Truly a Charter for Mistresses

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I Introduction

In the latter part of the twentieth century the term mistress has not infrequently been used to describe, in contradistinction to a kept woman, a woman who cohabits in the same household with a male partner who is unmarried or who has abandoned his *de facto* or *de jure* wife.[1] In *Davis* v. *Johnson*[2] Lord Kilbrandon regretted the use of the term mistress in this context. In his view the term mistress more accurately portrayed a "woman installed, in a clandestine way, by someone of substance, normally married, for his intermittent sexual enjoyment."[3] Lord Kilbrandon doubted whether this latter category of women continued in existence in late twentieth century society.

Freeman and Lyon have also declined to employ the word mistress to describe a female partner who lives permanently in an unmarried state with a male partner in the same household. They have suggested that the concept of a mistress is wholly sexist and that the term mistress carries connotations of an exclusively illicit and outdated sexual relationship.[4]

These disparaging observations pertaining to mistresses may result from an excessively rigorous conceptualization of extra-marital relationships into two distinct categories, the first consisting of cohabitants and the second consisting of kept women. Whether extra-marital relationships should be granted legal protection remains somewhat controversial.[5] There tends, however, to be a general acceptance that if such relationships are to be brought within the bounds

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1. See, *e.g.*, Kingdom, (1988) 15 *Jo. of Law and Soc.* 77; Masson, [1979] *Conv. 184;* Richards, *(1976) 40 Conv. NS* 35; *Richards* v. *Dove* [1974] 1 All E.R. 888, at p.894.
2. [1979] A.C. 264.
3. *Ibid.*, at p.338. See also the judgment of Lord Denning MR in *Davis* v. *Johnson* [1979] A.C. 264, at p.270.
4. Freeman and Lyon, *Cohabitation without Marriage* (1983), at p.5.
5. See, *e.g.*, Freeman and Lyon, (1980) 130 *N.L.J.* 228; Deech, at p.300, in *Marriage and Cohabitation in Contemporary Societies* (1980); Freeman and Lyon, *Cohabitation without Marriage* (1983), at p.183 *et seq.*; *Gammans* v. *Ekins* [1950] 2 K.B. 328, at p.334; *Richards* v. *Dove* [1974] 1 All E.R. 888, at p.894; *Dyson Holdings* v. *Fox* [1975] 3 All E.R. 1030, at p.1036; *Helby* v. *Rafferty* [1978] 3 All E.R. 1016, at p.1022 *et seq.*; *Watson* v. *Lucas* [1980] 3 All E.R. 647, at p.653 *et seq.*.

of law only the first category of relationship is worthy of protection. Parker has explained that "the law is engaged in reproducing the traditional patriarchal family form by assimilating threats to the marital norm within a slightly wider definition of marriage."[6]

In this article the term mistress will be used to refer to the second category of women. A mistress is a woman who is kept by, or receives some financial support from, a visiting male lover. Her male lover normally resides with another woman in a *de jure* or *de facto* matrimonial relationship.[7] The plight of the mistress when her relationship of dependency comes to an end has, for the most part, been ignored. Until the enactment of the Inheritance (Provision for Family and Dependants) Act 1975 law reformers, legislators and the judiciary tended to disregard the highly vulnerable position of the mistress on the death of, or breakdown of her relationship with, her lover. Their attention has, instead, been centred on the dilemmas faced by cohabitants whose relationship has ended. The mistress, no less than the cohabitant, may find herself homeless and without the financial means of maintenance. Those who deplore the mistress relationship may view it as a deviation from the societal norm of monogamous perfection in that the mistress and her lover's wife co-exist in a state of quasi-polygamy which detracts from the approved matrimonial model. If this latter ideal is to be buttressed, the relationship of mistress and lover must be distinguished from *de facto* matrimonial relationships for the purpose of excluding it from any expanded definition of marriage. Critics, therefore, have been inclined to stress the *démodé* and tawdry nature of the mistress relationship with its overtones of commercial sexuality, and by so doing marginalize the relationship.[8] If a mistress is no more than one of a dying species of glorified prostitutes it becomes feasible for the critics to seek to prevent the extension to a mistress of those legal remedies offered to partners cohabiting in a quasi-matrimonial relationship.

These derogatory images of the mistress are not reflected in studies relating to mistresses. The mistress is neither a member of a rare breed[9] nor is she primarily a personal prostitute. Rigid categorisation of extra-marital relationships is not only fallacious but may also prove to be dysfunctional in its perceived protection of the institution of marriage. Empirical research in the mistress context has revealed that the label mistress is "an opaque umbrella term for a multitude of types" of kept women rather than one category. The term mistress does indeed encompass

6. *Cohabitees* (1981), at p.222 *et seq.* See also Freeman and Lyon, *supra* n. 5, at p.145 *et seq.*; Bruch, (1976) 10 *Fam. Law Q.* 101; Eekelaar, (1975) 38 *M.L.R.* 245; Report of the New South Wales Law Reform Commission on *De Facto* Relationships 1983; Family Law Act (Ontario), SO 1986, c. 4 ss. 1, 29.

7. A mistress will not normally be cohabiting in a permanent relationship with a male partner during the currency of her relationship with her lover. See, however, *Horrocks* v. *Forray* [1976] 1 All E.R. 737, at p.739; *Robinson* v. *Cox* (1741) 9 Mod. 262, 88 E.R. 439.

8. See nn. 2 and 4 *supra*. See also Salamon, *The Kept Woman* (1984), at p.19 *et seq.*.

9. See, generally, Salamon, *supra* n. 8; James and Kedgley, *The Mistress* (1973); Sands, *The Making of the American Mistress* (1981). See also Coleridge, (October 1987) *Harpers and Queen*, at p.216; Mayle (April 1987) *Gentleman's Quarterly*, at p.50.

relationships which resemble an exclusive form of prostitution[10] but it also includes stable long term visiting relationships which contain many of the incidents of marriage. A mistress engaged in this latter form of relationship may regard herself, in some sense, as the quasi-polygamous wife of her lover, performing many of the roles normally associated with a traditional wife.[11] She may, for example, give birth to and care for children.[12] Unlike the cohabitant, neither the mistress as prostitute nor the mistress as quasi-polygamous wife have expectations that their lovers will abandon their current matrimonial relationships for their sake.[13] It is difficult not to reach the conclusion that it is not only the mistress but also the cohabitant who poses a threat to the monogamous ideal of marriage.[14]

Whether a dependent mistress falls into the category of quasi-polygamous wife or personal prostitute, if her relationship with her lover ends, she will face similar problems to those facing a dependent cohabitant. She has been encouraged to offer her services to a male partner in return for financial dependency.[15] If that financial support is withdrawn at the end of the relationship she is likely to find herself without a home and will have to seek an alternative means of earning a living. If the relationship of dependency has continued for a substantial period of time she may find herself disadvantaged as a direct result of that dependency when seeking to re-enter the labour market.[16] In these circumstances, a mistress, no less than a cohabitant, requires legal solutions to the problems facing her at the end of a relationship.

The focus of this article is fixed upon legal approaches to the problems faced by mistresses at the end of a relationship, and, in particular, the extent to which the Inheritance Act has ameliorated these problems.

