees can co-own a car that is not a cohabitation property and a dispute would be solved using general private law instruments, such as the Act on Co-ownership (1904:48) (*lagen om samäganderätt*).
Co-ownership may arise if the parties acquire a property together. Co-ownership may also arise if one party has paid for the property, while the other party has contributed with corresponding amount of money on other expenses or on another property.[36] Co-ownership between two parties is legally regulated by the Act on Co-ownership. Accordingly, the general thought is that the person who, by financial contribution, acquires a property also becomes the owner of it.[37] Co-ownership means that the co-owners receive a certain share in the acquired property. Each one of the co-owners is presumed to have equal shares, according to art. 1 of the Act on Co-ownership. The co-owners have the right to dispose of their shares, which also includes a right to sell them without the consent of other shareholders. Thus, the right of disposal does not include the co-owned property as a whole, only the shares acquired by the respective co-owner, in accordance with articles 2 and 6 of the Act on Co-ownership.

2.2 Co-ownership of property

Cohabitees may, as in ordinary cases between two or more people, acquire property together and become co-owners. In Sweden, co-ownership can arise either as co-ownership due to a common acquisition or as hidden co-ownership. Formal requirements for the fulfilment of acquisition are common regarding immovable property, which differs from the acquisition of movables where formal requirements are rather unusual.[38] Two people can co-own movables (*lös egendom*) as well as immovables (*fast egendom*). Co-ownership may arise through a gift that has been provided to the couple or through a joint purchase. Co-ownership is mainly settled according to the general laws of property.[39] The second principle of co-ownership refers to hidden co-ownership (*dold samäganderätt*), which means that even if one

33 SOU 1999:104, p. 199 and p. 201.
34 Ibid. p. 21.
35 Prop. 2002/03:80, p. 30.
36 SOU 1999:104, p. 148.
37 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 224.
38 Ibid. p. 224.
39 Comp. NJA 1992 p. 163.

party has acquired a property in his or her own name, both parties can be co-owners.[40] Hidden co-ownership applies regardless of the kind of property in question.

2.2.1 Co-ownership of movables

The lack of formal agreements makes it difficult to determine who the owner of a certain property is when a relationship ends. The difficulties in determining the ownership rights have been considered in the preparatory work of the Marriage Code. The statements in the preparatory work are likewise important for understanding the situation for cohabitees, as the property conditions resemble the conditions that apply to a married couple:

> '[…]; and if both spouses have contributed to the family's expenses in a reasonable proportion, they should be co-owners of the household goods acquired during the marriage, with equal shares (my translation).'[41]

If one party in a cohabitee relationship cannot prove that he or she is the owner of a certain property, co-ownership will be assumed to exist.[42] This presumption of co-ownership is described in the excerpt of the preparatory work above and is determined in proportion to the total expenses during the cohabitee relationship. The assessment of whether the presumption shall be applied in the individual case or not is based on two conditions.[43] The first condition is that there are unclear perceptions of ownership rights. The second condition is that the two parties of a cohabitee relationship possess earned income and have alternately contributed to the acquisition of property for joint use. The presumption of co-ownership is not legally regulated; however, it is promoted through domestic case law. In NJA 1992 p. 163[44], the Supreme Court stated that a property is to be regarded as co-owned in case of evidence-difficulties. The Supreme Court took the economic contributions of the cohabitees into consideration. The contributions varied over time and funded various purposes.

The presumption of co-ownership is not applicable if counter-evidence is presented. In RH 1986:25[45], the presumption of co-ownership was applied by the Court of Appeal.[46] Through the case, the in-application of the presumption is explained. The circumstances related to a man who had acquired household goods for the joint home. It was clear that he had used his own money. The woman, on the other hand, had contributed to other expenses. According to what is previously mentioned above, the

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40 Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 269; Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 226.

41 *Lagberedningens förslag till revision av giftermålsbalken och vissa delar av ärvdabalken IV – Förslag till giftermålsbalk m.m.* 1918:15, p. 257.

42 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 227.

43 Ibid. p. 228.

44 NJA 1992 p. 163.

45 RH 1986:25.

46 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 227.

in-application thus requires that the acquisition was on the man's behalf and not for the sake of the joint use. Here, the presumption constituted protection for the cohabitee (i.e. the woman) that did not add funds to the acquisition of the household goods but contributed with other efforts.

The protection, provided by the presumption of co-ownership, entails the greatest significance when the rules of the Cohabitee Act do not apply. If the presumption, on the other hand, functions as supplementary protection in addition to the rules of the Cohabitee Act, it is not as significant. The protection of both pertains to property that has been acquired for joint use (i.e. cohabitation property) during the cohabitee relationship. Accordingly, as long as the rules of the Cohabitee Act are applicable, most of the co-owned property will be included under the rules of cohabitation property.[47] Allocation of cohabitation property will be further explained under section 3.4.

2.2.2 Hidden co-ownership

Issues of hidden co-ownership have emerged in Swedish case law since the early 1980s. Hidden co-ownership can briefly be summarized as a purchase by one party in his or her own name, but partly for the other cohabitee's behalf. Legally, hidden co-ownership is regarded as a right of ownership through a commission purchase. A commission purchase requires an agreement between the purchaser (the commission agent, i.e. the open owner) and the principal (i.e. the hidden owner on behalf of whom the agent acts). The commission agent is then instructed to act in a certain manner.[48] Hidden co-ownership may arise for both movable and immovable properties. The fact that hidden co-ownership is legally qualified as a commission purchase actualizes the provisions of the Commission Act (2009:865) (*Kommissionslagen*). However, the provisions apply only to movable property. When acquiring immovable property, by hidden co-ownership, deviations from the formal requirements are made. For immovable property, the legal effects appear from what follows in the established practice.[49] Commission purchase is not the term used as the legal designation in practice and the doctrine of the family law; most often hidden co-ownership is the designation used.[50]

In contrast to the presumption of co-ownership regarding movables, described in section 2.2.1, it is here even more important to study each property before applying the principle of hidden co-ownership. This is best done by taking guidance through the case law that has emerged in the area. The principle of hidden co-ownership has been discussed by the Supreme Court in several cases; therewith the prerequisites of the principle have been clarified. In NJA 2002 p. 142[51] and NJA 2004 p. 397[52], the

47 Ibid. p. 231–232.

48 Ibid. p. 233.

49 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 234; Göran Lind, *Sambolagen m.m. – En kommentar*, Nordstedts Juridik AB, 2013, p. 294; NJA 1985 p. 97; NJA 1986 p. 513.

50 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 235.

51 NJA 2002 p. 142.

52 NJA 2004 p. 397.

Supreme Court stated three prerequisites that shall be fulfilled in order to put the principle into practice:

1. The cohabitee (the open owner) must have purchased a property in his or her own name but on behalf of both himself or herself and the other cohabitee's.
2. The other cohabitee (the hidden owner) must have enabled or facilitated the purchase of the property by contributing financially.
3. The purpose of the purchase and the intention of the financial contribution must be consistent i.e. the hidden owner must have intended co-ownership and the open owner must have realized this intention.

The third prerequisite means that an agreement does not have to be made explicitly. In the context of family law, a silent agreement can be interpreted through the circumstances. If the first two prerequisites are met, it is presumed that there is willingness, hence hidden co-ownership then exists.

The closer meaning of financial contribution in the second prerequisite is still unclear. However, it is clear that efforts and work in the home can neither establish co-ownership of movables nor hidden co-ownership of movables or property.[53] In NJA 2008 p. 826[54], the difference between hidden co-ownership and ownership to cohabitation property was illustrated, also that cohabitees can interact and own assets together even if these assets are not covered by the Cohabitees Act. In the case, the Supreme Court considered that hidden co-ownership of a recreational accommodation existed. The woman in the cohabitee relationship had acquired the recreational accommodation in her own name and appeared as the only legal owner. The man, on the other hand, had contributed financially to the acquisition and put effort to improve what needed to be fixed in it. It was undisputed that the two cohabitees had used it collectively. In the light of the circumstances, the Supreme Court stated that a common intention to own the property is presumed to have been present, why hidden co-ownership existed. Additionally, a loan attributed to a co-owned property, taken in either of the cohabitees' name, may also constitute hidden co-debt if the other cohabitee has given his or her consent to it. This means that both cohabitees are responsible for the loan. Co-responsibility for a loan was established in, inter alia, NJA 2016 p. 1057[55], where a cohabitee took a loan, with the consent of the other cohabitee, for investments in a co-owned property. Thus, the hidden co-owner is responsible as well.

In another case NJA 2013 p. 242[56], the Supreme Court considered that hidden co-ownership did not exist regarding a re-formed owner-occupied apartment. The owner-occupied apartment had been acquired before the initiation of the relationship. The Supreme Court considered that it was only owned by one of the cohabitees, although the other cohabitee contributed financially to enable the re-formation of the

53 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 238–239; NJA 2019 p. 23.
54 NJA 2008 p. 826.
55 NJA 2016 p. 1057.
56 NJA 2013 p. 242.

tenancy to an owner-occupied apartment (*bostadsrätt*). In other words, only one cohabitee holds the right to the common place of living. It was not proven that the owner-occupied apartment had been acquired for the collective use, in particular in the light of the cohabitees' economic dealings and the fact that the contributing cohabitee already had acquired an owner-occupied apartment since 1981.

Another important aspect of co-ownership is the opportunity to enter agreements regarding the size of the shares in the property. Such an agreement is more common in open co-ownership in relation to hidden co-ownership. In the Act on Co-ownership, it is in principle presumed that the co-owners have equal shares in the jointly owned property unless there is an explicit agreement governing the shares, see art. 1 of the Act on Co-ownership.[57] It is the time of acquisition that constitutes the decisive time for the sizes of shares. The presumption of equal shares is stronger when the property is a cohabitation property, while it is more common to depart from the presumption for other properties.[58] In NJA 2012 p. 377[59], the Supreme Court relinquished the presumption of equal shares. In the case, a couple had acquired a sailing boat, without having agreed upon the respective shares. The Supreme Court considered that the cohabitees had a divided economy and that it constituted a significant investment in contrast to the respective economy, which is why the parties' shares were determined to correspond to their financial contributions, i.e. 81, 5 percent and 18, 5 percent. The Supreme Court judgement NJA 2003 p. 650[60], in comparison to NJA 2012 p. 377, referred to cohabitation property why the presumption of equal shares is considered even stronger. However, both judgements carry similarities in the sense that it would be unreasonable to divide the value of the property equally due to the overall circumstances. Instead, an adjustment was made, and the parties were granted shares that corresponded to the contributions of respective part; 75 percent and 25 percent of the total value of the parties' shares in the property.

2.2.3 Co-ownership and other kinds of contributions

An issue that tends to be discussed in the legal literature in connection with co-ownership rights is on which basis compensation claims can be made. It is clear that it is not possible to become a co-owner by working oneself into co-ownership, even though there are situations when cohabitees contribute indirectly in the form of housework and upbringing the children. In the long term, it can cause major financial consequences, especially if one of the cohabitees refrains from work for contributing to the housework and the children, while the other cohabitee is gainfully employed. The financial implications do not need to be apparent during the cohabitee relationship but will be noticeable if the relationship is dissolved. For example, the pension situation will be affected forever.[61] Still, almost 28 percent of the women state

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57 SOU 1999:104, p. 149.

58 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 249–250; NJA 2012 p. 377.

59 NJA 2012 p. 377.

60 NJA 2003 p. 650.

61 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 130.

that they do the most unpaid works at home, corresponding to 4 percent of the men (all statistics must be read with caution).[62] If a cohabitee, however, contribute in assisting the other cohabitee in his or her company, the contribution of assistance will establish a right to receive compensation just like the ordinary right to compensation in the work life.[63]

When it comes to contributions in money for the improvement of the other cohabitee's property, the provisions in the Land Code become important to consider. Property improvements usually lead to an increased value of the improved property. When two cohabitees have acquired a dwelling for the joint use and share the costs for the improvements equally, both of the cohabitees invest in a value-added property. In certain cases where only one of the cohabitees owns the property, for instance because it was acquired before the cohabitation, the improvements will only benefit the owner of the property, as was the case in the Supreme Court judgements NJA 1986 p. 513[64] and NJA 2019 p. 23[65]. Nevertheless, about 26-38 percent (all statistics must be read with caution) still shares equally costs of improvements of the other cohabitee's property. Thus, the non-owner invests in a property that he or she has no right in when a relationship is dissolved.[66]

In Ch. 2 articles 1 and 2 of the Land Code, property and property fixture are defined. If the owner of the property applies an object to the property, the object will then be recognized as a fixture if the requirements for what constitutes a property fixture are met.[67] If, on the other hand, a tenant or someone else adds an object to a property, it will not be considered as a property fixture, according to Ch. 2 art. 4 para. 1 of the Land Code. Accordingly, a cohabitee has the right to the objects that are invested in the other cohabitee's property. In reality, it becomes difficult to assess the rights of ownership due to the cohabitee's intertwined economy. In such circumstances, investments in the other's property will be assumed as gifts, unless the gift-intention is rebutted. The non-owner consequently takes risks if he or she put time or investments in form of work in a property that is not owned by him or her and that does not constitute co-owned property.[68] For a further discussion regarding gifts and transfers of beneficial nature, see section 4.4.

