

BURGES SALMON

Local Government Association: Definition of "Cohabiting Partner"

Note: This paper has been prepared solely for the Local Government Association, and we do not accept liability to any other person or body in respect of it, unless we have expressly agreed otherwise in writing.

1 BACKGROUND

- 1.1 We have been instructed by the Local Government Association (the “**LGA**”) to advise on the approach for administering authorities (“**AAs**”) to take when applying the definition of “Cohabiting Partner” (“**CP**”) to assess eligibility for certain benefits under the Local Government Pension Scheme (the “**LGPS**”).
- 1.2 In particular, we will advise on assessing eligibility for a CP pension where the member (“**M**”) or partner (“**P**”) has lived in a care home or hospital for an extended period during the two years before the member’s death (a “**care home / hospital case**”).

2 INTRODUCTORY COMMENTS

Position under the E&W 2013 Regs

- 2.1 Within regulation 2 of schedule 1 of the Local Government Pension Scheme Regulations 2013 (the “**E&W 2013 Regs**”), the term CP is defined as follows (our emphasis added):

“...a person whom the [AA] is satisfied fulfils the following conditions—

- (a) the person (P) has fulfilled the condition in paragraph (b) for a continuous period of at least 2 years on the date the member (M) died, and*
- (b) the condition is that—*
 - (i) M is able to marry, or form a civil partnership with P (the “**ability to marry requirement**”),*
 - (ii) M and P are living together as if they were married or as if they were civil partners (the “**E&W LTMC requirement**”),*
 - (iii) neither M nor P is living with a third person as if they were married or as if they were civil partners (the “**not living with a TP as if they are married requirement**”), and*
 - (iv) either P is financially dependent on M, or M and P are financially interdependent (the “**financial dependence requirement**”);”*

- 2.2 We note that in the event of a care home / hospital case, there is an argument that the definition of CP is not met because of:

- (a) The E&W LTMC requirement, and
- (b) The financial dependence requirement (this may be particularly difficult to ascertain as being present where M is the one in the care home).

Position under the Scottish 2018 Regs

- 2.3 Within regulation 2(4) of schedule 1 of the Local Government Pension Scheme (Scotland) Regulations 2018 (the “**Scottish 2018 Regs**”), the term CP is defined as follows (our emphasis added):

“means a person whom the [AA] is satisfied fulfils the following conditions—

- (a) the person (P) has fulfilled the condition in paragraph (b)(i), and the conditions in (b)(ii) to (iv) for a continuous period of at least 2 years on the date the member (M) died; and*
- (b) the condition is that—*
 - (i) M is able to marry or form a civil partnership with P;*

- (ii) *M and P are living together as if they were a married couple or as if they were civil partners (the “**Scottish LTMC requirement**”);*
- (iii) *neither M nor P is living with a third person as if they were a married couple or as if they were civil partners; and*
- (iv) *either P is financially dependent on M, or M and P are financially interdependent”*

2.4 The provisions are therefore materially the same as within the E&W 2013 Regs, albeit with two differences as follows:

- (a) The introductory paragraph is framed slightly differently, with the Scottish version, in our view, providing that the ability to marry requirement is assessed at the date of the member's death (rather than with reference to the two years before), with the remaining requirements being assessed with reference to the two years before (as is the case with the English & Welsh version); and,
- (b) The Scottish version refers, within conditions (ii) and (iii), to “*as if they were a married couple*” rather than simply being “*married*”.

2.5 Again, in the event of a care home / hospital case, there is an argument that the definition of a CP is not met because of the Scottish LTMC requirement and the financial dependence requirement.

2.6 When referring to the E&W 2013 Regs and the Scottish 2018 Regs together, we will refer to these as the “**Two LGPS Regs**”. Similarly, we refer to the E&W LTMC requirement and the Scottish LTMC requirement collectively as the “**LTMC requirement**”. And finally, when referring to all of the requirements set out for a “*cohabiting partner*” within the Two LGPS Regs, we will refer to these as the “**CP requirements**”.