II Limited Legal Redress for Mistresses

Statutory provision, although limited in scope, has extended some legal protection to parties engaged in extra-marital sexual relationships. With the clear

10. See, *e.g.*, the Canadian cases of *R.* v. *Garau* (1891) 1 C.C.C. 66; *Queen* v. *Elise Rehe* (1898) 1 C.C.C. 63. See also *Robinson* v. *Cox* (1741) 9 Mod. 262, 88 E.R. 439.
11. See, *e.g.*, *Malone* v. *Harrison* [1979] 1 W.L.R. 1353, at p.1356.
12. See, *e.g.*, *Horrocks* v. *Foray* [1976] 1 All E.R. 737; *Tanner* v. *Tanner* [1975] 3 All E.R. 776; *Coombes* v. *Smith* [1986] 1 W.L.R. 808.
13. See *Malone* v. *Harrison* [1979] 1 W.L.R. 1353, at p.1357.
14. The mistress relationship poses a threat in two ways. *First*, although the mistress has no expectation that her lover will leave his wife and marry her, his wife is less likely to tolerate the long term continuation of the mistress relationship once she becomes aware of it. Sexual exclusivity remains the linchpin of traditional marriage. Divorce is likely to ensue: see, generally, Lawson, *Adultery: An Analysis of Love and Betrayal* (1988). *Secondly*, the mistress relationship in most circumstances will have disastrous economic consequences for a marriage: see, *e.g.*, *Horrocks* v. *Forray* [1976] All E.R. 737, at p.739.
15. Oliver, [1978] *C.L.P.* 81, at p.85.
16. See Welstead, *Proprietary Estoppel and the Family Home*, at p.95 (unpublished PhD Thesis, University of Cambridge, 1987).

exception of the Inheritance (Provision for Family and Dependants) Act 1975,[17] Parliament has tended to adopt a status based model in legislation relating to extra-marital relationships. Statutes have been worded with the purpose of protecting only those parties who live together in relationships which correspond with traditional marriage.[18] The mistress may have difficulty in obtaining statutory protection under status based legislation.

Non-statutory principles, both legal and equitable, have also been employed by mistresses seeking legal redress, but with little success. Judicial interpretation of principles of contract, constructive trusts and proprietary estoppel, although in principle relationship neutral, has militated against the interests of the mistress.

(a) *Domestic Violence and Matrimonial Proceedings Act 1976*

In 1976, legislation was enacted empowering the courts to grant protective injunctions restraining one spouse from molesting another and, where necessary to prevent further violence, excluding the molesting spouse from occupation of the matrimonial home.[19] Section 1(2) of the Domestic Violence and Matrimonial Proceedings Act 1976 extended these protective injunctions to "a man and a woman who are living with each other in the same household as husband and wife."[20] The narrow wording of section 1(2) of the Act has been construed in a manner which will exclude most mistresses from the protection of the Domestic Violence Act.

In *Davis* v. *Johnson*,[21] Lord Denning MR accepted that the Domestic Violence Act did not apply to mistresses. He distinguished such women from *de facto* wives living in the same household as their cohabiting male partners. Lord Denning MR regarded a mistress, somewhat deprecatingly, as a woman involved in a "casual, impertinent and secret" relationship.[22] This category of woman, he thought, could not claim the protection of the Domestic Violence Act.

In the House of Lords, in *Davis* v. *Johnson*,[23] Lord Kilbrandon also rejected the possibility that mistresses might obtain protection under the Domestic Violence Act. He maintained that section 1(2) of the Act was "for the protection of families-households in which a man and a woman either do or do not bring up children - the man and the woman being for whatever reason unmarried."[24]

In spite of these judicial *dicta* courts may be prepared to accept that a mistress should receive the protection of the Domestic Violence Act where she can

17. See, *infra*, at p.130.
18. In addition to the Domestic Violence and Matrimonial Proceedings Act 1976 which is discussed in this paper, see also Rent Act 1977, Schedule 1, Part I, para 2; Housing Act 1985, section 87. See also Hill, [1987] *Conv.* 349.
19. See Wright, (1980) 130 *N.L.J.*; Masson [1979] *Conv.* 184.
20. See Wright, (1981) 11 *Fam. Law* 221. See also *Davis* v. *Johnson* [1979] A.C. 264, at p.334. *et seq.*.
21. *Ibid.*, at p.264.
22. *Ibid.*, at p.270.
23. *Ibid.*, at p.264.
24. *Ibid.*, at p.338.

demonstrate that her relationship with her lover was of long duration and involved at least some element of cohabitation. The relationship, for example, may have involved cohabitation during the week but weekends apart in circumstances where the lover worked away from home and returned to his family at weekends. The couple may also have spent significant periods of time on holiday together. It may be appropriate to describe the mistress here as a part-time cohabitant.[25] The law has already accepted that an application under the Domestic Violence Act may be brought by a partner who is not actually living with the molesting party at the time of the court hearing. The applicant may have been forced to leave home because of the molestation. A court will only refuse to entertain an application in these circumstances if the length of the separation suggests that the applicant no longer requires the protection of the court.[26] The judgments of Lord Denning MR in the Court of Appeal and of Lord Kilbrandon in the House of Lords, in *Davis* v. *Johnson*, stress the importance of the stability of the "living together relationship", prior to the application, as a factor in determining whether an applicant comes within the ambit of section 1(2) of the Domestic Violence Act. Stability of the applicant's relationship was also considered to be a relevant issue by the House of Commons Standing Committee during the Committee stage of the Bill on domestic violence. Miss Richardson MP explained that "the words, 'living with each other in the same household' are intended to avoid a casual relationship, but to indicate a continuing state of affairs."[27] It would seem not unreasonable to extend to mistresses the protection of the Domestic Violence Act. A mistress, particularly one with a child, is in no less a predicament than a cohabitant who faces domestic violence.[28]

(b) *Contractual remedies*

A mistress who wishes to make a claim against her lover based on an express or implied contract is liable to confront at least two obstacles. *First*, she must

25. See, *e.g.*, *Malone* v. *Harrison* [1979] 1 W.L.R. 1353, at p.1357. Hollings J in *Malone* v. *Harrison* (at p.1359) describes the mistress as a part-time mistress. Perhaps he meant a part-time cohabitant. In *Re Labbe and McCullough* (1979), 23 OR (2nd) 536, the Ontario Provincial Court granted financial support under section 14(b)(i), para. 2 the Family Law Reform Act 1978 (Ont), c. 2 (now see section 29, Family Law Act 1986 (Ont) c. 4) to a woman who had lived with a man for only six weeks out of a total period of relationship of nineteen months. It is of interest to note that a new form of matrimonial relationship exists in late twentieth century English society in which husband and wife live happily married but apart: see Wyn-Ellis, (November, 1988) *Harpers and Queen*, at p.176.

26. See *Adeosa* v. *Adeosa* [1980] 1 W.L.R. 1535, at p.1538; *O'Neil* v. *Williams* [1984] F.L.R. 1, at p.9; *McLean* v. *Nugent* [1979] 1 F.L.R. 26; *McLean* v. *Burke* [1981] 3 F.L.R. 70; *White* v. *White* [1983] 2 All E.R. 51; *Ainsbury* v. *Millington* [1986] 1 All E.R. 73.

27. Standing Committee F Col. 9, 20 June 1976.

28. Goff LJ in *Davis* v. *Johnson* [1979] A.C. 264, at pp.299, 300 explained the predicament of a cohabitant faced with domestic violence in the following terms: "Either she stays and suffers further battering as so often happens, or she goes off and fends for herself, leaving the child or children with the violent father, which may be even worse, or she takes them with her to what is often very inadequate and squalid accommodation."

demonstrate that there was the requisite intention to enter into legal relations.[29] Where the parties have expressed their agreement, with respect to their relationship, in writing, there will be little difficulty in proving the requisite intention. It will, however, be rare for the parties to make an express agreement at least during the currency of the relationship. *Second*, the courts have shown a general reluctance to enforce contracts in respect of relationships involving extra-marital sexual conduct. Whether the contract is based upon sexual consideration or its purpose is a sexual relationship, the law tends to the view that the contract is contrary to public policy and therefore unenforceable.[30] An elaborate case law has, however, grown up excepting certain contracts involving extra-marital sexual conduct from defeasance.