Compensation claims for work (apart from housework) that have given rise to increased value, without constituting a right of co-ownership for the contributor, has not been considered in the Swedish practice in a significant extent. However, in a recently released judgment by the Supreme Court, NJA 2019 p. 23[69], a compensation claim founded on the principle of unjust enrichment was tried. A cohabitee claimed

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62 Ibid. p. 130.

63 Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 270.

64 NJA 1986 p. 513.

65 NJA 2019 p. 23.

66 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 177.

67 Land Code (1970:994), Ch. 2, art. 2 para. 1 and para. 2; comp. NJA 1986 p. 513.

68 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 180.

69 NJA 2019 p. 23.

the right to compensation due to payment of invoices related to work on the other cohabitee's property. The Supreme Court held in its judgement that such a right did not exist in the present case. Compensation claims have further been discussed in the legal doctrine as will be developed in section 3.6.[70]

2.3 Distraint

Ownership rights have fundamental importance during the cohabitee relationship. This becomes particularly evident when either of the cohabitees cannot pay their debts, which is why distraint takes place.[71] Property found in the cohabitees' joint home may be subject to distraint. The Enforcement Code contains presumption rules for distraint of movable property. For spouses and cohabitees, a special rule applies. The debtor is presumed to be the owner of the property that is in the joint home of the cohabitees and can thus be seized to secure repayment of a debt to the creditor.[72] In order for the presumption to not apply, it must be made probable that the property is co-owned or that the property belongs to the non-indebted cohabitee, according to Ch. 4 art. 19 of the Enforcement Code.

3. Grounds to claim compensation upon dissolution

A short answer to this question would be that the term used in a Swedish context would not be compensation upon the dissolution of the relationship. However, such an answer would be simple in relation to a far more complex and discussed issue in the Swedish legal context. The starting point in this section is a description of the three ways by which a cohabitee relationship can be considered dissolved, followed by a basic explanation of cohabitation property. Cohabitation property does not constitute a form of compensation; however, the recognition of cohabitation property signifies the base for the subsequent sub-sections i.e. adjustment, allocation of cohabitation property and unjust enrichment – all of which can be seen as opportunities to counter-balance economic disproportion due to cohabitation, contributions, and investments, etc. The principle of unjust enrichment is probably the closest to the meaning of a compensation claim. However, as will be elaborated, the principle is restrictively applied.

3.1 Dissolution of a cohabitee relationship

In connection with the introduction of the Cohabitees Act in 2003, a provision that explicitly regulated the states of dissolution of a cohabitee relationship was introduced for the first time. In the preparatory work, such a rule was of great relevance since many of the legal effects relating to cohabitees are linked to the time when a relationship ends.[73] The current rule can be found in art. 2 para. 1 of the Cohabitees Act, in which it is specified that a cohabitee relationship can be considered dissolved in

70 Comp. Göran Lind, *Sambolagen m.m. – En kommentar*, Nordstedts Juridik AB, 2013, p. 320.
71 SOU 1999:104, p. 150.
72 Ibid. p. 150.
73 Prop. 2002/03:80, p. 29.

mainly three ways. The first case is when the cohabitees or one of the cohabitees enter marriage. The second case is if the cohabitees move apart, which can give rise to some application problems.[74] The third case refers to the situation when one of the cohabitees dies.

Usually, the parties agree on the time of dissolution of their relationship. However, sometimes, it may be unclear when cohabitation is deemed to be discontinued, especially with regard to the prerequisite of "moving apart". As a starting point, cohabitees are considered to have moved apart, if either of them settles himself or herself elsewhere from the address where both were registered.[75] Nevertheless, the circumstances of the individual cases may vary and cause difficulties in the application of the prerequisite. For instance, a cohabitee relationship may end even without either of the parties moving, or the reverse; a cohabitation relationship may last even though the parties live apart. This is the situation where one of the parties is in a hospital or another form of care facility. Another situation is when cohabitees work in different places within the country. Under such circumstances, the parties' intentions may be considered.[76] A cohabitee relationship may exist even if living apart is long-termed. Circumstances that may be attributed importance to the assessment of whether the cohabitee relationship lasts or not, are the parties' intentions, common finances, and a common home.[77]

The fact that the parties are considered as separated without actually having moved apart is possible and of particular importance when there is housing shortage for example.[78] According to the preparatory work, the parties' perception of whether their relationship is dissolved is not decisive, unless the dissolution is manifested visibly to the surrounding.[79] There are three different ways by which it can be manifested visibly, according to art. 2 para. 2. A cohabitee can request the court to appoint an estate distribution executor (*bodelningsförättare*) according to art.26, apply for the right to remain resident in the joint dwelling according to art. 28, or institute proceedings to be able to take over the joint dwelling even if it is not included in the division according to art. 22.

The determination of when a cohabitee relationship is dissolved is important as some deadlines are based on the time of the termination of the cohabitee relationship. For example, the division of cohabitation property must be requested no later than one year after the relationship has dissolved, art. 8 of the Cohabitees. Another example is the requisition of right to take over the occupation of the joint dwelling that must be done within one year from the termination of the relationship, art. 22 of the Cohabitees Act.

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74 Ibid. p. 28.

75 NJA 1994 s. 61 and RH 1989:56, see Håkansson, Sambolagen (2003:376) 2 § st. 1, Karnov 2019-04-01.

76 Prop. 2002/03:80, p. 46.

77 Håkansson, Sambolagen (2003:376) 2 §, Lexino 2017-03-01.

78 Ibid.

79 Prop. 2002/03:80, p. 29.

3.2 Cohabitation property

As already mentioned above, the rules in the Cohabitees Act cover only cohabitation property, which comprises the joint dwelling and household goods, articles 3 and 6 of the Cohabitees Act. The rule is dispositive, art. 9 of the Cohabitees Act. Thus, the parties can agree in a cohabitation agreement to exclude what would have otherwise been regarded as cohabitation property. For further explanation of cohabitation agreement, see section 4.1.

If a cohabitee relationship ends, a division of cohabitation property (*bodelning*) may be requested by either of the parties according to art. 8 of the Cohabitees Act. In a division of cohabitation property, the value of the cohabitation property shall be divided equally between the parties after deduction of debts (*skuldtäckning*), see articles 12, 13 and 14 of the Cohabitees Act. From an economic point of view, the classification of a property as cohabitation property is therefore relevant.

Under art. 3 of the Cohabitees Act, only property gemensam användning (*acquired for the joint use*) shall be included in the division of cohabitation property. The prerequisite relates to the purpose of the acquisition. For the determination of whether the property is acquired for the individual or joint use, the time of the acquisition is important as well as the manner in which the property was acquired.[80] Property acquired through inheritance, a will or a gift is considered as separate property since it is not acquired for joint use, unless the circumstances expressly indicate that the property should be for the joint use of the parties. Also, a surrogate for such property is presumed to be separate property.[81]

Property acquired before the cohabitation is normally not considered in the division of property since such property was not acquired for the joint use.[82] However, there is an exception. If the acquisition has been made in close connection to the cohabitation, the property is to be considered as acquired for the joint use, provided there was an intention for the acquisition of joint use.[83] One such example is if the parties have not moved together but acquired a property, as part of the preparations for a future joint home.[84]

3.2.1 Dwelling acquired for the joint use

As stated above, art. 3 of the Cohabitees Act stipulates that a joint dwelling shall be regarded as cohabitation property if it has been acquired for the joint use. Furthermore, art. 5 of the Cohabitees Act sets out the definition of what is considered to be a joint dwelling. As said by the provision, only dwellings that are located in or constitute buildings can be classified as a joint dwelling. Examples are tenancies,

80 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 167.
81 Göran Lind, *Sambolagen m.m. – En kommentar*, Nordstedts Juridik AB, 2013, p. 178.
82 Prop. 1986/87:1, p. 105; prop. 2002/03:80, p. 47.
83 Prop. 1986/87:1, p. 257.
84 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 167.

owner-occupied apartments, and houses. Tents, houseboats, and caravans do not constitute buildings and thus fall outside the scope of the governing body.[85]

Dwellings may, however, in some cases, serve several purposes. In order for a dwelling to be classified as a common residence - and thus as cohabitation property - the main purpose of the house or the apartment will be of importance. A dwelling can accordingly serve as a common residence and at the same time serve a cohabitee's business activity. In such cases, the dominant purpose should be the joint home – not the corporate part.[86] According to case law, an overall assessment must be made of how a dwelling is to be classified. Circumstances that can be considered are the sizes of respective part, the financial effort for the dwelling in relation to the financial effort for the corporate part, as well as the parties' views.[87]

Recreational accommodations (*Fritidsbostäder*) that are mainly used for recreational purposes cannot constitute a joint home in the legal term. Recreational accommodations are thus kept outside the property division rules in the Cohabitees Act.[88] Nevertheless, a discussion that has emerged in the legal doctrine is whether a recreational accommodation that has been acquired during the cohabitation and later becomes the permanent residence of the cohabitees is to be regarded as a joint dwelling, and thus as a cohabitation property in the event of a property division? It has also been discussed whether such an understanding would be in line with the aim of the Cohabitees Act i.e. in line with the protection of the weaker party? There are no explicit provisions in the Cohabitees Act that prevent property acquired for recreational purposes from being regarded as cohabitation property, at a later time.[89] Yet, the legal situation is not clear in this matter. Nonetheless, such an understanding, depending on the situation, may be in line with the aim of the Cohabitees Act if the acquisition of the property is a result of both parties' contributions.[90] In the legal doctrine, another issue on a similar theme has been discussed. The question concerns the situation where one cohabitee acquires a tenancy before the initiation of the cohabitation. During the cohabitation, the tenancy is re-formed into an owner-occupied apartment; and the question that appears is whether the re-formation means that the owner-occupied apartment becomes a cohabitation property? Should the re-formation be regarded as a new acquisition for the joint use? In NJA 2004 p. 542[91], one cohabitee already owned a tenancy before the cohabitee relationship began. During the cohabitation, an extension to the building was added, to which the cohabitees moved into and lived. At the separation, the non-owner cohabitee argued that the extension should be included in the property division. However, the Supreme Court considered that the extension, even if it constituted the cohabitees' joint home,

85 Göran Lind, *Sambolagen m.m. – En kommentar*, Nordstedts Juridik AB, 2013, p. 97.

86 SOU 1981:85, p. 144; Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 171.

87 Comp. NJA 1960 p. 265 regarding store functions; RH 2009:44 regarding agricultural property.

88 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 170–171.