3 THE SCHEDULES TO THIS PAPER

3.1 For an executive summary on this topic, please refer to **Schedule 1** below.

3.2 In terms of all the schedules, these are summarised below:

No.	Schedule Title	Schedule Summary
Schedule 1	Executive Summary	Sets out a summary of our advice on the most complex aspects of deciding whether a partner qualifies as a “ <i>cohabiting partner</i> ” in the context of a care home / hospital case. <i>Look at this if... You want a high-level overview of our advice in this area.</i>
Schedule 2	Step-by-step guide	Sets out a high-level summary of steps for AAs in order to decide whether a partner qualifies as a “ <i>cohabiting partner</i> ” in the context of a care home / hospital case. <i>Look at this if... You want guidance on steps to consider taking and key principles to note when taking these steps.</i>
Schedule 3	Ability to marry requirement	Sets out our advice regarding applying the ability to marry requirement, in particular in the context of a care home / hospital case. <i>Look at this if... You are not sure whether the ability to marry requirement is complied with in the case you are dealing with.</i>
Schedule 4	LTMC requirement	Sets out our advice regarding applying the LTMC requirement, in particular in the context of a care home / hospital case. We have provided significant guidance on this area given the complexity of it in this context. <i>Look at this if... You are not sure whether the LTMC requirement is complied with in the case you are dealing with.</i>

Schedule 5	Not living with a TP as if they are married requirement	Sets out our advice regarding applying the not living with a TP as if they are married requirement, in particular in the context of a care home / hospital case. We note that this is not an area we consider to be particularly impacted in the care home / hospital context, and so we do not advise in detail on this in this paper. <i>Look at this if... You need a reminder of the wording of the not living with a TP as if they are married requirement.</i>
Schedule 6	Financial dependence requirement	Sets out our advice regarding applying the financial dependence requirement, in particular in the context of a care home / hospital case. We note that this is not an area we consider to be particularly impacted in the care home / hospital context, and so we do not advise in detail on this in this paper. <i>Look at this if... You need a reminder of the wording of the financial dependence requirement and the extent to which the care home / hospital context impacts the process.</i>
Schedule 7	Other legal considerations	We note that some AAs may feel that it is an unfair outcome to determine that a partner does not qualify as a “<i>cohabiting partner</i>” on the sole basis of the member or partner having been in a care home / hospital. This schedule sets out our advice on the risks of treating the partner as a “<i>cohabiting partner</i>” in cases where it is not clear cut whether they should qualify as such or not. <i>Look at this if... You are considering treating the partner as a “cohabiting partner” in a case where it is not clear cut whether they should qualify as such or not, and wish to understand the risks of doing so.</i>
Schedule 8	Procedural considerations	Sets out our advice with regard to limiting the risk of a decision being procedurally unreasonable. <i>Look at this if... You require guidance on ensuring that the decision taken is procedurally reasonable.</i>
Schedule 9	Further information regarding analogous law for the LTMC requirement	Sets out further information on case law (including TPO decisions) relating to the LTMC requirement. This is for ‘further reading’ purposes only. <i>Look at this if... You are dealing with a particularly tricky care home / hospital case in terms of deciding whether the LTMC requirement is complied with.</i>

Schedule 1

Executive Summary

1 INTRODUCTION

- 1.1 Under regulation 2 of schedule 1 of the Local Government Pension Scheme Regulations 2013 and regulation 2(4) of schedule 1 of the Local Government Pension Scheme (Scotland) Regulations 2018, in order to qualify as a *“cohabiting partner”*, a person must meet four requirements. Please refer to page 1 of this paper for a summary of these requirements (together, the **“CP requirements”**).
- 1.2 We have been asked to advise on applying the CP requirements where the member or partner lived in a care home or hospital for an extended period during the two years before the member's death, including cases where the member or partner died in the care home, hospital, or at home (a **“care home / hospital case”**).
- 1.3 Broadly speaking, we consider that the not living with a TP as if they are married requirement and the financial dependence requirement can be applied using the AA's general process and principles to determine whether those requirements are complied with in a care home / hospital case. Please see below for further comment on the LTMC requirement (which, broadly, we consider to be more complex in the care home / hospital case context).
- 1.4 Please note that we are not aware of any binding case law on the CP requirements, in particular in the context of a care home / hospital case (or anything analogous to such a case). There is therefore risk incurred where dealing with such cases given the unsettled nature of this area of law.

2 ABILITY TO MARRY REQUIREMENT

- 2.1 As set out above, in our view, the Scottish 2018 Regs do not require for the ability to marry requirement to have been met for two continuous years at the date of the member's death (and instead provide that this requirement should be assessed at the date of the member's death).