Where a contract is made by deed or there is some alternative form of consideration, contracts in respect of past cohabitation have normally been regarded as enforceable. In *Ayerst* v. *Jenkins*,[31] Lord Selbourne, the Lord Chancellor, maintained that covenants founded on past extra-marital sexual conduct "whether adulterous, incestuous, or simply immoral, are valid in law."[32] In his view, similar contracts founded on future extra-marital sexual conduct are invalid as they tend to encourage illicit behaviour.[33]

In *Re Wooton Isaacson, Sanders* v. *Smiles*,[34] it was also held that a deed founded on past extra-marital sexual conduct was valid. The mere fact that similar future conduct was contemplated by the parties was insufficient to invalidate the deed. If, however, the deed was actually founded on both past and future extra-marital sexual conduct, it would be invalid.[35]

A number of eighteenth and nineteenth century mistress cases suggest that a further refinement of the doctrine relating to immoral contracts can be made. Where the mistress relationship commenced by an act of seduction by the male partner or where there were quasi-matrimonial incidents to the relationship, such as long term stability or children, the courts followed the approach in *Ayerst* v. *Jenkins* and validated contracts based on past consideration. Public policy demanded that legal redress be given to the mistress. In *Nye* v. *Moseley*,[36] for example, a young servant was provided with a cottage by her employer for the

29. See *Balfour* v. *Balfour* [1919] 2 K.B. 571, at pp.578, 579. See also *Layton* v. *Martin* (1986) 16 Fam. Law 212.

30. See *Pearce* v. *Brooks* (1866) L.R. 1 Exch. 213, at pp.217, 218; *Upfill* v. *Wright* [1910] 1 K.B. 506, at p.510; *Fender* v. *St John Mildmay* [1938] A.C. 1, at p.42.

31. (1873) 29 L.T. 126.

32. *Ibid.*, at p.128.

33. See *Robinson* v. *Gee* (1749) 1 Ves. Sen. 251, 27 E.R. 1013; *Ford* v. *De Pontès* (1861) 30 Beav. 572, 54 E.R. 1012. The major question confronting the courts has been whether the enforcement of the contract would tend to encourage the illicit conduct. It was argued in *Nye* v. *Moseley* (1826) 6 B. & C. 133, 108 E.R. 402, at p.403 that "holding such bonds to be void will have a tendency to prolong the illicit intercourse, because it will then be the woman's interest to prevail upon the man to continue to live with her.

34. (1904) 21 T.L.R. 89.

35. See *Friend* v. *Harrison* (1827) 2 C. & P. 584.

36. (1826) 6 B. & C 133, 108 E.R. 402.

purpose of a visiting extra-marital relationship with him. Two children were born of the relationship. The employer subsequently terminated his relationship with the servant and executed a bond to pay her an annuity for herself and the children. Bayley J held that a bond given to a single woman by her lover "as *premium pudicitae* at a time when he terminates the illicit connection, is valid."[37] The Court was prepared to uphold the contract here because it would make reparation for the damage suffered by a woman who prior to this relationship "had conducted herself with propriety and morality".[38] Furthermore, the enforcement of the contract would benefit the children of the relationship.

Where the mistress relationship has been viewed as one of prostitution, the courts have declined to give effect to a covenant founded on past cohabitation. In *Robinson* v. *Cox*,[39] the defendant mistress was given a promissory note by the deceased prior to his death. He had maintained the mistress and provided her with a house during his lifetime and visited her once a week. The defendant was not only the mistress of the deceased, but also a common prostitute. The Court distinguished between "a woman who has been modest to the rest of the world, and lain with none but the man who has given her such note or bond"[40] and a woman who engaged in prostitution. The former was deemed worthy of the Court's protection. The Court made the presumption that the latter should be denied a remedy because "as women of the town are full of design and artifices to impose upon people, that they therefore do make use of such artifices, and are guilty of some fraud or imposition, in getting such notes; and this presumption is made from general principles of policy . . . to prevent women of the town taking any advantage of their artifices."[41]

Dwyer[42] has questioned whether the old authorities relating to immoral contracts can be accepted as good law today without some qualification. He has suggested that the courts' acknowledgment of the dramatic change in the sexual *mores* of society which has led to the validation of contracts involving extra-marital sexual conduct may require a revision of the doctrine relating to immoral contracts. Dwyer's argument may be correct in the context of decisions concerning cohabitation in a *de facto* marital relationship.[43] There remains, however, considerable uncertainty whether the courts will be prepared to extend this liberated approach into the mistress context. Two modern cases illustrate the courts' approach to contractual claims involving mistresses in twentieth century

37. *Ibid.*, at p.403.
38. *Ibid.*, at p.402.
39. (1741) 9 Mod. Rep. 263, 88 E.R. 439.
40. *Ibid.*, at p.441.
41. *Ibid.*
42. (1977) 94 *L.Q.R.* 386, at p.387. See also Poulter, 124 *N.L.J.* 999, at p.1034; Oldham and Caudill, (1984) 18 *Fam. L.Q.* 93, at pp.97, 106 *et seq.*
43. See, *e.g.*, *Marvin* v. *Marvin* (1976) 18 Cal 3d 660, 815; *Andrews* v. *Parker* [1973] Qd. R. 93; *Stanley* v. *Stanley* (1960) 23 D.L.R. (2nd) 620; (1962) 36 D.L.R. 443; *Ward* v. *Byham* [1956] 2 All E.R. 318. See also *Heglibiston Establishment* v. *Heyman* (1977) 121 *Sol. Jo.* 851.

society. The decisions suggest that the courts have not entirely abandoned the traditional approach outlined in the early case law.

In *Tanner* v. *Tanner*,[44] the Court of Appeal ruled in favour of a mistress, abandoned with young children, on the breakdown of her relationship with her lover by inferring a contractual licence.[45] Here, the plaintiff, a married man, had lived with his wife and adult children whilst at the same time indulging in a visiting relationship with the defendant mistress. At the commencement of the relationship, his mistress lived in a rent controlled flat as a protected tenant.[46] She subsequently became pregnant and gave birth to twins. The plaintiff began to lose interest in the relationship. He did, however, purchase a house, installed his mistress and their children on the ground floor and let the upper floor to tenants. The mistress managed the lettings and collected the rent. In this way, the mistress and children were partially maintained.[47]

The defendant mistress was only one of a number of women with whom the plaintiff had a visiting relationship. Eventually, the plaintiff broke off his relationship completely with the defendant and asked her to leave his property. He had, by this time, divorced his wife and married another woman who was pregnant with his child. He wanted the property to enable his new family to have a home there. He therefore brought proceedings against the defendant for possession of the property. The defendant counter-claimed '*inter alia*' that she had a long term licence to occupy the property.[48] The Court of Appeal granted the defendant's counter-claim and inferred that the terms of the contractual licence were such that her occupation of the plaintiff's property was to be protected until the children were no longer of school age.

In *Tanner* v. *Tanner* the Court of Appeal found it unnecessary to confront the issue of immoral consideration. This is implicit in the decision in that the Court accepted that the plaintiff had effectively ended his relationship with the defendant by the time she relocated to his property.[49] The Court viewed the purpose of the contract in terms of a benefit to the defendant in her capacity as mother of the plaintiff's children and not as his mistress. Lord Denning MR also found that the defendant mistress had provided the requisite consideration for a contractual licence, because she had relinquished her rent controlled tenancy when she moved to the plaintiff's property.