89 Ibid. p. 173.

90 Ibid. p. 173-174.

91 NJA 2005 p. 542.

could not be classified as cohabitation property. The property was used as a joint home for three years but was not acquired for the joint use from the first beginning. Regarding the extension, the Supreme Court found that it constituted a fixture of the concerned property, which has already been noted was acquired before the commencement of the cohabitee relationship. In the legal doctrine, the opinions towards the legal relevance of this case are divided among the legal scholars, mainly when answering the question stated above regarding the re-formation of a tenancy to an owner-occupied apartment. Two main options have been highlighted. The first option is that the outcome of the case is a stipulation that a re-formed owner-occupied apartment is, through a practical view, the same dwelling as the tenancy before the re-formation, why it cannot be considered as acquired for the joint use.[92] The second option, which contradicts the first option, is that the re-formation constitutes a new acquisition for the joint use. The parties invest in a new dwelling, why the previous dwelling cannot be characterized as the same dwelling as the new one; particularly in view of the fact that it is two different types of residences.[93]

3.3 Division of cohabitation property

When a cohabitation relationship ends, cohabitation property shall be divided between the parties, if either of the parties request a division of cohabitation property (*bodelning*), according to art. 8 para. 1 of the Cohabitees Act. A cohabitee who wants a division of cohabitation property shall request it no later than one year after the cohabitation ended due to a separation or at the latest at the property inventory (*bouppteckning*) if the cohabitation ended due to death, pursuant to art. 8 para. 2 of the Cohabitees Act. If the request is not made within one year, the possibility is forfeited.[94] It is sufficient if only one of the cohabitees make a request. There are no formal requirements for how a division of cohabitation property shall be requested, neither in the Cohabitees Act nor in the preparatory works. However, high demands are made on clarity, why a written request is preferable. An oral request or concludent actions may also meet the requirement of clarity.[95] In NJA 2008 p. 49[96], the Supreme Court concluded that anyone who claims that he or she has requested a division of property within the one-year period has the burden of proof for such claim in event of a dispute. Furthermore, if a party who have made a request on the division of property later withdraw the request after the one-year period, the other party will not automatically lose his or her right to a division of property. The consequences of withdrawal must be assessed based on the behaviours of the parties during the division of cohabitation

92 Margareta Brattström, *Ombildning av hyresrätt till bostadsrätt – hur påverkar den en bodelning mellan makar eller sambor*, Juridisk Tidskrift, Vol. 1, 2009/10, p. 34.

93 Margareta Brattström, *Ombildning av hyresrätt till bostadsrätt – hur påverkar den en bodelning mellan makar eller sambor*, Juridisk Tidskrift, Vol. 1, 2009/10, p. 31; Göran Lind, *Sambolagen m.m. – En kommentar*, Nordstedts Juridik AB, 2013, p. 84–86.

94 Prop. 2002/03: 80, p. 35.

95 NJA 2008 p. 49.

96 NJA 2008 p. 49.

property and after the request of withdrawal, which follows from the Court of Appeal judgement RH 2013:10[97]. Pursuant to NJA 2014 p. 643[98], a withdrawal of a request may affect the other party only when he or she decides to refrain from the division of cohabitation property or if the refrain is shown in another way.

At the division of cohabitation property, the starting point is to determine which property is to be included in the division i.e. which property constitutes cohabitation property. Only the parties' joint dwelling and household goods that have been acquired for joint use shall be included, according to art. 6 of the Cohabitees Act. How a division of property between cohabitees is carried out is in accordance with what applies for the division of marital property between two spouses. This follows by reference to the Marriage Code in art. 20 of the Cohabitees Act.

When it is clear which property is to be included in the division of cohabitation property, a deduction of the parties' debts is done. The deduction includes debts that each party had when the cohabitee relationship ended, according to art. 13 of the Cohabitees Act. In the first instance, debts that are attributable to the cohabitation property shall be deducted. Such may have arisen through loans financing a joint dwelling or the acquisition of certain property on credit.[99] If, on the other hand, a debt is not attributable to the acquisition of cohabitation property, it shall be deducted against property that is not included in the division of cohabitation property, i.e. the property possessed in the cohabitees' own right.[100] A debt, not related to the acquisition of cohabitation property, can only be deducted against such property if the separate property does not correspond to that cohabitee's debt. In case NJA 2013 p. 602[101], the Supreme Court stated that a cohabitee has a duty to provide information about his or her assets and liabilities before an estate inventory and thus to the other cohabitee. It is the party who requests the deduction of a debt that must prove the origin of the debt.[102] When all debts have been deducted, the cohabitation property that remains from the respective party must be merged and shared equally between both parties according to art. 14 of the Cohabitees Act.

3.4 Allocation of cohabitation property in the division of property

After a value-based calculation of the parties' respective shares in the cohabitation property, allocation of cohabitation property (*lottläggning*) must be done in accordance with art. 16 and art. 17 of the Cohabitees Act.[103] The rules for allocation of assets in the Cohabitees Act corresponds to the rules that apply to spouses, see Ch. 11

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97 RH 2013:10.

98 NJA 2014 p. 643.

99 Prop. 1986/87:1, p. 261; Håkansson, Sambolagen (2003:376) 13 § st. 2, Karnov 2019-04-01.

100 Håkansson, Sambolagen (2003:376) 13 § st. 1, Karnov 2019-04-01.

101 NJA 2013 p. 602.

102 Prop. 1986/87:1, p. 261; prop. 2002/03:80, p. 51.

103 Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 295.

art. 7 through art. 10 of the Marriage Code. Only cohabitation property shall be included. More specific, the allocation involves an actual distribution of the property in the common residence i.e. the joint dwelling and the household goods, for example, furniture and utensils. The determination of one party's share of the division of cohabitation property, presented in the previous sections, shall form the basis when allocating the property. Each cohabitee shall be entitled to have a value of a property that corresponds to his or her share. According to the second paragraph, however, the dwelling or the household goods should be allocated to the cohabitee who has the greatest need. In those cases, the value will be deducted from the cohabitee's share, or, if the value is small, without deduction. The right to take over a property is possible, provided it is deemed reasonable in view of the circumstances in general. If there are any children, the greatest need of taking over a property will be assessed in accordance with the best interest of the child. Pursuant to the preparatory work, the cohabitee who has the greatest need of the dwelling is the one who has the sole custody of the child. The assessment of need in art.16 para. 2 of the Cohabitees Act is formulated based on Ch. 11 art. 8 of the Marriage Code, why the preparatory works for this rule can be considered in the assessment of a cohabitee´s greatest need.
The right to take over cohabitation property means that the acquirer takes over a property from the other cohabitee by paying the differences, either by other property or with money. According to art. 17 para. 1 of the Cohabitees Act, a cohabitee has the right to pay the equivalent value in money instead of leaving an exchanged property to the other cohabitee. By art. 17 para. 2, it follows that if a cohabitee takes over a property, which exceed his or her shares, the other cohabitee shall be compensated. In this way, none of the cohabitees do lose the value of his or her property.[104] When assessing whether there is a right for a cohabitee to take over a property, regard should be put to the fairness in this action in relation to the owner of the property. If the owner surrenders his or her property to the acquiring cohabitee, and do not have other properties, it would lead to an unreasonable result.[105]

3.4.1 Take over a common residence that is not cohabitation property

In certain cases, the right to take over can go so far as to take over a common residence even though it does not constitute cohabitation property. Even if a party owned the joint residence before the cohabitation relationship began, the other party can get the right to take over the dwelling if it is considered that he or she has special needs to get it. This may happen when the parties have children together. If the parties live in an owner-occupied apartment, the party who is entitled to the residence may pay compensation to the other party for his or her part. Such a possibility is stated in art. 22 of the Cohabitees Act. This provision is compulsory, by which means that even if the parties agree to abolish the rules of the Cohabitees Act or even if the parties agree to not include a joint dwelling in the division of cohabitation property, the application of art. 22 will not be prevented. The main means of the compulsion is consistent with the Cohabitees Act initial purpose; the protection of the weaker party. The provision

[104] Håkansson, Sambolagen (2003:376) 16 § st. 2, Karnov 2019-04-01.
[105] Prop. 2002/03:80, p. 52.

should apply to the cohabitee who has the greatest need if the takeover, with regards paid to the circumstances in general, is reasonable. Unlike the rule in art. 16 para. 2 of the Cohabitees Act, which concerns the acquisition of a tenancy, an owner-occupied apartment, and real estate; art. 22 of the Cohabitees Act refers only to the first two i.e. tenancy and owner-occupied apartment. If the cohabitees do not have or have had a common child, a takeover of the joint dwelling and household goods will only apply if exceptional reasons exist, for example if a woman is pregnant.[106]

A cohabitee who takes over a dwelling or household goods that do not constitute cohabitation property shall compensate the value of the taken over property, according to art. 22 para. 3 of the Cohabitees Act. Either the value is deducted from the acquirer's share in the cohabitation property, or the value is compensated with money. Owner-occupied apartments are reimbursed in accordance with the market value, while no compensation is usually paid for tenancies. Signing over a tenancy for compensation is punishable.[107]

3.4.2 The right of use – a further protection for the weaker party

In order to further strengthen protection for the weaker party in a relationship and in the light of the fact that separations can constitute long-term processes, a court can make a temporary decision on which of the cohabitees should be allowed to go on living in the common residence until a division of property has taken place, art. 28 of the Cohabitees Act. On the request of either of the cohabitees, the court is enabled to make such a decision. This decision may apply to both cohabitation property and other property, according to art. 22 of the Cohabitees Act. Whether compensation for the right of use is required to be paid or not, depends on which kind of property is involved. If a cohabitee is given the right to use a dwelling that he or she does not own, provided it is not cohabitation property, compensation shall be paid to the cohabitee that owns the property, pursuant to art. 31 of the Cohabitees Act. If, on the other hand, a dwelling constitutes cohabitation property, but belongs to only one of the cohabitees, there are no corresponding provisions on liability for compensation. Even if there are no statutory obligations to pay compensation, a liability to pay compensation may occur if the right of use lasts for "unusually long time".[108] In NJA 2006 p. 206[109], the Supreme Court granted compensation rights to a cohabitee, since the other cohabitee had been given the exclusive right to use the common residence, which also constituted cohabitation property. The division of cohabitation property lasted for five years, which was considered as "unusually long time". In the judgment, the Supreme Court also discussed whether the compensation-free period should be limited to a couple of months or even that the party who has the right to go on living in the other party's residence should pay compensation already from the beginning of the

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106 Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 299.

107 Ibid. p. 299.

108 Comp. NJA 1968 p. 197; Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 194.

109 NJA 2006 p. 206.

period of use. In the legal doctrine, a compensation claim from the beginning of the period of use is considered to be justified if the party who goes on living is given an economic advantage in relation to the other party. The assessment of what constitutes a financial advantage is not clear. However, objections to such compensation claims are based on the aim of the right to use i.e. the social protection such right offers to the party in greatest need. Hereby, it would be contra-productive if the party with the greatest need do not have the financial possibilities to go on living because of the inability to afford compensation to the other party. At the same time, cohabitees do not have maintenance obligations, why it has been questioned for how long a right of use could be justified without compensation being paid and whether such compensation claims could be made with unjust enrichment as a legal base.[110]

3.5 Adjustment

The result of equal division (*likadelning*) in the division of cohabitation property may sometimes be unreasonable, in view of the length of the cohabitation, the economic conditions of the cohabitees and the circumstances in general. Subsequently, the result of the division of cohabitation property can be adjusted (*jämkas*), according to art. 15 of the Cohabitees Act. Through adjustment, a cohabitee may retain more of his or her property. The adjustment can, in certain cases, go so far as to result in each cohabitee completely retaining their property. Only the cohabitee who has to share the net value of his or her cohabitation property can invoke the adjustment-rule.

The possibility of adjustment is a deviation from the main rule on an equal division of cohabitation property, which follows from art. 15 of the Cohabitees Act. The provision is limited to the result of the division of cohabitation property and thus only the cohabitees' joint dwelling and household goods are included. In the assessment of whether there are grounds for adjustment, other property can nonetheless, indirectly, be considered since such an assessment includes the parties' property conditions and debts.[111]

In the preparatory work, it appears that the principle of adjustment is only intended to apply in exceptional cases.[112] The circumstances that must be considered in order to adjust are determined on a case-by-case basis. It is not enough just to consider the length of the relationship and the economic conditions of the cohabitees as evidenced by the prerequisite "the circumstances in general". An adjustment may seem relevant due to the length of the relationship and the economic dealings including deduction of debts under art. 13 of the Cohabitees Act, although conditions such as health, education and opportunity to support oneself may work for the opposite.[113]

A circumstance that could usually actualize adjustment of equal division is, as mentioned, the length of the cohabitee relationship – if it has been short-lived and one of the cohabitees acquires a cohabitation property of high value. Equal division may

[110] Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 214–216.
[111] Prop. 1986/87:1, p. 262.
[112] Ibid. p. 184-185.
[113] Ibid. p. 184.

also appear to be unfair if a cohabitee has received funds through inheritance, a will or gifts shortly before the dissolution of the cohabitation, by which cohabitation property was acquired.[114] Another circumstance that could actualize adjustment is in a situation of dwelling exchange; a situation that may be relatively common in Sweden since almost 72 percent (all statistics must be read with caution) live in a co-owned residence acquired during the cohabitation.[115] The situation relates to the fact when a dwelling, acquired by one of the cohabitees before the cohabitation, is exchanged for new property of the same kind but for both cohabitees' joint use. If such property is exchanged for new property, the new property will then be subject to an eventual division of cohabitation property. If the cohabitee relationship becomes short-lived and ends thereafter, it may be unfair to distribute the value of the newly acquired property equally. In such cases, reasons for adjustment appear. The extent of the adjustment takes place on the basis of the time that has elapsed since the exchange of property and the value of it. If the property is of small value, there are fewer reasons for an adjustment.[116] Nevertheless, if five years have passed since the property was exchanged; an adjustment would normally not take place.[117] In the Supreme Court judgement NJA 2003 p. 650[118], the adjustment rule was applied. In the case, it was applied in particular with regard to the length of the cohabitation. The relationship was dissolved shortly after the parties acquired a co-owned owner-occupied apartment, where the man had paid a significantly larger amount of money for the acquisition, while the woman had not participated with her own funds. Together, the couple owned 54.84 percent of the owner-occupied apartment. The woman had a fortune that consisted of a valuable recreational accommodation. The Supreme Court made an overall assessment of the circumstances and thus considered the length of the relationship which lasted for only four years. The dissolution of the cohabitation relationship lasted two years after the acquisition of the valuable owner-occupied apartment. In light of the circumstances, the Supreme Court considered that it would be unreasonable to divide the value of the property equally, why an adjustment was made. The man was granted three quarters and the woman a quarter of the total value of their shares in the property.