3 LTMC REQUIREMENT

General principles on the LTMC requirement

- 3.1 We recommend applying the following “signposts” in order to determine whether the member and partner were *“living together as if they were [married / a married couple]”* for the two continuous years before the member's death. These were established in the *Kimber v Kimber* [2000] 1 FLR 383 case:
- (a) Living together in the same household — whether the parties share a home
 - (b) A sexual relationship — the existence of an intimate relationship (though its absence is not determinative)
 - (c) Stability and permanence — the duration and settled nature of the relationship
 - (d) Financial arrangements — the degree to which parties share finances, pool resources, or maintain joint accounts
 - (e) Children — whether the couple have or care for children together
 - (f) Public acknowledgement — whether the couple hold themselves out publicly as a couple
 - (g) Domestic arrangements — the sharing of domestic tasks and responsibilities.
- 3.2 The court emphasised that no single factor is decisive and that the question is one of overall assessment. It could therefore be that a couple are “living together as if they were a married couple” even if they have not been complying with (a) (living together in the same household) for an extended period of time (assuming that (b) - (g) above, when considered on the whole, point towards the couple “living together as a married couple”).
- 3.3 For further information regarding how the “living together in the same household” test should be applied, please see immediately below. We suggest this is referred to if the seven *Kimber v Kimber* signposts do not definitively confirm whether the LTMC requirement is met either way.

Specific principles on how absence may impact the LTMC requirement

- 3.4 There is useful statutory guidance regarding the interpretation of legislation¹ that uses materially the same wording as the LTMC requirement.
- 3.5 With reference to this guidance, we recommend applying the following factors with reference to the circumstances immediately before the member's death and for the two years before it. Namely:
- (a) The length of the absence,
 - (b) The expected further length of the absence,
 - (c) Whether the couple had maintained contact, and
 - (d) The couple's future intentions.
- 3.6 Further, this guidance suggests taking the following approach regarding factors (a) and (b) above:
- (a) If the total of (a) and (b) is six months or less, then generally, this factor should not be fatal to the LTMC requirement;
 - (b) If the total of (a) and (b) is more than six months but not more than twelve months, then the AA should consider (c) and (d) as being the key factors as to whether the LTMC requirement is complied with;
 - (c) If the total of (a) and (b) is more than twelve months but not more than twenty-four months, then the AA should require (c) and (d) to be very strongly in favour of the couple "living together as a married couple" in order to proceed on the basis that the LTMC requirement is complied with; and
 - (d) If the total of (a) and (b) is more than twenty-four months, then the AA should generally consider the LTMC requirement not to be complied with, unless (c) and (d) are exceptionally strong.

4 OTHER LEGAL CONSIDERATIONS

- 4.1 In applying the requirements to be a "cohabiting partner" within the Two LGPS Regs, AAs may find that they are rejecting claims that, morally, they feel should be accepted. We note that:
- (a) Rejecting the claim would carry with it the lowest risk profile in terms of legal invalidity.
 - (b) That being said, in what feels to be a case that is not clear cut in terms of whether the partner is a "cohabiting partner" or not, AAs may wish to provide the partner with what they consider to be the more morally acceptable outcome (i.e. providing the benefits).
- 4.2 In our view, the use of the term "*satisfied*" within the Two LGPS Regs² implies that the AA is the arbiter of the CP requirements and provides AAs with an element of flexibility, particularly in cases that are not clear cut. Further, the courts have typically taken a practical approach to interpreting "living together" and similar requirements (e.g. in *Nugent-Head v Jacob* [1948] AC 321, the couple were deemed to meet the requirement of "living together" despite being apart for three years whilst the husband was away on military service). AAs may take some comfort from this apparent flexibility when considering determining a "borderline case" in the favour of the partner.
- 4.3 If wishing to treat the partner as a "*cohabiting partner*" where it is not clear cut as to whether the CP requirements are met or not, we note that the main legal risks are:
- (a) breaching fiduciary duty (by having failed to administer the fund in accordance with governing regulations and coming to a decision that could be deemed to be "perverse"),
 - (b) making an unauthorised payment and incurring the tax penalties as a result, and

¹ Namely - The State Pension Credit Regulations 2002; the Welfare Reform Act 2012; Family Law Act 1996; Social Security Contributions and Benefits Act 1992; and the Tax Credits Act 2002

² In relation to the four CP requirements, the Two LGPS Regs require that the AA is "*satisfied [the person] fulfils*" the requirements.

- (c) legal challenge, e.g. to the Pensions Ombudsman (although the likelihood of this in practice may be deemed to be low unless another competing beneficiary is known of).