44. [1975] 3 All E.R. 776. See also Barton, (1976) 92 *L.Q.R.* 168.
45. A contractual licence is a licence granted under the terms of some form of contract which restricts the licensor's right to revoke it: see *Errington* v. *Errington* [1952] 1 K.B. 290; *Binions* v. *Evans* [1972] Ch. 359; *DHN Food Distributors Ltd.* v. *Tower Hamlets LBC* [1976] 1 W.L.R. 852; *Re Sharpe* [1980] 1 W.L.R. 219; *Ashburn Anstalt* v. *Arnold* [1988] All E.R. 147.
46. *Tanner* v. *Tanner* [1975] 3 All E.R. 776, at p.779.
47. The mistress and children were dependent primarily on social security for their maintenance.
48. *Tanner* v. *Tanner* [1979] All E.R. 776, at p.779. Counsel for the defendant had alternatively submitted that a trust could be inferred whereby she obtained a beneficial interest in the property for herself and her children. The County Court judge rejected this contention and there was no discussion of this point in the Court of Appeal.
49. [1976] 1 All E.R. 737, at p.745.

By the time the defendant's claim had reached the Court of Appeal, she had left the plaintiff's property in pursuance of an order made by the County Court. In those circumstances the Court of Appeal awarded her £2000 for the loss of her contractual licence.

The decision in *Tanner* v. *Tanner* reflects the approach taken in the early mistress cases. Lord Denning MR took the view that the defendant had not only "a moral duty to provide for the babies of whom he was the father", but also "a duty to provide for the mother."[50] Public policy demanded that the plaintiff should take responsibility for his children and their mother at the end of an illicit relationship.

Six months after the decision in *Tanner* v. *Tanner*, a differently constituted Court of Appeal refused to grant a contractual remedy to a mistress with children after the sudden death of her lover. The defendant mistress in *Horrocks* v. *Forray*[51] had been the deceased's mistress since the age of fifteen. Their relationship of some seventeen years had endured until the moment of death. Throughout this time, the deceased had lived with his wife who remained totally unaware of the existence of his mistress and child. The deceased had purchased a house for his mistress in which she lived with their child and a child of her previous marriage.

Immediately after the unexpected death of the lover, his executors learned of the existence of the mistress and her home. They brought proceedings for possession of this property. The defendant relied on the decision in *Tanner* v. *Tanner* and argued that she had a contractual licence for life or for as long as the daughter was receiving full-time education or for as long as she and the daughter reasonably required the property as their home.[52] She maintained that she had given consideration for this licence because she had left her previous home and had also withheld any action for an affiliation order for her daughter.

The Court of Appeal rejected the mistress' contention. It accepted that the deceased had intended to provide for his mistress and daughter but not in the form of a contractual licence to occupy the property.[53] According to the Court of Appeal, there was neither evidence of an intention by the parties to enter into legal relations nor of the necessary consideration from which the Court might be prepared to infer a contract.[54]

In *Horrocks* v. *Forray*, Scarman LJ attempted to distinguish the decision in *Tanner* v. *Tanner* and thereby limit its application in the future. He suggested that an inference of a contract could readily be drawn in those circumstances where the relationship of mistress and lover was close to breakdown and both parties wished to arrange for the future of their children.[55] In *Tanner* v. *Tanner*, in his view, "the

50. *Tanner* v. *Tanner* [1975] 3 All E.R. 776, at p.779.
51. *Horrocks* v. *Forray* [1976] 1 All E.R. 737.
52. *Ibid.*, at p.740.
53. *Ibid.*, at p.744.
54. *Ibid.*, at p.745.
55. *Ibid.*

woman was concerned for herself and her children: the man concerned to limit and define his financial responsibilities towards the woman and the children."[56] In *Horrocks* v. *Forray*, according to Scarman LJ, the parties had not contemplated the sudden accident that had befallen the deceased. The circumstances here were those of "a continuing, warm relationship of man and mistress"[57] living in luxurious and extravagant style right up to the moment of death. The subject of contractual licences was far from the parties' minds.

Scarman LJ also found that the deceased's provision for his mistress was generous beyond what one would reasonably expect the man to provide in a legally binding obligation. It was generous, not because he was bound, or was binding himself, to be generous, but because he chose to be generous to the woman "for whom there was a big place in his heart."[58] The implication of this view is that a less generous provision would be provided had the parties chosen to regulate their relationship by contract.

Scarman LJ did not, therefore, think it right for the Court to infer a contractual licence on the facts in *Horrocks* v. *Forray*. According to Scarman LJ, there was, however, nothing contrary to public policy which prevented a court of law from enforcing an express contract which provided maintenance for a mistress who cared for her lover's child. He suggested that it was better for parents in such a situation ". . . to regulate their position by contract than that they should have to resort to the court under the Affiliation Proceedings Act."[59] It remains uncertain whether the *dicta* of Scarman LJ support the view that the courts will enforce an express contract, regulating a mistress relationship from the outset or whether they merely reinforce the traditional view that the courts will only enforce a contract in circumstances where the relationship is at an end.[60]

In *Horrocks* v. *Forray*, the deceased's estate was at risk of insolvency because of his extravagant lifestyle. The wife of the deceased, who was unaware of the defendant mistress' existence until after her husband's death, would have been left with financial problems unless the mistress' home could be sold.[61] The Court of Appeal implicitly weighed up the competing claims of the wife and mistress. The latter had been treated generously in her lifetime. The Court of Appeal was not prepared to jeopardize the financial future of a legitimate wife by inferring a contract in favour of a mistress in the context of a continuing relationship.

(c) *Constructive trusts and proprietary estoppel*

Where a lover has provided a home for his mistress during the currency of the relationship, she may wish to preserve this home when the relationship is

56. *Ibid.* See Dwyer, (1977) 93 *L.Q.R.* 386, at p.397 for a criticism of this view.
57. [1976] 1 All E.R. 737, at p.745.
58. *Ibid.*, at p.746.
59. *Ibid.*, at p.745.
60. See n. 35, *supra.*
61. [1976] 1 All E.R. 737, at p.739.

terminated. In the absence of a written express grant of a legal or an equitable title in the property in her favour, a mistress may resort to the doctrine of constructive trusts or the analogous doctrine of proprietary estoppel.[62] She is, however, unlikely to achieve success in protecting her home under either doctrine.

Under English law a mistress who wishes to establish a plea based on the doctrine of constructive trusts, must assert the existence of an overt or an inferred common intention that she should receive a beneficial interest in her lover's property. In addition there must also be proof that she acted to her detriment in reliance on that common intention.[63] It will be a rare case where a mistress is able to show that there was an overt common intention that she should receive a beneficial interest in her home. There are no reported mistress cases where such a claim has been made. Where, however, a mistress is able to prove the existence of an overt common intention, she must also prove the requisite detrimental reliance. In *Grant* v. *Edwards*,[64] one of the few cohabitant cases in which an overt common intention was proven, the Court of Appeal held that detrimental reliance in the context of constructive trusts included any conduct referable to the acquisition of the property.[65] In the majority of mistress cases, it will be difficult to meet this requirement. Mistresses, by definition, are kept women who are dependent on their lovers. They are unlikely to contribute money towards the acquisition of their lovers' properties. In *Eves* v. *Eves*,[66] substantial work relating to the material fabric of the property was also accepted as evidence of detrimental reliance in circumstances where the existence of an overt common intention had been proven. A mistress who is able to demonstrate that she has made a labour contribution to the property may succeed in a claim based on the doctrine of constructive trusts.

Where there is no overt common intention, the courts will be prepared to infer the relevant intention from direct, substantial, financial contributions referable to the property.[67] For the reasons stated above, a mistress is unlikely to have made such contributions.