Equal division can furthermore be unfair in a debt coverage context under art. 13 of the Cohabitees Act.[119] A debt that is attributed to a cohabitation property does not always mean that the loan has been used to improve the cohabitation property for example. The loan may instead have been used for another property that does not constitute cohabitation property, or for the own account.[120] Given the circumstances, an adjustment may thus be a more just alternative, instead of having the other

[114] Ibid. p. 185.

[115] Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 172 and p. 203.

[116] Prop. 1986/87:1, p. 263.

[117] Ibid. p. 186-187 and p. 263.

[118] NJA 2003 p. 650.

[119] Comp. NJA 2013 p. 602.

[120] Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 294.

cohabitee's cohabitation property as a subject of equal division in order to cover the debts.
Other circumstances, apart from debt coverage, that may constitute a basis for adjustment in a division of cohabitation property are for example unfair procedures according to articles 23-25 of the Cohabitees Act, the existence of a cohabitation agreement according to art. 9 of the Cohabitees Act, individual property used for the acquisition of cohabitation property or a large difference in the size between the cohabitees' assets.[121]

3.6 Unjust enrichment

At times, cohabitees may perceive that neither the division of cohabitation property nor the principle of hidden co-ownership reflect the financial situation properly during cohabitation, why alternative ways to claim compensations are contemplated.
The presumption of hidden co-ownership, as mentioned above in the section 2.2.2 and the section 2.2.3, has been developed as a financial protection for parties in a relationship by regulating the situation in which both parties contributed financially to an acquisition of a property, but where only one of the parties stands as a formal owner. Today, however, more legal solutions are needed for cohabitees' financial transactions. Such financial transactions are mainly related to investments in the property of the other parties and unpaid work in the joint home in event of dissolution of the relationship. In the Swedish context, there are currently no such remuneration opportunities with a legal basis, unlike other Nordic countries where remuneration opportunities exist for investments in the other party's property or for work at home.[122] However, this matter has been up to discussion in the legal doctrine, in which the principle of unjust enrichment (*obehörig vinst*) is one of the suggestions raised as a possible legal ground.[123] The principle of unjust enrichment, as a Swedish legal principle, has for years been met with a sceptical attitude towards its application. Although the principle has been the base in precedent cases from the Supreme Court, giving right for compensation in the area of property law, the application of the principle in family law context is still unclear.[124]
The principle of hidden co-ownership has been considered to be an outflow of the principle of unjust enrichment. This is because the principle of hidden co-ownership functions as economic protection for a contributing cohabitee and gives him or her right to claim co-ownership of jointly acquired property. The contributing cohabitee would face difficulties in claiming part in ownership rights if the opportunity to claim hidden co-ownership did not exist. Thus, the other cohabitee who stands as the owner would make a financial profit, which in turn would be regarded as unjust if the contributing cohabitee did not have an intention to gift. However, considering the

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121 Göran Lind, *Sambolagen m.m. En kommentar*, Nordstedts Juridik AB, 2013, p. 148.
122 Ibid. p. 267.
123 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 270–271; comp. Göran Lind, *Sambolagen m.m. – En kommentar*, Nordstedts Juridik AB, 2013, p. 332.
124 See NJA 1993 p. 13; NJA 2007 p. 519; NJA 2019 p. 23.

possibility to claim part through hidden co-ownership, other legal considerations such as unjust enrichment stand aside.[125]

Unjust enrichment means that an objective assessment is made for whether compensation is to be paid when a shift of wealth has taken place from a party to the other party. Thus, it functions as protection; as a last resort when other options of legal bases are not available. In order to apply the principle of unjust enrichment, four prerequisites are required to be fulfilled. The first prerequisite is that there should have been a profit, which must have been unjust according to the second prerequisite. The third prerequisite is that the profit has been at the expense of another i.e. that the performer's loss is the receiver's profit. Lastly, the fourth prerequisite is that there are no grounds for an excuse for the profit that has been made.[126] All prerequisites are deemed to be possible to apply to a cohabitee relationship.[127] Even so, the requirement of a profit being "unjust" has been found difficult to specify in guidelines; considering the social and economic unity between cohabitees. The unity that a cohabitee relationship entails implies inevitably a disproportion of the economy as they often operate in consultation with the parties' best; in terms of expectations, services, and services in return. In NJA 2019 p. 23[128], the possibility for a cohabitee to receive compensation for financial contributions, due to loans or with unjust enrichment as a legal base, was discussed. The majority opinion of the Supreme Court considered that the economic expenditures were neither loans nor profits that should be reimbursed with unjust enrichment as a legal basis. Even with the guidance of NJA 2019 p. 23, the legal situation can still be seen as somewhat unclear.[129] Two out of five judges had a dissenting opinion in the case. The dissenting judges argued that the expenditures are not to be counted as expenses of an everyday nature, but rather have the nature of investments. Moreover, the judges argued that economic expenditures are not conditioned to either be regarded as gifts to the other cohabitee or as loans, establishing that an economic expenditure can be made without a cohabitee having an intention to gift specifically directed to the other cohabitee. Thus, the situation of expenditures should be interpreted as a situation of financial investments, which would benefit the contributing cohabitee in the long term. However, since the cohabitation did not last long enough for the contributing cohabitee to be benefited from the investments (through the use of the property invested in), the other cohabitee should be liable to compensate the contributing cohabitee. Otherwise, the other cohabitee is considered to have been enriched with no legal ground due to the contributing cohabitee's shift of wealth.

As stated above, the legal situation regarding the principle of unjust enrichment is unclear in Swedish jurisprudence, and in particular in the context of family law. In the

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125 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 296; NJA 2019 p. 23 regarding the discussion of hidden co-ownership of a car in section 16.

126 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 272–273.

127 Ibid. p. 286.

128 NJA 2019 p. 23.

129 Margareta Brattström and Anna Singer, *Skuldförhållanden mellan sambor: Blendow Lexnova Expertkommentater – Familjerätt*, Blendow Lexnova, April 2019.

legal doctrine, opportunities to claim compensation under the principle of unjust enrichment have been argued as possible. However, it has not been explicitly stated that the Supreme Court based its ground for decisions on the principle of unjust enrichment in, inter alia, NJA 1975 p. 298[130] and NJA 1995 p. 297[131]. Pursuant to the legal doctrine, the opinions on the application of the principle differ among the legal scholars. On the one hand, it is considered to be possible to make compensation claims for work when maintaining a home/housework in line with the principle of unjust enrichment, based on the Supreme Court's statement that in certain situations there may be opportunities for one party in a marriage-like relationship to pay compensation to the other party who performed a job.[132] On the other hand, it has been considered that it is not possible to award a cohabitee compensation for the disproportion of the economy due to housework, as such is accompanied by a joint household. It may, however, be possible to distinct compensation claims for housework from compensation claims for financial contributions and investments.[133]

4. Cohabitation agreements—frequency, limitations, typical clauses

In Sweden, there is a general contract law. According to the Swedish general contract law, cohabitees are free to enter into agreements with each other. General contract law is founded on two principles; freedom of contract and contractual obligation i.e. *pacta sund servanda*. Freedom of contract refers to the freedom to decide with whom one wants to enter into agreements and which contractual terms to apply. Nevertheless, the freedom of contract is not absolute.[134] There are exceptions depending on the circumstances of the individual cases, as follows by the Contracts Act (1915:218) (*Avtalslagen*). A general clause exception can be found in art. 36 of the Contracts Act. This applies to agreements which can be considered unconscionable with regard to the content of the contract, the circumstances related to the formation of the contract, the subsequent events or other circumstances. If a term in the agreement or the agreement in its entirety is considered unconscionable, it can be modified or, if necessary, set aside. The primary purpose of this provision is to protect the inherently weaker party in a relationship. Under the Swedish contract law, contracts cannot impose obligations that contradict the content of compulsory provisions in the special regulations. One example can be found in art. 22 of the Cohabitees Act, by which the possibility to take over a joint residence is regulated, see section 3.4.1.

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130 NJA 1975 p. 298.

131 NJA 1995 p. 297.

132 Göran Lind, *Sambolagen m.m. – En kommentar*, Nordstedts Juridik AB, 2013, p. 333; comp. NJA 1975 p. 298.

133 Göran Lind, *Sambolagen m.m. – En kommentar*, Nordstedts Juridik AB, 2013, p. 333.

134 Young Arbitrators Sweden supported by the Swedish Arbitration Association, *Swedish law and arbitrations – Reasons for choosing Swedish law and dispute resolution in international commercial contracts*, p. 3-4. <https://sccinstitute.com/media/171471/yas_initiative_2017.pdf> (accessed 26 June 2019).

Cohabitees may choose whether they want their relationship to be covered by the legal protection of the Cohabitees Act. In addition to the legal protection of the Cohabitees Act, cohabitees also have the opportunity to create complementary legal protection by entering into mutual agreements. This opportunity is emphasized in the preparatory work; 'cohabitees always have the opportunity to create further protection through mutual agreements, wills, and insurances if they choose to stand outside the society-regulated marriage (my translation).'[135]
There are different types of agreements that can be concluded between cohabitees during the relationship and at the end of the cohabitation. In the doctrine, a distinction is made between family law agreements (*familjerättsliga avtal*) and property law agreements (*förmögenhetsrättsliga avtal*). There are three types of family law agreements; cohabitation agreements (*samboavtal*), pre-agreements (*föravtal*), and division of cohabitation property agreements (*bodelningsavtal*). In addition to these, there is the possibility of property law agreements that are fulfilled only at the end of cohabitation. Agreements may be considered through a property law aspect if it is not regulated by family law, since the Cohabitees Act only applies on cohabitation property.[136] Special regulations on property law agreements are the Sale of Goods Act (1990:931) (*Köplagen*), the Land Code and the Gift Act (1936:83) (*Gåvolagen*).