- 4.4 Practically, too, we note that AAs may wish to treat the partner as a “cohabiting partner” particularly when the benefit payable is relatively low and/or there is a risk of an IDRP from the partner. By accepting the partner as a “*cohabiting partner*”, the fund would avoid the time and fees incurred in dealing with an IDRP and potentially a Pensions Ombudsman case. That being said, and whilst the AA is under a duty to administer the fund in a proportionate manner, we do not consider that this would (in the event that the decision was a breach of the regulations) validate the decision from a legal perspective.
- 4.5 Finally, where it is clear that the CP requirements are not met, the claim should be rejected in order to avoid a breach of the regulations, a breach of fiduciary duty, and acting ultra vires.

5 PROCEDURAL CONSIDERATIONS

- 5.1 Broadly speaking, one legal risk for AAs when considering whether someone meets the definition of “*cohabiting partner*”, particularly in the event of a care home / hospital case, is how the decision is made. Namely, as per the legal case *Edge v Pensions Ombudsman*, it was confirmed that trustees (and, similarly, AAs) must:
 - (a) Direct themselves correctly in law,
 - (b) Take into account all relevant but no irrelevant factors,
 - (c) Ask themselves the correct questions, and
 - (d) Reach a decision which was not perverse.
- 5.2 AAs should therefore also ensure that any decision regarding whether a partner qualifies as a “*cohabiting partner*” is also “procedurally reasonable” – particularly given the legal complexity in determining whether the LTMC requirement and the financial dependence requirement are met in such cases. We therefore recommend that AAs follow a consistent process when dealing with such cases and keep a paper trail (recording the rationale for the decisions taken throughout).

6 STEP-BY-STEP GUIDE

- 6.1 We have provided a step-by-step guide to dealing with a care home / hospital case to assist with mitigating the risk of a decision being either substantively or procedurally unreasonable – please see **Schedule 2** below.

Schedule 2

Step-By-Step Guide to Dealing with a Care Home/Hospital Case

Note: The below should not be used simply as a flow diagram. In particular, if you think that one or more of the conditions are clearly not met, then we suggest starting from that section for efficiency reasons (i.e. you do not need to start from the first step below).

No.	Question to ask	Comment	Impact of the response
1	Preliminary steps		
1.1	Was either M or P in a care home or hospital during the two years before the date of M's death?	Generally, this will be self-explanatory. If there is any doubt, then we suggest you refer to guidance. In particular, if there is doubt whether they were in a: • "care home" – see Pension Credit guidance³. • "hospital" – see separate Pension Credit guidance⁴.	If yes, refer to the rest of this guide to determine whether P should be treated as a "cohabiting partner". If no, apply usual process.
2	Ability to marry requirement <i>Note in relation to Scottish AAs: As set out above (in particular at paragraph 2.1 of Schedule 1), in our view, the Scottish 2018 Regs do not require the ability to marry requirement to have been met for two continuous years at the date of the member's death (and instead provide that this requirement should be assessed at the date of the member's death). The remainder of this section of the guide should be read accordingly by Scottish AAs.</i>		
2.1	Were both M and P unmarried and not in a civil partnership with anyone else for two continuous years before M's death?	We have not advised on this aspect in any detail because it is not a particularly complex requirement in the context of a care home / hospital case. We have noted this here for completeness.	If yes, then continue with remainder of process. If no, then the legal position would be that P should not be treated as a "cohabiting partner" (see the PO-23576 case⁵).
2.2	Were M and P both able to marry for two continuous years before M's death (i.e. not prevented for any other reason, e.g. due to age or their family relationship)?	We have not considered in detail reasons why this requirement may not be met, as we have focused on the context of a care home / hospital case.	If yes, then continue with remainder of process. If no, then the legal position would be that P should not be treated as a "cohabiting partner".
3	LTMC requirement		
3.1	Were M and P like a married couple / civil partners for two continuous years before M's death?	We recommend applying the seven "signposts" from the Kimber v Kimber case. These are:	If you consider that, plainly, the absence from the household was not sufficient to undermine the test being met (e.g. because the remaining "signposts" are so strongly present), then skip to section 4 of this table.

³ Accessible [here](#). In particular, see section titled "What we mean by care home". (NB that this guidance is relevant here because the legislation to which it relates uses materially the same wording as the LTMC requirement wording)

⁴ Accessible [here](#). In particular, see section titled "Hospital or similar institution". (NB that this guidance is relevant here because the legislation to which it relates uses materially the same wording as the LTMC requirement wording)

⁵ Accessible [here](#). Or refer to **paragraph 2.5 of Schedule 7** for a summary.