A claim based on proprietary estoppel is not dissimilar to one based on the doctrine of constructive trusts.[68] In the aftermath of *Taylors Fashions Ltd.* v. *Liverpool Victoria Trustees Co. Ltd.*[69] it has been generally assumed that the elements of proprietary estoppel can be condensed into two interlinked

62. See, *e.g.*, *Re Sharpe* [1980] 1 W.L.R. 219, at p.225; *Walker* v. *Walker* (unreported, Court of Appeal, 12 April 1984); *Grant* v. *Edwards* [1986] 3 W.L.R. 114, at p.129. See also Welstead, *supra* n. 16.
63. See *Gissing* v. *Gissing* [1971] A.C. 886; *Burns* v. *Burns* [1984] Ch. 317; *Grant* v. *Edwards* [1986] 3 W.L.R. 114, at p.120 *et seq.*. *Lloyds Bank P.L.C.* v. *Rossett* [1990] 1 All E.R. 1111 (H.L.). See also Eekelaar, [1987] *Conv.* 93; Warburton, [1986] *Conv.* 291; Hayton, [1988] *Conv.* 259.
64. [1986] 3 W.L.R. 114.
65. *Ibid.*, at pp.122, 127. *Cf.* the approach of Browne-Wilkinson V-C in *Grant* v. *Edwards* to the question of detriment. He suggested that "any act . . . relating to the joint lives of the parties" is sufficient detriment for a successful claim based on the doctrine of constructive trusts (at p.130).
66. [1975] 1 W.L.R. 1338, at p.1345.
67. See *Grant* v. *Edwards* [1986] 3 W.L.R. 114, at p.121.
68. See, *supra*, n. 62.
69. *Taylors Fashions Ltd.* v. *Liverpool Victoria Trustees Co. Ltd.* [1982] Q.B. 133.

requirements distilled from Oliver J's broad test of unconscionability in that case. *First*, there must be an encouragement engendered by the proprietor that some rights have been granted in or over the property. *Secondly*, the person in whom the encouragement has been engendered must act to her detriment in reliance on that encouragement.[70] The detrimental reliance in the estoppel context need not relate to the property nor even to the joint lives of the proprietor and claimant.[71] In satisfying any claim made under the estoppel doctrine, the court has complete discretion over the remedy granted.[72] The doctrine is thus more flexible than that of constructive trusts; this flexibility has been of little benefit to mistresses who seek to protect their homes.

In *Coombes* v. *Smith*,[73] Judge Jonathan Parker QC accepted counsel's observation that "if the plaintiff in the instant case has an equity to remain in occupation of the property, then a similar equity may be expected to arise in the majority of cases where there is a dispute over property between a man and his mistress."[74] He thus made explicit the policy reasons for rejecting a mistress' claim to occupy property based on a plea of proprietary estoppel.

The Court in *Coombes* v. *Smith* considered first the question of encouragement. The defendant had provided a house for the plaintiff mistress and the child of their relationship. He, meanwhile, continued to live with his wife and family. When the plaintiff asked him to place the property in joint names, he assured her that she need not worry because "he would provide a roof over her head".[75] It would not seem unreasonable that the plaintiff should have inferred from this that she had been encouraged to expect a permanent right of occupation. This, however, the judge did not accept. He explained somewhat obscurely that "a belief that the defendant would always provide her with a roof over her head is, to my mind, something quite different from a belief that she had a legal right to remain there against his wishes."[76] The parties in *Coombes* v. *Smith* had not discussed what should happen in the event of a breakdown in their relationship. The defendant's statement that he would provide a roof over his mistress' head was, therefore, not viewed as an encouragement by the Court. It was deemed to lack the necessary clarity for the purposes of an estoppel claim.

Even if the Court in *Coombes* v. *Smith* had been prepared to make a positive finding of encouragement it was not prepared to accept the mistress' claim of detrimental reliance. The first act claimed by her as detrimental reliance was that

70. See, *e.g.*, *Amalgamated Investment and Property Co. Ltd.* v. *Texas Commerce International Bank Ltd.* [1982] Q.B. 84; *Cameron* v. *Murdoch* [1983] W.A.R. 321. See also Welstead, *supra* n. 16.
71. *Grant* v. *Edwards* [1986] 3 W.L.R. 114, at p.130. See also *Riches* v. *Hogben* [1986] 1 Qd. R. 315.
72. See, *e.g.*, *Plimmer* v. *Mayor etc. of Wellington* (1884) 8 App. Cas. 699, at p.713; *Crabb* v. *Arun D.C.* [1976] Ch. 179, at p.189; *Griffiths* v. *Williams* (1977) 248 *Estates Gazette* 947, at p.949.
73. [1986] 1 W.L.R. 808. See also Hayton, [1986] *C.L.J.* 395.
74. *Coombes* v. *Smith* [1986] 1 W.L.R. 808, at p.821.
75. *Ibid. Cf.* the approach of the court in cases involving cohabitation, *e.g. Pascoe* v. *Turner* [1979] 1 W.L.R. 431; *Greasley* v. *Cooke* [1980] 1 W.L.R. 1306.
76. *Coombes* v. *Smith* [1986] 1 W.L.R. 808, at p.820.

she had allowed herself to become pregnant by her lover. Judge Jonathan Parker QC simply stated without explanation that he was "unable to treat the act of the plaintiff in allowing herself to become pregnant as constituting detriment in the context of proprietary estoppel."[77] However, pregnancy outside the context of a long term relationship and without the security of a home is normally regarded by society as a detrimental alteration of position. There seems to be no clear reason why pregnancy should not be treated as a relevant detrimental reliance for the purpose of an estoppel claim.

The second act claimed as detrimental reliance by the plaintiff was that she had left her husband, with whom she was unhappy, in order to move into the defendant's property. The judge accepted the submissions of counsel for the defendant that "whenever a woman moves into a house provided by a man, she must have come from somewhere else; and that, if the mere fact of that inevitable change were sufficient as detriment, there would be detriment in every case."[78] On this basis, an estoppel claim would simply fail on the ground that too many women would otherwise be able to make estoppel claims if leaving one home and moving into another were automatically accepted as relevant detrimental reliance. Such a view disregards the possibility that women might still leave their husbands and seek alternative accommodation rather than become the mistresses of men and live in property provided by their lovers if they knew that their lovers would subsequently attempt to evict them.

In *Coombes* v. *Smith*, the third and fourth acts claimed as detrimental reliance by the plaintiff took the form of giving birth to, and taking care of, the child of the relationship. These acts, without further discussion, were also disallowed as relevant detrimental reliance. There has traditionally been a reluctance in claims for damages in contract or tort to accept that the birth of a child after the failure of a sterilization operation can give rise to a compensatable claim.[79] Nevertheless, there has been an acceptance in such claims that pregnancy inevitably leads to a loss of income by the mother which can result in an award of damages.[80] There seems to be no reason, other than one based on policy considerations, why this loss of income should not constitute detrimental reliance sufficient to found an estoppel claim.

The plaintiff in *Coombes* v. *Smith* had also spent money and labour on the decoration of the property. The Court rejected this act as detrimental reliance without explanation, the assumption seeming to be that as she had already enjoyed the benefits of such improvements, she had suffered no detriment.

77. *Ibid.*, at p.820.
78. *Ibid.*, at p.816.
79. See, *e.g.*, *Jones* v. *Berkshire Area Health Authority* (Unreported, Court of Appeal, 2 July 1986); *Gold* v. *Haringay Health Authority* [1987] 2 All E.R. 888, at p.890 *per* Lloyd L.J. See also, Symmons, (1987) 50 *M.L.R.* 269.
80. See *Emeh* v. *Kensington and Chelsea and Westminster Area Health Authority* [1984] 3 All E.R. 1044, at pp.1051 *et seq.*

Finally, the plaintiff claimed that she had deliberately refrained from looking for a job. The judicial response to this claim was that the defendant had been content to pay the bills and that the plaintiff had not therefore needed a job. The Court failed to take account of the fact that the plaintiff would quite clearly suffer detriment if the belief which she claimed had been engendered by the defendant's encouragement was not fulfilled. It was predictable that she would find difficulty in finding a job, having absented herself from the employment market for seventeen years.