4.1 Cohabtiation agreement

As already mentioned in this research, two cohabitees may enter into an agreement with each other about how a future division of cohabitation property should look like. It is not so common for cohabitees to conclude a cohabitation agreement, or other agreements. According to statistics only 14 percent (all statistics must be read with caution) have concluded an agreement of one kind or another. Usually, the cohabitees conclude a cohabitation agreement to maintain their economic independence.[137] Through a cohabitation agreement, the cohabitees can decide that certain property is not to be included in a division of property or that the division of property rules in the Cohabitees Act will not apply at all in event of dissolution of the relationship, art. 9 of the Cohabitees Act. It is only possible to agree on matters relating to cohabitation property. According to the preparatory work of the law, the Cohabitees Act and its rules of division of property cannot be extended to include additional property.[138] It is possible to agree to exempt property acquired in a certain way; inheritance, wills, and gifts are such examples. However, these are usually not included in the cohabitation property because they have not been acquired for joint use unless the reverse is expressly stated. Furthermore, co-ownership is not automatically dissolved through a division of cohabitation property. Instead, such property may be regulated through

135 Prop. 1986/87:1, p. 99; prop. 2002/03:80 p. 32.
136 Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 290; Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 308.
137 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 109–110.
138 Ibid. p. 216.

property law agreements, and thus be divided by, for example, a purchase or a gift.[139] Property, owned with co-ownership, should still be presumed to be equally shared.[140]
The cohabitees decide what shall be included in the cohabitation agreement. However, all terms are not considered to be valid. The cohabitees may not, as explained above, include property other than cohabitation property in the division of cohabitation property. The cohabitees may neither agree that the rules of the Marriage Code shall apply in their entirety to the parties' cohabitee relationship, nor may they agree to abolish the compulsory provisions of the Cohabitees Act. They can certainly agree that a common residence should not be included in a division of cohabitation property, but if a cohabitee, at the dissolution of cohabitation, is considered to have the greatest need of the common residence, the right to take over will be actualized in accordance with the provision in art. 22 of the Cohabitees Act.
In order for a cohabitation agreement to have legal effect, it must be in writing and signed by both parties, pursuant to art. 19 para. 2 of the Cohabitees Act. However, the signing of the cohabitation agreement by the parties does not need to take place simultaneously.[141] When it comes to the actual timing of the agreement, an agreement can be drawn up both before and during the cohabitation. The agreement can probably also be concluded after the cohabitee relationship is dissolved.[142] Unlike a marital agreement between spouses, no registration with Tax Agency is required. Also, witnesses are not required.
Through a new agreement, the cohabitees may change what they have previously agreed upon, art. 9 of the Cohabitees Act. The cohabitation agreement can also be revoked. Both parties must take part in amending or revoking the agreement. However, according to art. 9 para. 3 of the Cohabitees Act, a cohabitation agreement may be modified or declared invalid if a cohabitee considers that a term in the agreement is unreasonable. No time limit has been imposed for the possibility of bringing the action of an unconditioned agreement. The rule in art. 9 para. 3 of the Cohabitees Act is modelled on the general rule of contract law in art. 36 of the Contracts Act.

4.2 Pre-agreement in close connection with dissolution of a cohabitee relationship

Prior to an immediately imminent dissolution of a cohabitee relationship, the cohabitees may conclude a preliminary agreement, so-called pre-agreement. The requirement for the agreement to take place prior to an imminent dissolution of the cohabitee relationship is intended to limit the pre-agreement from the long-term cohabitation agreements.[143] Previously, there was no corresponding rule on the

[139] Anna Molin, Samboboken, 6th. Ed. Björn Lundén Information AB, 2010, p. 81–82.
[140] Ibid. p. 77.
[141] Göran Lind, *Sambolagen m.m. – En kommentar*, Nordstedts Juridik AB, 2013, p. 119.
[142] Comp. Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 289.
[143] Göran Lind, *Sambolagen m.m. – En kommentar*, Nordstedts Juridik AB, 2013, p. 124.

possibility of drawing up a pre-agreement. In connection with the introduction of the Cohabitees Act in 2003, a practical need for such kind of agreement was deemed to exist.[144] Since it is necessary for a cohabitee relationship to be manifested if dissolved, in order for a division of cohabitation property to take place, there is a need to reach pre-agreements. The need is particularly clear when it comes to the division of cohabitation property for cohabitees who consider themselves separated, without having moved apart immediately.[145]

With a pre-agreement, it is possible to regulate the upcoming division of cohabitation property and all that is related to it, art. 10 of the Cohabitees Act. Issues that can be regulated are, for example, the value-assessment of the property, the deduction of debt coverage and the allocation of cohabitation property.[146]A pre-agreement shall be concluded as a part of the dissolution of the cohabitee relationship; an agreement that is concluded a long time in advance is therefore without legal effect.[147] The legal effects of a pre-agreement apply only between the cohabitees and have no effects against a third party.[148]

Just like the formal requirements for a cohabitation agreement, the pre-agreement must also satisfy certain requirements. It must be in writing and signed by both parties. Here as well, no witnesses are required. If a term in the pre-agreement or the agreement in its entirety is unconditional, it may be adjusted or left without regard in its entirety.[149]

4.3 Division of cohabitation property agreement

In a division of cohabitation property agreement, the final distribution of the cohabitation property is determined, in accordance with what the cohabitees have agreed on. A cohabitation agreement and a pre-agreement can thus be regarded as preparatory agreements for this final agreement. According to art. 20 of the Cohabitees Act, the rules on the division of property in the Marriage Code for spouses shall also apply in case of a dissolved relationship between cohabitees. Provisions that are important in this context are Ch. 9 articles 5, 7, 9 and 10 of the Marriage Code. Agreements between cohabitees regarding the division of cohabitation property shall be made in writing and signed by both the parties. This formal requirement occurs in Ch. 9 art. 5 of the Marriage Code. The legal effects of a division of cohabitation property agreement apply, not only between cohabitees, but affect also the third party. Thus, a cohabitee who receives a property, which previously belonged to the other cohabitee, is protected against the previous owner's creditors.[150]

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144 Prop. 2002/03:80, p. 34.

145 Ibid. p. 34.

146 Prop. 2002/03:80, p. 50; Håkansson, Sambolagen (2003:376) 10 §, Lexino 2016-01-01.

147 Prop. 2002/03:80, p. 49.

148 Ibid. p. 50.

149 Comp. Swedish Contracts Act (1915:218), art. 36.

150 Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 297.

4.4 Property law agreements

Cohabitees can, in general law circumstances that are not covered by the Cohabitees Act, enter into agreements as parties. However, there are two restrictions on what is not possible for cohabitees to agree on. The first restriction is towards agreement on the legal conditions when cohabitation ends due to a cohabitee's death, although cohabitees may within certain limitations make a will through which the other cohabitee can be benefited (issues of will and inheritance will not be further discussed since it is outside the topic of this question). The second restriction is that cohabitees may not, by referring to the freedom of contract, agree to apply the rules of the Marriage Code in its entirety to their cohabitee relationship, see also section 4.1.[151] Cohabitees may enter into agreements through which they, to a very high degree, can regulate the conditions in the event of dissolution of their relationship. By regulating, for example, the distribution of assets and internal debt conditions, conflicts can be avoided in the event of imminent dissolution. In order for the agreement to acquire legal effect, the agreement must be understandable, and the consequences of the conditions included must be foreseeable in advance, regardless of whether the agreement is oral or written.[152] Vague formulations in the agreements, with overly general contract terms, cannot have legal effects. In NJA 1985 p. 172[153], two cohabitees entered into an agreement that the marriage rules in the Marriage Code should be applied between them. In the case, the Supreme Court found that the terms of the agreement were too general, why the legal effects of the terms could not be determined. Furthermore, the Supreme Court determined that there is a possibility of entering into agreements where individual property law contract terms can lead to the same legal effects that the application of the marriage rules would have led to.[154] As long as a property law agreement is sufficiently clear and precise, the freedom of contract applies.

Through a perspective of property law, an agreement can sometimes, be regarded as a gift. Subsequently, it becomes binding only if the formal requirements for a gift is fulfilled. Agreements that a property which only belongs to one part shall constitute a co-owned property or be subject to equal division of shares in the event of a future dissolution are examples of value transfers of beneficial nature. A beneficial value transfer is referred to as gift, if there is no counter achievement that could indicate a purchase, exchange of property or indicate a loan. The distinction between a gift and a loan is sometimes difficult to determine unless the legal meaning of a financial expenditure is clearly specified. A loan is a form of a contractual relationship. Two parties have agreed on a loan under certain conditions. Likewise, a gift is, with or without certain terms, a contractual relationship between two parties.[155] A party gives

151 Ibid., p. 271-272.

152 John Asland and others, *Nordisk samboerrett*, Gylendal juridisk, 2014, p. 96.

153 NJA 1985 p. 172.

154 Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 272.

155 Örjan Teleman, *Försträckning eller gåva*, Advokaten, Vol. 2, 2014, p. 141.

a gift to the other party who accepts the gift, with the terms that follow. Whether the expenditure is to be classified as a gift or a loan that must be refunded depends on the parties' intention. Usually, a dispute about the classification arises when the relationship ends. The intention to gift is fundamental. If there is not an intention to gift, as an act of generosity, the value transfer may not be considered as a gift.[156] It is not clear whom of the parties do have the burden of proof for whether a transfer is to be recognized as a gift. It has been suggested that the party who claims that he or she has received a gift shall have the burden of proof for such a statement.[157]

Beneficiaries promise of a gift that one cohabitee gives the other cohabitee is binding between the cohabitees if it is in accordance with conditions given in art. 1 of the Act Regarding Certain Promises of Gifts (1936: 83) (*lagen angående visa utfästelser om gåva*).[158] In view of the fact that there is no maintenance obligation in Swedish law between cohabitees, as there is between spouses, an agreement for a future maintenance allowance from one cohabitee to the other cohabitee has been equated with a promise of gift.[159] It is of less importance how the cohabitees name an agreement.[160] It is sufficient to state that the formal requirements are fulfilled to, for example, consider a cohabitation agreement as a promise of gift between the cohabitees.[161]

4.5 Children

Parents are responsible to provide security, in form of material and emotional welfare, for their child. When parents in a relationship choose to go different ways, it is not only the property conditions that change. The responsibility for the child remains; meanwhile difficulties can arise in deciding on issues concerning the child's custody (*vårdnad*), residence (*boende*), and contact (*umgänge*). All the decisions should be taken to ensure what is in the best interest of the child, pursuant to Ch. 6 art. 2a of the Children and Parents Code. To ensure that children in the future have good living conditions, and that parents and children can continue as a family with the least possible conflict – agreements, in accordance with previous sections, can be concluded. Since the focus of this research is division of property between unmarried cohabitees on the termination of the cohabitation; pre-agreements, division of cohabitation property agreements and maintenance allowance are of central significance.

Through a division of cohabitation property agreement, described in section 4.3, the parties have the possibility to distribute the cohabitation property in accordance with what may be in the best interest of the child i.e. that the economically weaker parent

156 John Asland and others, *Nordisk samboerrett*, Gylendal juridisk, 2014, p. 103.

157 Örjan Teleman, *Försträckning eller gåva*, Advokaten, Vol. 2, 2014, p. 141–142.

158 Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap*, 6th. Ed. Iustus, 2018, p. 272.

159 John Asland and others, *Nordisk samboerrett*, Gylendal juridisk, 2014, p. 109.

160 Comp. NJA 2003 s. 650.

161 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 305.

receives a greater amount of cohabitation property than he or she is entitled to according to the Cohabitees Act. Through a favourable agreement of a division of cohabitation property, the weaker party may achieve a better standard of living.
At times, cohabitees may perceive that a division of cohabitation property does not reflect the financial situation during the cohabitees' cohabitation properly, due to housework, work with maintaining a joint home and upbringing of children; meanwhile the possibilities to claim compensation are limited, see section 3.6. The unfairness that may arise as a result of the lack of possibilities of invoking unjust enrichment as a legal ground for claiming economic compensation could be, partially, remedied by the parties concluding a pre-agreement as described in section 4.2. Although these pre-agreements are not legally binding to the third party, the agreements may serve as a tool to promote good cooperation between the parties in order to avoid a legal process, which is of the benefit of the family.
To ensure that children in the future have good living conditions, children of separated parents are entitled to security of supply. Pursuant to Ch. 7 art. 1 of the Children and Parents Code, parents should be responsible for the child's maintenance according to what is reasonable with regard to the child's needs and the combined financial capacity of the parents. To give the child the same economic standard regardless of whom of the parents the child alternately lives with, a parent with the larger financial space may be liable to pay maintenance allowance, according to NJA 2013 p. 955[162]. Additionally, the society also has a subsidiary responsibility for a child's security of supply. From public funds, a child is entitled to maintenance support. The prerequisites are regulated primarily in Ch. 17 art. 2 and Ch. 18 art. 2 of the Social Insurance Code.

5. Most problematic issues in Sweden

Several of the topics that have been debated in the legal literature have, to some extent, been mentioned in this research. However, the focus of this part will be legal inheritance rights for cohabitees, expanding the width of the division of property, possibilities of adjustment and compensation claims.