		- Living together in the same household: whether the parties share a home - A sexual relationship: the existence of an intimate relationship (though its absence is not determinative) - Stability and permanence: the duration and settled nature of the relationship - Financial arrangements: the degree to which parties share finances, pool resources, or maintain joint accounts - Children: whether the couple have or care for children together - Public acknowledgement: whether the couple hold themselves out publicly as a couple - Domestic arrangements: the sharing of domestic tasks and responsibilities. The court emphasised that no single factor is decisive and that the question is one of overall assessment. It could therefore be that a couple are “living together as if they were a married couple” even if they have not been complying with the first “signpost” (living together in the same household) for an extended period of time (assuming that the rest of the principles, when considered on the whole, point towards the couple “living together as a married couple”).	If you think the absence from the household may undermine the test overall, then continue with the remainder of the process below (which provides further guidance on how absence may impact the LTMC requirement). If you think the signposts are not adequately present, then the legal position would be that P should not be treated as a “cohabiting partner”.
3.2	Was M or P in the care home as a “trial period” and there for less than 52 weeks (or more than 52 weeks but only in exceptional circumstances)?	If M or P went to the “care home” as a trial period, then we suggest considering applying the “trial period” test from the State Pension Credit regime. This has the following requirements: - They intend to return to live in their original home (which must be unqualified, present at the start of the period of absence, and not be conditional); - Their home has not been let or sub-let to another person; - They are receiving care in a care home; and - The absence is unlikely to exceed 52 weeks (or, in exceptional circumstances, to substantially exceed 52 weeks).	If yes, then skip to section 4 of this table. If no, then continue with the remainder of process. In a borderline case, you may wish to refer to section 6 of this table.
3.3	Were M and P “living together” for two continuous years before M’s death? ⁶	Please see Schedule 4 for further information on this area (and Schedule 9 also for further reading). Broadly, we	If yes, then continue with remainder of process.

⁶ NB that we have separated the “living together” and “as a married couple” aspects of the LTMC requirement for ease of reference in this step-by-step guide. However, AAs should note that the LTMC requirement combines them both. Broadly speaking, though, we consider that the “living

		recommend applying the four factors from the Tax Credits regime. Namely: - The length of the absence, - The expected further length of the absence, - Whether the couple have maintained contact, and - The couple's future intentions. Regarding the impact of the length and expected further length of absence factors, please refer to the following footnote⁷.	If no, then the legal position would be that P should not be treated as a "cohabiting partner". In a borderline case, you may wish to refer to section 6 of this table.
4	Not living with a TP as if they are married requirement		
4.1	Were neither M or P living with a third person as if they were married or as if they were civil partners for two continuous years before M's death?	We have not advised on this aspect in any detail because it is not a particularly complex requirement in the context of a care home / hospital case. We have noted this here for completeness.	If yes, then continue with remainder of process. If no, then the legal position would be that P should not be treated as a "cohabiting partner". In a borderline case, you may wish to refer to section 6 of this table.
5	Financial dependence requirement		
5.1	Was it the case either that P was financially dependent on M, or M and P were financially interdependent for two continuous years before M's death?	We have not advised on this aspect in any detail because it is not a particularly complex requirement in the context of a care home / hospital case. We have noted this here for completeness. Broadly, we expect that if P passes the CP requirements to this point, then the ordinary financial dependence/ interdependence tests can be applied (as the care home/hospital admission is unlikely to materially impact the tests).	If yes, then skip to section 7 of this table. If no because of M or P being in a care home / hospital (but their "ordinary" position was dependence/ interdependence), or if it is a borderline case, then you may wish to refer to section 6 of this table. If no because of the couple's "ordinary" position, then the legal position would be that P should not be treated as a "cohabiting partner".
6	Other legal considerations		
6.1	Note: <i>If, having applied one of the steps above, you have been directed to this section because you are dealing with a case where it is not clear cut whether the partner meets the CP requirements or not (i.e. a "borderline case"),</i>		

together" part of it is most contentious when dealing with a care home / hospital case – and think that it makes some sense to consider them separately here.