The defendant had benefited from his mistress' conduct in caring for their child and his property but implicit in the decision of the Court was the idea that the defendant had benefited less than his mistress. The defendant was paying a small amount of maintenance to the plaintiff for their child. He was also prepared to permit the plaintiff a limited right of occupation in the property until their child reached the age of seventeen.[81] In these circumstances, the Court took the approach that the mistress did not require the protection of equity.

III The Inheritance (Provision for Family and Dependants) Act 1975 - Truly a Charter for Mistresses

Parliament clearly anticipated the possibility of a claim against a deceased's estate by a mistress under the Inheritance (Provision for Family and Dependants) Act 1975 (referred to in this article as the Inheritance Act).[82] The Earl of Mansfield observed, during the committee stage of the Bill, that the class of those who would be able to seek relief under the new legislation had been widened to include mistresses who, in the future, would be ". . . given a much fairer crack of the whip than ever before."[83]

In *Malone* v. *Harrison*,[84] Lord Mansfield's observations became fact. An application for provision under the Inheritance Act was made for the first time by a mistress.[85] The plaintiff had been the mistress of the deceased since she first met him when she was aged twenty three. She had lived in properties, both in England and abroad, purchased by her lover who financially supported her in a most generous manner. He was described as a "consummate deceiver". He had not only

81. See also *Savva* v. *Costa and Harymode Developments Ltd.* [1981] 131 *N.L.J.* 1114.
82. During the debates on the Bill concern was expressed by those opposed to provision for mistresses that the proposed legislation would permit claims by the mistress: see, *e.g.*, H.C. Deb. Vol. 895, Col. 1690 *et seq.*, H.C. Deb. Vol. 898, Cols. 171, 172, 175, 187. The Law Commission considered the report of the Law Reform Committee of Western Australia entitled "The Protection to be given to the Family and Dependants" of a deceased person. In this report the Committee recommended the protection of members of the deceased's household. Had the Law Commission adopted this approach the mistress would have been left unprotected. See Law Commission No. 61, Second Report on Family Property: Family Provision on Death (1976), para. 86.
83. H.L. Deb. Vol. 358, Col. 924. See also H.L. Deb. Vol. 358, Col. 932, *per* Lord Wilberforce.
84. [1979] 1 W.L.R. 1353.
85. *Cf.* Cadwallader, [1980] *Conv.* pp.46, 49; Green, [1988] 51 *M.L.R.* 187, at p.196. Both Cadwallader and Green use the term mistress to describe a cohabitant.

a wife but also a *de facto* wife and several mistresses who were largely unaware of each other's existence. Hollings J acknowledged the likelihood that the deceased did not want to distress his *de facto* wife by making express provision in his will for an undisclosed mistress and granted the mistress financial provision from her late lover's estate.[86] The deceased in *Malone* v. *Harrison* had actually foreseen the possibility of an application by his mistress under the Inheritance Act. He had sent her a press cutting from the *Sunday Times* which explained in detail the Inheritance Act which at the time was going through Parliament.

(a) Applications under section 1(1)(e) of the Inheritance Act

Section 1(1)(e) of the Inheritance Act permits a mistress, *inter alia*, to apply for provision from her deceased lover's estate if she has been maintained wholly or partly by him immediately prior to his death and if the disposition of his estate did not make reasonable provision for her.

(i) *A person maintained by the deceased*

Section 1(3) of the Inheritance Act provides that where an application is made under section 1(1)(e) of the Inheritance Act, a person will be treated as being maintained by the deceased if he ". . . otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person."

In *Malone* v. *Harrison*, Hollings J made merely fleeting reference to section 1(3) because the executors had conceded that the mistress applicant came within section 1(1)(e).[87] The mistress in *Malone* v. *Harrison* had undoubtedly been maintained by the deceased for some twelve years prior to his death. The maintenance had been lavish. The mistress had received furs and jewellery worth £5,500; expensive holidays abroad; all her living expenses; the lease of a hairdressing salon; a joint share in two flats and shares worth £15,000.

Section 1(3) of the Inheritance Act has normally been construed as a qualifying provision to section 1(1)(e).[88] In the absence of a concession by the deceased's executors, a mistress will be unable to satisfy section 1(3) if she has given full valuable consideration in return for her maintenance by the deceased. In *Re Beaumont*,[89] Megarry V-C maintained that an accounting exercise should be undertaken for the purpose of section 1(3). He suggested that whether the respective contributions made by the applicant and the deceased towards the reasonable needs of the other were made under a contract or not they should be balanced. If the deceased's contributions substantially outweighed those of the applicant, the latter should be permitted to make a claim against the deceased's

86. *Malone* v. *Harrison* [1979] 1 W.L.R. 1353, at p.1359.
87. *Ibid.*, at p.1360.
88. *In re Beaumont* [1980] Ch. 444, at p.451. See also Naresh (1980) *L.Q.R.* 534, at p.535; Cadwallader, (1981) 125 *Sol. Jo.* 175; Dewar, (1982) 12 *Fam. Law* 158.
89. [1980] Ch. 444, at p.451.

estate. If the applicant's contributions outweighed those of the deceased, the claim must fail.[90]

In *Jelley* v. *Iliffe*,[91] Stephenson LJ accepted that it was the Court's duty as a part of the accounting exercise to assess the financial value of such imponderables as companionship in addition to financial contributions. For this purpose he suggested that the Court should ask the question "was this man dependent on this woman during his lifetime . . . or did he give as good as he got?"[92]

In the context of applications by a mistress, it is uncertain what approach the courts will take in the accounting exercise necessitated by section 1(3). The very nature of the mistress relationship involves the provision of services by the woman for her lover rather than any financial contribution. These services will be particularly difficult to evaluate.

Where a mistress has received substantial benefits during the lifetime of the deceased, as in *Malone* v. *Harrison*, those benefits will without question outweigh any contribution however evaluated. Where a deceased has been less generous in his maintenance of his mistress, her claim may fail if her services to the deceased are deemed to represent full valuable consideration for her meagre maintenance. The anomaly exists that a mistress who has lavished loving care on a man who has rewarded her meanly will be less likely to succeed than an uncaring mistress who is well rewarded by the deceased. Megarry J's construction of section 1(3) of the Inheritance Act appears to reflect the biblical message that ". . . unto everyone that hath shall be given, and [she] shall have abundance: but from [her] that hath not shall be taken away . . ."

Section 1(3) of the Act refers to contributions by the deceased towards the applicant's maintenance "in money or money's worth". It has been suggested that contributions by an applicant in the form of companionship should only be taken into account insofar as they involve services which would normally be paid for.[94] In *Jelley* v. *Iliffe*,[95] Griffiths LJ suggested that in the circumstances of a man living with a woman as his wife, providing the house and all the money for their living expenses "she would clearly be dependent upon him, and it would not be right to deprive her of her claim by arguing that she was in fact performing the services that a housekeeper would perform and it would cost more to employ a housekeeper than was spent on her."[96] If courts are prepared to recognize that a mistress' relationship with the deceased was of a quasi-polygamous nature, her

90. *Ibid.*, at p.453.
91. [1981] 2 All E.R. 29.
92. *Ibid.*, at p.36. *Cf. Re C* (1979) 123 *Sol. Jo.* 35; *Re Wilkinson* [1978] Fam. 22.
93. Matthew 25:29 (King James Bible). The courts may, of course, redress the inequity inherent in this message in the exercise of their discretion under section 3 of the Inheritance Act.
94. See Bromley's *Family Law* 7th ed (1987), at p.740. See also Law Commission No. 61 Second Report, "Family Property: Family Provision on Death" (1974), para. 98 H.C. Standing Committee C. 1974–75 Session, Col. 12.
95. *Jelley* v. *Illiffe* [1981] 2 All E.R. 29.
96. *Ibid.*, at p.38. See also *Bishop* v. *Plumley* (*The Times*, July 11, 1990).

contributions to the deceased's welfare may be viewed as not dissimilar to those of a *de facto* wife.