5.1 Legal inheritance rights

In Swedish law, the protection of a deceased's cohabitee has been and is a debated issue. For the time being, cohabitees do not have the right to inherit one another; however, the rules on the division of cohabitation property are applicable in the event of a cohabitee's death. Although inheritance law is not dealt with in this research, the issue is important for the context, especially in the light of the cohabitees' economic dealings. Most cohabitees seem to know that they do not have any inheritance rights in the event of one of the cohabitees passing, yet the frequency of cohabitees making a

[162] NJA 2013 p. 955.

will is relatively low. Only 18 percent (all statistics must be read with caution) have made a will for the benefit of the other partner.[163]

In the legal doctrine, the legal status of the surviving cohabitee today is compared to that of a surviving spouse in the beginning of the 20th century - the situation of today for cohabitees is however worse, compared to surviving spouses in the beginning of the 20th century. The legal status of a surviving cohabitee is an issue that has already been highlighted at the time of the previous act of cohabitees in 1988 and in recent years the inheritance situation of unmarried cohabitees has received greater attention.[164]

The inheritance protection of the surviving cohabitee is, in several of the Nordic legal systems, comparatively more far-reaching.[165] In Swedish law, it has not been considered as appropriate with legal inheritance rights between cohabitees. Nevertheless, minimum protection was introduced with regard to the dwelling and household goods acquired for joint use, which is an exception to the equal division rule.[166] This exception is known as the small base amount rule (*lilla basbeloppsregeln*) and applies only in event of the death of one of the cohabitees. The small base amount rule means that the surviving cohabitee has always the right to receive a value corresponding to two price base amounts from the cohabitation property – if the property is sufficient – according to Ch. 2 art. 6 and art. 7 of the Social Insurance Code. In 2019 the Swedish Government set out one base amount to 47 400 SEK, i.e. a surviving cohabitee has the right to receive 94 800 SEK.[167] This minimum protection includes only cohabitation property; thus, the surviving cohabitee cannot receive additional property, art. 18 para. 2 of the Cohabitees Act. The rule has its role model in the base amount rule for spouses and that is in Ch. 3 art. 1 para. 2 of the Inheritance Code. However, the guaranteed amount that applies to the surviving cohabitee corresponds to only half of the guaranteed amount that applies to a surviving spouse. Hence, it is called as the small base amount rule. The purpose of this rule is to protect the surviving cohabitee against the loss of the most necessary property acquired for joint use (i.e. cohabitation property) in the event of succession. When the small base amount rule was established, the Swedish legislature limited it to a moderate economic level since it was aimed to apply in all conditions, including short-term cohabitee relationships.[168]

Over the past years, arguments for - and against legal inheritance rights have been presented. The main argument against the introduction of inheritance rights in a cohabitee relationship is that the introduction of such rights would undermine the

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163 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 111.

164 Margareta Brattström and Anna Singer, *Rätt arv: fördelning av kvarlåtenskap*, 4th. Ed. Iustus, 2015, p. 206.

165 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 336.

166 Prop. 1986/87:1, p. 109.

167 The Swedish Government, *Prisbelopp för 2019 fastställt*, 6 September 2018.<https://www.regeringen.se/artiklar/2018/09/prisbasbelopp-for-2019-faststallt/> (accessed 2 July 2019).

168 Prop. 1986/87:1, p. 110.

marriage as an institution. Another argument is that the number of couples who become cohabitees when they get older has increased; that is why the interest in creating inheritance rights for each other seems not so strong, in view of the fact that many would rather want their children to inherit them. However, a strong argument for inheritance rights is that the number of cohabitee relationships has increased in recent decades and tends to be increasingly long-lasting. According to suggestions in the legal doctrine, counter-interests could eventually be balanced through a distinction between cohabitees with common children and cohabitees without children, whereby demands on the length of the cohabitation should be requested for the last mentioned in order to have rights of inheritance.[169]

According to statistics, inheritance rights for cohabitees appear to be supported to a great extent.[170] Today, the legal protection of a surviving cohabitee is mainly dependent on the cohabitees' own initiatives to expand the legal protection for each other by drawing up wills or taking out a life insurance which stipulates the other cohabitee as beneficiary. By drawing a will, a surviving cohabitee could be put in the same legal position as a surviving spouse, if there are no direct heirs (*bröstarvingar*). Thus, cohabitees who do not have direct heirs can draw a will with the entire deceased person's estate (*kvarlåtenskap*) for the benefit of the surviving cohabitee. If the cohabitees, on the other hand, have a child, the freedom of drawing up a will is limited due to the child's right to laglott (the statutory share of the inheritance), regardless of whether it is a question of a child in common or a child of the deceased person in a previous relationship (*särkullsbarn*). A child has the right to demand his or her lawful share by requesting an adjustment of an existing will. Children over the age of 18 may refrain from requiring their lawful share for the benefit of the surviving cohabitee. If the child is under the age of 18, the child's guardian (*förmyndare*) or custodian (*god man för barn*) is obliged to invoke an adjustment in favour of the surviving cohabitee.[171] It has been considered as more reasonable, pursuant to the legal doctrine, to equate the situation of cohabitees with a child in common with the same situation of spouses. A cohabitee who has a child in common with the deceased is considered to be worthy of protection and the interest in giving the surviving cohabitee a right to inherit has been declared to be in the best interests of the child. Therefore, instead of the current order with no legal inheritance rights for a surviving cohabitee, it has been proposed that legal inheritance rights should be introduced through which cohabitees with a child in common can inherit each other. Common children may, likewise the direct heirs of spouses, be entitled to inheritance only at the last parent's death i.e. they will not be entitled to require statutory share of the inheritance.[172] At the same time as Swedish law contains provisions regarding other aspects of a cohabitee relationship, there are almost no rules (apart from the small base amount-rule) that prevent a surviving

169 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 386.

170 Ibid. p. 103.

171 Ibid. p. 386.

172 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 407; principle 5a in John Asland and others, *Nordisk samboerrett*, Gylendal juridisk, 2014, p. 303.

cohabitee from ending up in an economically disadvantaged position in event of one of the cohabitees death.[173] This despite the fact that the number of cohabitee relationships has increased, that the majority have an intertwined economy, and that many cohabitee relationships are long lasting, where as many as 52 percent (all statistics must be read with caution) of the cohabitees intend to enter marriage.[174] Therefore, an examination of the current rules, for possibly stronger protection, may be justified. A possible alternative to strengthen the protection is to focus on the economic dealings between cohabitees which today comprises much more than the joint dwelling and the household goods. A proposal that was made in the preparatory works and which was also rejected was to include other property acquired for the joint use, in addition to what is known as cohabitation property today, such as motor-driven transport vehicles and recreational accommodations. See section 2 and section 5.2.
The legal doctrine contains several propositions for an inheritance protection of unmarried couples. One proposition, inspired by Danish law, is to give the cohabitees the right to assign the property left by the deceased cohabitee in a will in the same order as if the cohabitees were married.[175] Another proposition is to grant cohabitees an independent entitlement of inheritance since cohabitees often have a relationship that can be regarded as extensive as that of a married couple, although such a proposal entails practical problems regarding time, extent, etc. A third proposition, which has been proposed by a group of Nordic family law researchers, is that a surviving cohabitee with a common child shall inherit in the same way as a surviving spouse unless the otherwise is expressly written in a will. In the Swedish context, this means replacement of the small base amount rule with inheritance rights from which deviation is eligible; in order to meet a surviving cohabitee's need for protection in accordance with Ch. 3 art. 1 para. 2 of the Inheritance Code.[176]

5.2 Rules of division and possibilities of adjustment

The formation of the division rules is significant whether the relationship is dissolved due to a separation or due to death. As previously noted in this research, the economic unity between two cohabitees extends to property acquired during the cohabitation, while at the same time the division rules of cohabitation property are just limited to the joint dwelling and household goods acquired for joint use. Other properties such as a car and holiday accommodation acquired during the cohabitation are to be shared according to the rules of co-ownership, in case the property is co-owned. A discussion that has taken place in the legal doctrine is the possibility of extending the rules of division to include property that is co-owned. From a practical perspective, the extension of the division rules would mean that the co-owned property can be

[173] Margareta Brattström and Anna Singer, *Rätt arv: fördelning av kvarlåtenskap*, 4th. Ed. Iustus, 2015, p. 206.
[174] See the sections 3.4.4, 3.4.7 and 3.9 in Kajsa Walleng, *Att leva som sambo*, Iustus, 2015.
[175] Margareta Brattström and Anna Singer, *Rätt arv: fördelning av kvarlåtenskap*, 4th. Ed. Iustus, 2015, p. 207–208; Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 388.
[176] John Asland and others, *Nordisk samboerrett*, Gylendal juridisk, 2014, p. 296.

dissolved in connection with a division of cohabitation property, instead of the current order, by which the division of co-owned property takes place separately with the application of the Act on Co-ownership. Furthermore, housework, work with maintaining a joint home, upbringing of children, and renovation costs also indicate that the economic unity of cohabitees extends beyond the division that is granted by the current cohabitation property rules.

An extended scope of division has been discussed as a step in the revision of the Cohabitees Act. Various options of the extension are possible in order to achieve a division result that is more economically fair. An alternative is that the division rules shall cover all such property acquired during the cohabitation. The prerequisite "joint use" has not been considered as decisive in the discussions of alternatives, as one of the options intends to include bank funds and shares. Normally, it is difficult to prove that the acquisition of bank funds and shares have been for the joint use. Regardless of whether prerequisite "joint use" should remain or not, there is a risk of a problem regarding which property that shall be included in a division of property. Since a cohabitee relationship does not arise at a specific time, it becomes difficult to determine the timeframe for the cohabitation in order to decide which property to include later. However, the difficulties with determining a cohabitee relationship's start and dissolution already give rise to problems today.[177]

With an order where all the property acquired during the cohabitation is included in the division of property, the weaker party is considered to be favoured as the value of the shared property will increase. In long-term relationships, it can be assumed that the economic unity of the cohabitees becomes more extensive through direct and indirect contributions, why dividing all property may be justified. Conversely, it is also assumed that disadvantages may arise with equal sharing of the property, particularly in short-term relationships, where it may lead to an unfair financial distribution.[178] It is indeed a difficult task to try to achieve the perfect solution (if there is any). Nonetheless, a room for strengthening the protection of the weaker party in this regard seems possible.

Finally, it has also been discussed whether certain cohabitees should receive a more far-reaching protection than an economic equal share of the accumulated values. According to the discussion, the starting point is to distinguish between relationships dissolved due to separations and relationships dissolved due to death. Cohabitees, irrespective of whether legal inheritance rights are granted, are worth protecting, which is why the division rules have a significant role in strengthening the protection. The division rules are of particular significance when a deceased cohabitee has drawn a will with all his or her estate for the benefit of someone else than the surviving cohabitee, or when a direct heir requires his or her legal share. It has thus been proposed that the division rules that apply to spouses should also apply to cohabitees whose long-term relationship ends due to death. Counter-arguments towards such suggestion are that a law which distinguish between cohabitee couples will be difficult

177 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 394.

178 Ibid. p. 396.

to apply and unpredictable. Additionally, it is augmented that an extension of the division rules in accordance with what applies for spouses would probably require additional provisions in the Marriage Code.[179] If a result of the division of property is considered to be unfair in relation to the cohabitees' jointly earned values, a cohabitee may utilize the opportunity to adjust the result even though the rule of adjustment is restrictively applied. Only the cohabitee that has to share the net value of his or her property can invoke the rule. This condition is considered as problematic in the legal doctrine since both the economically stronger cohabitee and the economically weaker cohabitee may need to adjust a result of the division of property. Even if only the cohabitee that has to share the net value that is allowed to invoke an adjustment, the other cohabitee with least net value may nevertheless be disadvantaged. Thus, it is proposed that both cohabitees shall be permitted to invoke the rule of adjustment. A cohabitee with the least net value on his or her cohabitation property can be disadvantaged by the debt settlement rules. This situation may occur if the other cohabitee is allowed to settle debt against property that is not connected to cohabitation property or because a division of a cohabitation property that the economically weaker cohabitee received by gift or inheritance just before the dissolution of a cohabitee relationship. The restrictive application of the adjustment rule can hit hard on the economically stronger cohabitee when purchasing a joint dwelling, for example. If a cohabitee relationship dissolves shortly after the purchase, the consequences of equal sharing in a division of property may be unreasonable for the cohabitee who has paid for the dwelling with assets that originate from the time before cohabitation. Entering into a cohabitation agreement has previously been considered as a solution to such situation, through which the cohabitees may exempt the dwelling from the property division, or the cohabitees may agree to abolish the property division rules in their entirety. However, the knowledge of this opportunity is limited and almost 77 percent (all statistics must be read with caution) do not know that the rules of property division can be disclaimed in their entirety.[180]

One suggestion to even out the economic inequalities that tend to arise between cohabitees is to expand the possibilities of adjustment. An individualized estimation is proposed, where adjustment between two cohabitees is based on what each one actually contributed to in the common home. Arguments raised as against such individualized estimation are the risk of unpredictability, increasing disputes, and eventually the difficulties for the economically weaker party to find a new residence if the dwelling falls to the other, since the takeover right of a residence in art. 22 of the Cohabitees Act rarely become applicable if the parties do not have common children. To avoid such negative consequences and disputes, clearer guidelines and legislation are required.[181]

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179 Ibid. p. 398.