Where, however, the relationship of the mistress and the deceased was primarily of a sexual nature, the courts might be faced with a dilemma. To refuse to evaluate the sexual contribution of the mistress would lead to a finding that her maintenance by the deceased was otherwise than for full valuable consideration. Such a finding would permit the mistress' application to be considered. If the courts evaluate the sexual contribution and find that the mistress had thereby given full valuable consideration, the mistress' application would fail, but the court's evaluation of sexual contribution would be tantamount to giving recognition to a contract for sexual services.[97]

(ii) *Reasonable financial provision*

Not only must a mistress show that she was being maintained by the deceased prior to his death, she must also prove that the disposition of the deceased's estate did not make reasonable financial provision for her. Section 1(2)(b) of the Inheritance Act defines reasonable financial provision for a mistress applicant claiming dependency on the deceased under section 1(1)(e) as "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for [her] maintenance." A mistress who has received generous provision from the deceased during his lifetime is not excluded from making an application. In *Malone* v. *Harrison* although the mistress applicant had been well recompensed during the deceased's lifetime she had received no benefit whatsoever from the disposition of the deceased's estate. Thus clearly she fulfilled the requirements of section 1(2)(b).

Where a mistress has received some provision from the disposition of the deceased's estate, the question arises whether that financial provision is such as ". . . would be reasonable in all the circumstances of the case" for her maintenance. The court is enjoined to answer this question by having regard to the matters outlined in section 3. This section will be considered below.[98]

(iii) *Immediately before the death of the deceased*

A mistress whose relationship ended prior to the death of her lover will receive no assistance from the Inheritance Act. Section 1(1)(e) limits applications to those for whom the deceased was actually financially responsible during his lifetime. A financial duty cannot be imposed on the deceased's estate for a mistress for whom the deceased had ceased to be financially responsible.[99]

In *Re Beaumont*, Megarry V-C considered the meaning of the phrase "immediately before the death of the deceased". He interpreted the phrase to mean not necessarily "the *de facto* state or balance of maintenance at that moment

97. See, *supra*, n. 30.
98. See *In re Callaghan* [1984] 3 W.L.R. 1076; Virdi, (1982) 12 *Fam. Law* 240.
99. See, *e.g.*, *Kourkgy* v. *Lusher* (1981) F.L.R. 65.

[of death], but something more substantial and enduring" such as the "settled basis or arrangement between the parties as regards maintenance."[1] His concern which led to this statutory reconstruction was twofold. *First*, he believed that an application under section 1(1)(e) should not fail because in the immediate period before death the applicant had cared for the deceased and thereby her contribution had temporarily exceeded that of the deceased. *Secondly*, Megarry V-C wished to prevent a person who was fortuitously being maintained at the moment of the deceased's death from making a successful claim when there had been no assumption of maintenance by the deceased at an earlier stage.[2] To these concerns expressed by Megarry V-C might be added a third. A deceased might, because of illness or incapacity, be incapable of maintaining his mistress immediately before his death. To deny her a right to apply under the Inheritance Act because of a break in maintenance at this stage would be to thwart the purpose of the Act.[3]

(b) **Matters to which the court is to have regard in its determination of reasonable financial provision**

The court is granted considerable discretion under section 3 of the Inheritance Act. This section provides that the court shall have regard to a number of interrelated matters to enable it to determine whether and how to satisfy a mistresses' claim for maintenance from the deceased's estate. The task of the court would appear to be remarkably similar to that of the Family Division in proceedings relating to family provision after divorce.[4]

In *Malone* v. *Harrison*, Hollings J awarded the mistress applicant a capital sum of £19,000. He explained that such an amount would provide for such maintenance "as is reasonable in all the circumstances for the plaintiff to receive."[5] The decision in *Malone* v. *Harrison* outlines the task of the court under section 3 of the Inheritance Act in its determination of an award of maintenance.

(i) *The financial resources and financial needs of the applicant*

Section 3(1)(a) of the Inheritance Act provides that the court must consider what financial resources are available to the applicant in relation to her needs. In *Malone* v. *Harrison*, the applicant's resources were not insubstantial. She had capital assets of some £34,000 which were readily realisable. These assets did not

1. *In re Beaumont* [1980] Ch. 444, at p.452. Because Megarry V-C did not address the question of whether a settled basis of maintenance was a necessary as well as a sufficient condition to satisfy the requirement of section 1(1)(e) it is arguable that the decision in *Re Beaumont* merely states that a settled basis of maintenance is a sufficient condition. Where there is no settled basis of maintenance the courts may have to look at the *de facto* state of maintenance. See Naresh, (1980) 96 *L.Q.R.* 535, at p.547. See also Law Commission No 61 Second Report on Family Property: Family Provision on Death (1974), para. 93.
2. See *Jelley* v. *Iliffe* [1981] 2 All E.R. 29, at p.34 *et seq.*
3. *Ibid.*
4. See Matrimonial Causes Act 1973, s.25 as amended by the Matrimonial and Family Proceedings Act 1984.
5. *Malone* v. *Harrison* [1979] 1 W.L.R. 1353, at p.1365. See also Bennet, (1980) 130 *N.L.J.* 565.

include furs and jewellery. The Court, with the concession of the executors, was not prepared to consider these latter gifts as part of the financial resources available to the applicant.[6]

Hollings J accepted that the applicant's earning capacity was not good but nonetheless took the approach that some form of employment was within her capabilities. Such employment could be expected to make a fifty *per cent* contribution to her needs. The approach of the Court was more than generous in the context of a fit thirty eight year old female albeit one who was work-inexperienced. Her earning capacity, according to the Court, had been significantly weakened by her lover's negative attitudes towards her attempts to obtain work during his lifetime. The deceased had preferred her to be available for his needs.[7] The applicant's lack of earning ability was a direct consequence of her relationship with the deceased.

(ii) *Resources and needs of other applicants and beneficiaries : obligations and responsibilities of the deceased*

The mistress was the only applicant for financial provision from the deceased's estate in *Malone* v. *Harrison*. Therefore, section 3(1)(b) of the Inheritance Act was irrelevant. However, other mistresses might find themselves in competition with another applicant such as *de facto* or *de jure* wives whose resources and needs would have to be considered under this section.

In *Malone* v. *Harrison*, Hollings J attached considerable importance to section 3(1)(c) of the Inheritance Act which relates to the financial needs and resources of the beneficiaries. The beneficiaries here were primarily *de facto* or *de jure* members of the deceased's family.[8] They included both a wife and a *de facto* wife. In balancing out the resources and needs of the beneficiaries, Hollings J appeared to rank the beneficiaries in accordance with what he viewed as the deceased's responsibilities and obligations towards them in accordance with section 3(1)(d). Hollings J implicitly took the approach that there was a lesser obligation on the deceased to provide for his brother who already had a substantial income than to make provision for other members of his family. He thus concluded that any order for the mistress applicant should be deducted from the deceased's bequest to his brother.

Where an applicant or beneficiary has a physical or mental disability, the court must take this into account in determining any award.[9]

(iii) *The size and nature of the deceased's estate*

Section 3(1)(e) of the Inheritance Act provides that the court must take into account the size and nature of the deceased's estate. Where an estate is of

6. *Malone* v. *Harrison*, *supra* n. 5, at p. 1358.
7. *Ibid.*, at p.1356 *et seq.*
8. *Ibid.*, at p.1362.
9. See section 3(1)(f), Inheritance (Provision for Family and Dependants) Act 1975.

substantial size, there will be little problem in making an order for the mistress' reasonable maintenance. Any order made in these circumstances will however relate to the level of maintenance received by the mistress during the deceased's lifetime rather than to the size of the estate. Where an estate is small, the court may be forced to scale down any award it would otherwise make.