180 Ibid. p. 380.

181 Ibid. p. 400.

5.3 Compensation claims

A discussion that has emerged in the legal doctrine concerns compensation claims and the possibility to be reimbursed for economic expenditures due to the principle of unjust enrichment. The main discussion has specifically been about whether direct and indirect contributions from one cohabitee to another may constitute a right to compensation due to a loan or unjust enrichment, as was the case in NJA 2019 p. 23[182]. In NJA 2019 p. 23, two relevant point were pointed out. Firstly, the Supreme Court considered that the contributing cohabitee may not receive compensations for his or her contributions, in case the contributions are not recognized as loans. It is the cohabitee who claims the existence of a loan that has the burden of proof, which was not fulfilled in the case. Secondly, the Supreme Court considered that the contributions did not constitute a right to compensation with unjust enrichment as a legal ground. Accordingly, cohabitees who wish to be compensated for expenses relating to the other cohabitee's property shall clearly handle their economic dealings through the protection that follows by mutual agreements, wills, and insurances.[183] Nevertheless, two out of five judges had dissenting opinion concerning the outcome of the case.

Another case with close connection to the discussion of unjust enrichment and the right to be compensated appeared in a previous case from 2006. The case, NJA 2006 p. 206[184], concerned the right for compensation of use of another's property. The Supreme Court granted compensation rights to a cohabitee, because of the economic advantage that a cohabitee was given, in relation to the other cohabitee who have had the exclusive right to use the common residence during an unusually long time due to a division of cohabitation property that lasted for five years instead of the usual period of one year. However, objections were directed against the outcome of the case. On the one hand, it gave compensation to a cohabitee in an extra-ordinary situation, who may have been experienced an economic disadvantage. On the other hand, the aim of the right of use offers a social protection to a party with the greatest need. Hereby, it would be contra-productive if the party with greatest need do not have the financial possibilities to go on living because of the inability to afford compensation to the other party.

The outcomes in NJA 2019 p. 23 and NJA 2006 p. 206 may function as a proof that the issue of requesting compensation is still somewhat unclear. The right to claim compensation in general, and the principle of unjust enrichment specifically, has been handled restrictively in the family law context since the consequences of the application is unforeseeable with no basis in the Cohabitees Act, the preparatory works or other Swedish legislation. Instead, renumerations to a contributing cohabitee have been provided, to some extent, by the division rules in the Cohabitees Act and the

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182 NJA 2019 p. 23.

183 NJA 2019 p. 23, point 25 in the judgement of the Supreme Court; see Margareta Brattström and Anna Singer, *Skuldförhållanden mellan sambor: Blendow Lexnova Expertkommentater – Familjerätt*, Blendow Lexnova, April 2019, p. 3.

184 NJA 2006 p. 206.

principles of co-ownership. The principle of hidden co-ownership has been considered as an outflow of the principle of unjust enrichment, see section 3.6. This is because the principle of hidden co-ownership functions as an economic protection for a contributing cohabitee and gives him or her right to claim co-ownership of jointly acquired property. Otherwise, the cohabitee who stands as the owner would make a financial profit, which in turn would be regarded as unjust if the contributing cohabitee did not have an intention to gift. With this in mind, legal considerations to claim compensation can be said to have existed in the Swedish family law context already in the 1980s. With the possibility to claim part through hidden co-ownership, other legal considerations such as unjust enrichment has been set aside.[185] However, there are several limitations regarding the application of the co-ownership principles, why some efforts and contributions fall outside the scope of application. For instance, the presumption of hidden co-ownership requires often that a financial contribution has been made, meanwhile there are situations where a cohabitee enabled an acquisition through indirect efforts or through contributions to increase a value of the other cohabitee's property after the date of acquisition. At present, there are no possibilities to claim compensation for such contributions.

The question that Swedish legal scholars have been asked themselves over the past the years is whether unjust enrichment is the right way to go when considering the right to be reimbursed in the Swedish law?[186] Through a comparison with the other Nordic countries, an analysis shows that this would not be the best way to go, as there is a tendency for an increased level in the number of court disputes regarding compensation claims and the outcomes vary, which in turn means that the rule of law may not always meet the requirements for predictability and material justice. In order to avoid a more unclear legal situation, Nordic family law researchers propose clearer rules of division of cohabitation property upon a dissolution of a cohabitee relationship, which is preferable over compensation claims due to unjust enrichment. In Sweden, rules on the division of cohabitation property already exist, why a re-overlook of the rules have been suggested.[187]

6. Conclusion of the Swedish report

It is important to investigate the provisions of the Cohabitees Act in relation to the conditions of Swedish society, in order to assess the strength of the legal protection that is provided for cohabitees. Today, the Cohabitees Act ensures minimum protection for the weaker party at an eventual dissolution of the relationship. Thus, the legal protection provided by the Cohabitees Act forms only a part of the legal protection that affects cohabitees. It has been established that the Swedish rules which applies to cohabitees are centred around the Cohabitees Act and mainly

185 Kajsa Walleng, *Att leva som sambo*, Iustus, 2015, p. 296.

186 Margareta Brattström and Anna Singer, *Skuldförhållanden mellan sambor: Blendow Lexnova Expertkommentater – Familjerätt*, Blendow Lexnova, April 2019, p. 4.

187 Ibid. p. 5.

complemented by the general laws of property and the legal framework that the Marriage Code provide. Further possibilities to expand the legal protection through agreements and drawing up wills are examples of circumstances that can affect the legal protection of cohabitees. Through this research, questions on the division of property between unmarried cohabitees upon the dissolution of cohabitation have been answered. Thus, in relation to reality, the legal protection can be determined primarily through the economic consequences for cohabitees following the dissolution. The research is divided into five parts; each part comprises a certain aspect of a cohabitee relationship.

The **first part** describes the legal situation of the cohabitees in general as well as the legal situation in family law. Through a historical perspective, the definition of cohabitation has undergone reformations in line with societal changes and prevailing norms, mainly from 1960s and forward. Today, the Cohabitees Act is applicable to all cohabitees regardless of their sexual orientation. In many ways, this development changed what was seen as a social norm – and a family form. Although marriage may still have a central role in the family law, the Swedish legislatures aimed to avoid provisions that complicated for unmarried couples to form a family.

In the **second part** the circumstances on how cohabitees can become co- owners of assets is pointed out. In general, there are different ways by which co-ownerships may arise. However, during the cohabitation a special assessment is made regarding the family home and the household goods. A fundamental prerequisite is that the property has been acquired during a relationship for the joint use, so-called cohabitation property. Nevertheless, a complexity in determining who of the parties own a certain property is common since it is normal that a couple share chores and expenses. Property, not recognized as cohabitation property may be co-owned, if it was acquired for the joint use and by the parties together. In the case law, two constellations of co-ownership appear; co-ownership of movables and the presumption of hidden co-ownership. For the later mentioned presumption, NJA 2002 p. 142[188] and NJA 2004 p. 397[189], are of certain relevance since three prerequisites for the presumption to be applied were pointed out by the Supreme Court. Hidden co-ownership rises in cases where one of the cohabitees acquire a property for the joint use in his or her own name, by the other cohabitee's economic contribution for the acquisition. Other contributions such as labouring for the acquisition or improvement of the other cohabitee's property, or indirect contributions in form or housework are not relevant to the assessment of whether co-ownership exists. In such cases the non-owner takes potential risks.

In the **third part,** grounds for claim compensation are discussed and whether there is a legal possibility to demand compensation with the support of unjust enrichment for the financial loss that a cohabitee may be caused due to his or her contributions. Here, the situation in the legislature and the case law is unclear. Even with the guidance of one of the latest judgments by the Supreme Court related to unjust enrichment, NJA

[188] NJA 2002 p. 142.

[189] NJA 2004 p. 397.

2019 p. 23, the legal situation can still be seen as unclear. Two out of five judges had a dissenting opinion in the case. The dissenting judges discussed the differences between gifts, loans and contributions of a daily nature. Both the majority of the Supreme Court and the dissenting judges concluded that the intention to gift must exist to consider the expenditures as gifts, and that loans require some sort of an agreement. However, it seemed more problematic to determine what constituted natural contributions of the daily life and how to handle contributions that a cohabitee make in order to benefit himself or herself, but due to the circumstances do not get the possibility to take advantage of the own contributions. Suggestions on how to answer these questions require a precedent by the Supreme Court through which the legal situation is clarified. A consequence of the unclear situation regarding the application of the principle of unjust enrichment is the limited possibilities for the cohabitee to claim compensation. The gaps in the legal regulation regarding the cohabitees' financial relations become even clearer when there are no possibilities for compensation in order to counterbalance the economic disproportion that have occurred as a consequence of direct and indirect contributions even though rules of division and possibilities of adjustment gives some kind of limited protection.

The **fourth part** deals with agreements between cohabitees during the relationship and at the end of cohabitation. Cohabitees can enter into different kinds of agreements in order to extend their legal protection. A distinction is made between family law agreements and property law agreements. The possibility to enter property law agreements as a complementary protection is important for the extension of the legal protection for the benefit of the economically weaker party, since the family law agreements under the Cohabitees Act only applies on cohabitation property. Nevertheless, there is a restriction towards agreement on the legal conditions when cohabitation ends due to a cohabitee's death. A cohabitee may, with limitation of the own child's right to its statutory share of the inheritance, make a will through which the other cohabitee can be benefited. However, cohabitees may not, by referring to the freedom of contract, agree to apply the rules of the Marriage Code in its entirety to their relationship. Thus, cohabitees that neither have entered into cohabitation agreement as encouraged in the preparatory work, nor drawn a will, may be in an economically disadvantaged upon dissolution of the relationship due to death.

In the fourth part the situation of a child upon dissolution of a cohabitee relationship is also described. The parents may enter agreements that are in the best interest of a child. To, inter alia, ensure that children in the future have good living conditions a right to take over a residence. Further, a child of separated parents is entitled to security of supply, why the parents are responsible to pay maintenance and the society has a subsidiary responsibility to pay maintenance support.

The final part of this research, the **fifth part,** summarises which legal issues that appear to be most problematic in Sweden. The non-existence of legal inheritance rules for cohabitees, expanding the division of property rules and the rules of adjustment were particularly highlighted. The common consequence of these legal issues appears to be the unequal economic position that a cohabitee may experience. The topics have been debated in the legal doctrine and there are no certain solutions, even though the

legal scholars have proposed suggestions for how to achieve a fairer economic result. Solutions that have been discussed are, among others, introducing legal inheritance rights for cohabitees, expending the rules of division of property to include all properties acquired during the cohabitation, and lastly to clarify the adjustment-rule.

Both the social conditions and the economic dealings between two cohabitees require legal protection that can solve practical problems in event of dissolution of the relationship. Values of assets accumulated together by the cohabitees, are not dealt with by the Cohabitees Act if the values do not refer to cohabitation property. This is a problem since the frequency to regulate dealings outside the frame of the Cohabitees Act is not as common as it should have been, with the legislature of today as a base. Thus, a lot of properties fall outside the scope of regulation. It is mostly up to the cohabitees themselves to either expand their legal protection or enter into agreements. Meanwhile, there is a lack of knowledge towards the regulations and the conditions that are applicable. This can also explain why it is only 14 percent that conclude agreements.

It has already been established that the Swedish rules that applies on cohabitees are spread out in different acts, principles and agreements, despite the existence of the Cohabitees Act. This may function as an indication that the scope of application of the Cohabitees Act is not fully keeping pace with its time. Today there is no comprehensive legal framework for unmarried couples. In accordance with what has emerged in this research it is evident that the legal effects of cohabitation have, in some aspects, to increase, otherwise the consequences for the economically weaker party in the future will be unreasonable and unpredictable.

Conclusive summary

Cohabitation is a family trend that is distinctive in the Nordic legal culture. With cohabitation, generally, the Nordic laws refer to couples living together without being married. As it has been shown in the reports, there is **no catch-all definition** of what constitutes 'cohabitation' in a legal sense, yet there are similarities and differences worth pointing out in regard to criteria set within the Nordic countries for cohabitees to be recognized as such by law. In summary, all Nordic countries often lay decisive weight to the length of the period living together or - as in Sweden - that it is continuous and permanent. In Denmark and Norway, considerable weight is also given in case-law to the fact that cohabitation is "marriage-like", while Sweden flexibly weighs a joint sexual life.