In *Malone* v. *Harrison*, Hollings J acknowledged that the size of the deceased's estate was significant only to the extent that there were sufficient resources to make the award which he thought to be appropriate.[10]

(iv) *Any other matter*

The court is granted a general discretion under section 3(1)(g) of the Inheritance Act to take into account "any other matter including the conduct of the applicant" or any other person in deciding any application. In *Malone* v. *Harrison*, Hollings J maintained that the deceased's conduct was an important factor in his decision. He found that the deceased had monopolized the applicant for twelve years of her life. The deceased had ". . . discouraged her from seeking gainful employment. He taught her to rely upon him for all her financial needs . . ."[11] This did not mean according to Hollings J. ". . . that the deceased through his estate should be punished, but as he was generous to her in her lifetime, so within the limits set by the statute should the court be in deciding what if any order to make."[12]

(v) *The deceased's assumption of responsibility*

In accordance with section 3(4) of the Inheritance Act, the court, in its determination of any entitlement for a mistress applicant, must have regard to the "extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant and to the length of time for which the deceased discharged that responsibility."

In *Malone* v. *Harrison*, Hollings J stressed that section 3(4) ought to play a major part in his decision. He did not however address the question of what constitutes an assumption of responsibility for maintenance. Hollings J merely had regard to the characteristics of the assumption of responsibility by the deceased for the applicant's maintenance. In his view, the deceased had assumed full responsibility for the applicant's maintenance during his lifetime for some twelve years . . . on the basis that he would not leave her unprovided for in case of his death.[13] Furthermore, the deceased had demonstrated unequivocally his desire that the applicant should be dependent on him. He did not want her to work. He wished

10. *Malone* v. *Harrison* [1979] 1 W.L.R. 1353, at p.1364.
11. *Ibid.*
12. *Ibid.*
13. *Ibid.* See *Borthwick* v. *Borthwick* [1949] 1 Ch., at p.401 where Harman J, in the context of an application by a wife, thought that the conduct of the applicant towards the testator could not make the difference between "whether you leave her starving in the gutter or not." Conduct could only be taken into account in that "an extravagant or erring wife may be given less than one against whom nothing can be said."

her to be available for him so that he could ". . . drop in at her flat in the late afternoon after work to relax and talk to her about his work and other matters, and he liked also to telephone her during the daytime, sometimes three or four times a day.[14]

The question of what constitutes an assumption of responsibility for maintenance arose in *Re Beaumont*. Megarry V-C took the approach that an applicant had to prove that the deceased had actually assumed responsibility for her maintenance. The mere fact of maintenance was insufficient. According to Megarry V-C, without proof of an assumption of responsibility for maintenance, the court could not have regard to the nature of the assumption of responsibility as enjoined to do under section 3(4) of the Inheritance Act. In his view, any application without proof of assumption of responsibility for maintenance would have to be struck out by the court.[15]

This restricted view of section 3(4) of the Act would have left many mistress applicants under the Inheritance Act without a remedy if they were unable to point to any act, other than the fact of maintenance itself, which would provide the necessary proof of an assumption of responsibility for their maintenance by their lover. However, in *Jelley* v. *Iliffe*,[16] the Court of Appeal rejected the approach of Megarry V-C in *Re Beaumont*. Stephenson LJ asked ". . . how better or more clearly can one take or discharge responsibility for maintenance than by actually maintaining . . . If B is A's mistress and he maintains her by providing her with accommodation or money or both, has he not assumed or taken on responsibility for her maintenance?"[17] Stephenson LJ accepted that an assumption of responsibility based on the fact of maintenance alone would be presumed but it would be rebuttable by a disclaimer on the part of the deceased. Stephenson LJ was influenced in his view by the object of the Inheritance Act which was to remedy "the injustice of one, who has been put by a deceased person in a position of dependency. . . ." Such a person was not to be "disentitled from applying for provision if he can prove that the deceased by his conduct made him dependent on the deceased for maintenance, whether intentionally or not."[18]

IV Conclusion

The Inheritance (Provision for Family and Dependants) Act 1975 was courageous and creative legislation. Parliament explicitly recognised the injustice resulting to a mistress when a testator, who has encouraged her dependency for maintenance on him, makes no provision for the continuance of that maintenance after his death. A mistress whose relationship ends with her lover's death need not resort to stretching the vagaries of contract law and equitable principles in the faint

14. *Malone* v. *Harrison* [1979] 1 W.L.R. 1353, at p.1356.
15. *In re Beaumont* [1970] Ch. 444, at p.445.
16. *Jelley* v. *Iliffe* [1981] 2 All E.R. 29.
17. *Ibid.*, at p.35 *et seq.*
18. *Ibid.*, at p.36.

hope that she will obtain redress. Nor does she have to resort to straining statutory definitions to bring herself within the ambit of statutes designed to protect cohabiting relationships. The discretionary nature of the Inheritance Act enables the court to determine a mistress' claim in a manner which will do the least injustice to beneficiaries, intestate successors and any other applicants under the Act.

The Inheritance Act has not, however, been warmly welcomed by everyone.[19] Critics of the mistress relationship have made a number of accusations against the Act. The Act is said to threaten not only freedom of testation and the institution of marriage but also to prolong the harm done to a woman by the fact of induced dependency during the lifetime of the testator.[20] To these accusations may be made three responses. *First*, there seems little reason to grant freedom of testation to one who has restricted the freedom of another by encouraging her to subjugate her way of life to his. *Secondly*, it is not the Act which threatens the institution of marriage but the testator's conduct in engaging in a mistress relationship during his lifetime. *Thirdly*, although induced dependency may be viewed as harmful to women, that harm will not be removed by imposing a different form of harm – homelessness and penury – which would result from the denial of a remedy to an already dependent mistress. If the mistress relationship is deplored by society any sanction which purports to eradicate the relationship must operate equally against both participants in the relationship and not merely against the female. Any repeal of section 1(1)(e) of the Inheritance Act which would prevent applications by mistresses for maintenance would be to indulge in an exercise in sexism. That cannot be the object of good law.

Whether Parliament should now turn its attention to the predicament of a mistress whose relationship ends not by the death of her lover but by abandonment remains a contentious issue.[21] If a dependent mistress is to be permitted to apply for maintenance where the relationship is ended by the death of her lover there seems to be every reason to enact legislation which would equally permit her to make a claim on the breakdown of her relationship with her lover. Justice which takes effect only on death is most unsatisfactory. If domestic violence is to be regarded as a problem for those who cohabit, albeit temporarily, in a *de facto* matrimonial relationship, there is no reason to disregard the plight of the mistress who faces domestic violence. Any proposed statute relating to support could use the Inheritance Act as its prototype. Dependency of the mistress during the relationship could be the key factor for the purposes of determining financial provision.[22] The existing Domestic Violence legislation requires very little amendment to grant protection from molestation for a man and woman who have

19. See, *e.g.*, Green, (1985) 51 *M.L.R.* 187.
20. *Ibid.*, at p.207.
21. See, *e.g.*, Freeman and Lyon, *Cohabitation Without Marriage* (1983), at p.183 *et seq.*
22. See Blake, (1982) 12 *Fam. Law* 95; Eekelaar, (1975) 38 *M.L.R.* 241; Harpum, [1982] *Oxf.Jo.L.S.* 277.

engaged in a relationship of some permanence with each other. Unless such protective legislation is enacted a mistress must continue to hope that, if her relationship with her lover comes to an end, he should die rather than abandon her.