If zoomed in on the length of the period during which the couples have lived together, two consecutive years generally qualify in three of four countries while Finland stands alone with a norm of 5 years. However, this is dynamically lowered, depending on the context at issue, so that—even in Finland—an agreement between the parties can waive the time requirement. And it may also be waived in special circumstances, for example when cohabitees share parenthood over a shared child.

As a distinct and shared feature overall, cohabitees—although they are a couple—are viewed as **two separate units as opposed to one marital unit**. At the same time, it is often understood in comparison to marriage. Thus, the starting point of regulating cohabitees is at the same time economically different from marriage - kept in regard as the one unital relationship - and is heavily perceived as connected to it. Despite being a common way of living together it has proved quite difficult to fit into regulation.

Worth noting, this is also visible in **legislative debate**, as the status quo of not having separate legislation in Denmark and Norway is upheld in a somewhat defensive stance of governments to maintain the respect for traditional marriage. The high threshold in Finnish legislation might similarly be contributed to marriage as the overarching idea still; while the Swedish legislators have chosen to adopt an ideology of neutrality towards the people's formation of family life.[1]

As a result, often seen in the practice of the courts in Nordic countries, it has become **difficult for cohabitees to foresee their rights** and benefits in various legal areas. Legislators have sought to solve this through **statutory intervention**, most notably the new Swedish Cohabitants Act and the Finnish Act on the Dissolution of Households of Cohabiting Partners. This means that cohabitees are regulated separately in Sweden and Finland with some degree of success. To date, neither Denmark nor Norway have a separate statute regulating cohabitation; instead they

[1] See section 5.6 of the Danish Report; section 5.4.1 of the Finnish Report; section 5.1.1 of the Norwegian report; and section 1 of the Swedish report.

have detailed court practice applying some rules from the marital sphere by analogy while other rules are consistently reserved for spouses.

These discrepancies naturally come with prospects and consequences. But there is more than meets the eye at first glance: When asked to put the **definitions** on a scale, authors agreed that Finnish law held the strictest conditions for cohabitees to be recognized in law while Swedish law was most open towards cohabitees. Denmark and Norway were more in the middle, despite having no general definition in legislation at all. Especially the 5-year norm in Finnish law was deemed a gap in legal protection for cohabitees awaiting childbirth.[2]

On the flipside, when it came to **access to justice**, the regulated environments of both Swedish and Finnish law provided more access to justice. It was highlighted that an executor could be appointed to settle disputes about the joint estate outside of courts – assuming in Finland that the cohabitees met the requirements to be recognized. This was both cheaper and more convenient for cohabitees.[3]

A general feature worth emphasizing is that settlements upon division is mainly solved along the lines of **common principles within property law**, although the applications differ. Only Sweden has a substantial change to this main rule, as the so-called cohabitation property (comprised of the joint dwelling and household assets) is divided in accordance with the **principle of equal division** instead.[4]

Considering the circumstances under which **joint ownership** forms within the sphere of property law, an important distinction was between direct contributions - which materialize in future assets - and indirect contributions which do not. The first could be paying for lasting items or the place of living while the latter could be grocery-shopping or doing housework. Only in Norway can co-ownership be established merely on the basis of indirect contribution. In Denmark, the practice went away from a similar line of case-law and went to focus more intensely on agreements and expectations between cohabitees as regards ownership. Nonetheless, both in Norway and Denmark, the burden of proof lies on the cohabitee who wants to claim joint ownership. This burden of proof is switched in both the Finnish and the Swedish cohabitation laws for movable assets that are acquired for the joint household to which both cohabitees have contributed. In other words, joint ownership is presumed when there is doubt.

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2 See general introduction to structure and definitions of cohabitation in section 1 of each report.

3 See section 6 of the Finnish Report and section 3.1 of the Swedish Report.

4 See circumstances under which joint ownership applies in section 2 of each report; and grounds to claim compensation upon dissolution in section 3 of each report; section 3 of the Swedish Report offers explanation why compensation claims do not exist there, as special rules ensure equal division of cohabitation property as a main rule.

Notable exceptions apply to immovable property where public registries are set in place to ensure legal certainty of the ownership. Here, although the actual ownership is the deciding factor in Denmark and Norway, it is difficult to prove if it is not registered; and third parties who rely on the registries are shielded from effects of unregistered transfers which might mean liability or the loss of ownership for cohabitees. In Finland, the argument ends in the registry. Contrarily, in Sweden, 'hidden co-ownership' applies regardless of the kind of property allowing it to be established that a property was bought on behalf of both cohabitees; and the joint dwelling is even included in the presumption rule.

Cohabitees might also seek **compensation** after dissolution of cohabitation for whatever unjust results the status quo of the law has brought about. However, in Denmark, Finland and Norway, the main rule is that such compensation is not given; and authors note that exceptions to the main rule have a high threshold. This includes requirements for significant enrichment of one cohabitee at the other's expense and (in Denmark and Norway) for compensation to be considered reasonable based on a number of factors, including the amount of enrichment, the duration of cohabitation and the reasonable expectations of the cohabitees.

Uniquely in Sweden, there is no legal basis for compensation claims. In turn, Sweden is the only country where the main rule is actually equal division (although only of the cohabitation property); and issues are dealt with through the concept of hidden co-ownership and adjustment away from equal division when this rule entails an unjust result, for example if a cohabitee inherits shortly before dissolution.

One particular effect of the view of cohabitees as two seperate units as opposed to a marital unit is that the point of departure becomes the freedom of contract as a basic principle. Cohabitees are free to enter into an agreement which is aimed at regulating their existing relationship and its termination. As a counterpart, it means that **agreements between cohabitees** must be legitimate within the sphere of contract law:

Especially the shared rule in § 36 of the contracts act is impactful: It applies to agreements that can be considered unconscionable with regard to the content of the contract, the circumstances related to the formation of the contract, the subsequent events or other circumstances. If a term in the agreement or the agreement in its entirety is considered unconscionable, it can be modified or, if necessary, set aside. The primary purpose of this provision is to protect the inherently weaker party in a relationship.

The contract act § 36 effectively cuts off cohabitees' opportunity to choose the 'marriage package' of rules without being married, unless they write a detailed contract foreseeing in detail the issues they will encounter. And even so, the contractual nature

of cohabitation agreements only allows for less flexible solutions, as there is always the risk that courts will set clauses aside.

Most commonly, it seems, agreements are made for documentation purposes alone.[5] Nevertheless, it is possible to make written agreements to state facts that the cohabitees agree should entitle one of them to a compensation claim or to state who shall have child custody on division.[6]

Considering the legal frameworks, it would be advisable that more cohabitees regulate their financial positions vis a vis each other to avoid unsatisfactory future consequences.

Among the **most problematic issues highlighted by the authors**, readers should note the agreement that there are special reasons for statutory intervention if legislators want to secure effective equal division of assets, *and* if they want to protect cohabitees via inheritance rights.[7]

Sweden has already taken the first and longest step, securing default equal division of the cohabitation property with the first cohabitation act in the Nordics. Finland has taken the shorter step without changing the default of separate assets and instead being the first Nordic country to codify special family law rules that hinder unjust enrichment. Denmark and Norway still rely on court practice for discretionary compensation with the abovementioned high threshold and rare use.[8]

Further, Swedish minimum protection ensures a base inheritance amount corresponding to half the amount ensured for spouses, provided that the cohabitation property is sufficient to cover it, and Norway maintains a right to inheritance for cohabitees who expect, have or have had children. Danish and Finnish law maintains no automatic rights to legal inheritance.[9]

Worth noting when it comes to agreements about inheritance, Danish law allows cohabitees to agree in a will that they will inherit each other as spouses if they have lived together for 2 years or expect, have or have had children, and Norwegian law

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5 See section 4.1.2 of the Norwegian report and section 4.1 of the Swedish report: 21 % of cohabitees use agreements in Norway. 14 % use them in Sweden. Although it should also be noted that evidence in Norway suggests that 68 % of the agreements merely state the ownership of assets. Statistics in Finland and Denmark was not available as to the use of agreements, although the general view of the authors seems to be that their use is especially low in Finland.

6 See limitations and typical clauses in section 4 of each report.

7 See all the issues highlighted by the authors in section 5 of each report.

8 See section 3 of each report.

9 See section 1.2.2, 1.2.4 and 6.3 of the Danish Report; section 5.3 and 5.4.1 of the Finnish Report; section 1.2.4 of the Norwegian Report; and section 5.1 of the Swedish Report.

allows it after 5 years. This feature was met with engagement from other authors, as Swedish and Finnish inheritance systems only allow more limited inheritance to cohabitees in order to maintain protection of other heirs. Another delicate fact is that cohabitees pay considerably more tax on inheritance.[10]

In addition, authors consistently argued that **agreements cannot fully fill out existing legislation gaps**. First, this included a general critique of common arguments based in contractual freedom, suggesting that the view of cohabitees as market actors missed the mark: Cohabitees live in a complex social relationship of trust towards a shared future which goes beyond the idea of transactions on which contract law is based. Thus, it should be separated from the contractual sphere in aim to reflect the social phenomenon better.

Second, it included a resistance towards the common argument that there is no need to legislate at all because cohabitees can simply marry: In order to reflect the emerging fact that lifelong cohabitation, even with children, is socially accepted in all Nordic countries, an appropriate safety net should be available also to those who choose to structure their family life without marriage.

Perhaps counting third, authors remarked that it takes two to marry and hence each individual cohabitee could veto: Lack of sufficient legal protection for cohabitees becomes a greater issue if one considers the possibility that one cohabitee can legitimately decline marriage or—as the case may be—require a prenuptial agreement as a condition for marriage. The generally low use of cohabitation agreements might also be understood in this view.

Re-evaluating family law requires understanding of its original aims, and in Nordic tradition we have consistently sought to protect the weaker parties, including spouses and children. With all respect, it takes an open mind to include a concept as dynamic as cohabitation in this context, and consideration must be given to the general principles and contract and property law which family law holds exemptions to.

In conclusion, the authors saw potential in the legislation and doctrine developed by legislators and courts, imperfectly bettering the status quo. However, **further statutory intervention was called for**, as Swedish and Finnish authors drew out existing gaps in their legislation and Danish and Norwegian authors concluded that a specific cohabitation act was also needed in their jurisdictions.[11]

[10] See section 1.2.3 of the Danish Report; section 5.3 of the Finnish report; section 6 of the Norwegian report; and section 1.1 of the Swedish Report.

[11] See conclusions in section 6 of each report.

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THE DIVISION OF PROPERTY BETWEEN UNMARRIED COHABITEES
A Nordic perspective on living together

This quadruple report provides comprehensive insight into the legal situation of unmarried cohabitees in Denmark, Finland, Norway and Sweden. Cohabitees are unmarried couples living together similarly to spouses, but mostly without the same legal security and certainty, as their situation is only in two of four countries regulated in statutory law. Contrary to the intense cooperation that took place between Denmark, Norway and Sweden in the early 1910s preparing new marriage laws, there has been no cooperation at all regarding the legal status of unmarried cohabitees. That makes it an interesting area for comparative research especially.

The report begins with general depictions of the legal structure in each country and carries readers through to end with suggestions for improvement of the law. It illustrates how, in the status quo of the law, cohabitees meet various statutory limits when arranging their family life; most markedly in respect of property, contract and inheritance law. Touching upon the interplay between the status quo of the law and the personal autonomy of persons to organize their own family life, authors highlight the most problematic issues of the law applicable to unmarried cohabitants in each country. They provide qualified suggestions to meet these issues as they conclusively call for further statutory legislation to provide all the necessary tools to protect weaker cohabitees and exposed children.

The Nordic Legal Research Group is a project on initiative of four Nordic groups of The European Law Students' Association (ELSA) in which 11 students gathered throughout 2019 to author this collective report. While written purely by students, the report is a product of close cooperation with three university professors as well as three doctoral candidates specialized within Nordic family law. In particular, the research framework has been developed by esteemed Family law Professor Ingrid Lund-Andersen while a further group of academics have supervised the process. She pronounces it "an impressive research work prepared by students in their spare time [which] can be useful for legal practitioners, academics at universities as well as for politicians and lawmakers.".

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