⁷ We suggest that (with reference to the State Pension Credit and Universal Credit regimes):

- If the total length of absence and further expected length of absence is six months or less, then generally, the absence length should not be fatal to the LTMC requirement;
- If the total length of absence and further expected length of absence is more than six months but not more than twelve months, then the AA should consider factors 3 and 4 in the row as being the determinative factors as to whether the LTMC requirement is complied with;
- If the total length of absence and further expected length of absence is more than twelve months but not more than twenty-four months, then the AA should require factors 3 and 4 in the row to be very strongly in favour of the couple "living together as a married couple" in order to proceed on the basis that the LTMC requirement is complied with;
- If the total length of absence and further expected length of absence is more than twenty-four months, then the AA should generally consider the LTMC requirement not to be complied with, unless factors 3 and 4 are exceptionally strong.

Please note that this is an untested area of law and the above should be treated as guidelines only.

then you may wish to refer to section 4 of Schedule 1 above (for a summary) or Schedule 7 (for further information). These areas of the paper describe the risks incurred in treating P as a “cohabiting partner” even where it is not clear cut as to whether the CP requirements are all complied with or not.			
We have provided some questions below that may be worth asking oneself if considering taking this approach (in particular, the question at row 6.2 below which is a key one here, in our view).			
6.2	Is it a “borderline case” (i.e. a case where it is not clear cut as to whether the CP requirements are met or not)?	In our view, AAs have at least some flexibility in applying the CP requirements (for the reasons set out in this paper). Although this should be done having considered all the circumstances and the risks (also as set out in this paper).	If yes , then continue with remainder of process (which relates to the practical risk profile of the decision and so may assist with deciding how to resolve a “borderline case”). If no , then the legal position would be that P should not be treated as a “cohabiting partner”.
6.3	What are the benefits payable if P is deemed to be a “cohabiting partner”?	If the benefits are relatively low, then (notwithstanding that you should administer the fund in accordance with regulation) you may consider that: - there is a lower risk in paying said benefits (e.g. lower tax penalties if declared an unauthorised payment); and, - it would be pragmatic to provide the benefits in order to avoid incurring disproportionate time and expenses on dealing with a complaint.	
6.4	Is P likely to submit an IDRP?	If you consider that P is likely to submit an IDRP, then (notwithstanding that you should administer the fund in accordance with regulation) you may consider that it would be pragmatic to provide the benefits in order to avoid incurring disproportionate time and expenses on dealing with a complaint.	
6.5	Is the “scheme employer” supportive of the payment?	If so, then (notwithstanding that you should administer the fund in accordance with regulation) you may consider this to reduce the risk profile. We would recommend obtaining confirmation in writing of the scheme employer’s support of this approach, where possible.	
6.6	Note: If you decide to take a risk-based decision in respect of one of the CP requirements, then return to the next section of this step-by-step guide that you had originally been directed to this section 6 from.		
7	Procedural considerations		
7.1	Note: <i>As per the legal case Edge v Pensions Ombudsman⁸, it was confirmed that trustees (and, similarly, AAs) must:</i> <i>a) Direct themselves correctly in law,</i> <i>b) Take into account all relevant but no irrelevant factors,</i> <i>c) Ask themselves the correct questions, and</i> <i>d) Reach a decision which was not perverse.</i> <i>Given that (a) to (c) relate to procedural aspects of the decision, we suggest a paper trail is kept by AAs when deciding whether someone meets the CP requirements.</i> <i>(d) relates to the substance of the decision. Sections 2-6 of this table relate to the substance of the decision – please refer to them for further information.</i>		
7.2	Decided that P does satisfy the CP requirements and is	We suggest a paper trail is maintained, covering (a) to (c) above.	

⁸ [1999] EWCA Civ 2013

	therefore a “ <i>cohabiting partner</i> ” (and there was no need to refer to section 6 of this table)	
7.3	Decided to treat P as a “ <i>cohabiting partner</i> ” in a “borderline case”, with reference to section 6 of this table.	We suggest that an even more in-depth paper trail is maintained – covering (a) to (c) above and, in particular, acknowledging that it was a “borderline case” and the rationale for, ultimately, accepting the claim. If possible, it would also be advisable to have in place support from the “scheme employer” as to the approach taken.
7.4	Decided not to treat P as a “ <i>cohabiting partner</i> ”.	There is a risk of challenge from P. We therefore suggest that a paper trail is maintained, in particular on (a) to (c) above. Again, if it was a “borderline case”, we suggest further detail on (a) to (c) is captured, along with acknowledging that it was a “borderline case” and the rationale for, ultimately, rejecting the claim – which can then be referred to in the event of an IDRPs being received.
8	Worked Examples <i>Note: We have included these examples (which were provided by the LGA) for illustrative purposes only. AAs should treat each case on its own merits and with reference to all of the circumstances. We acknowledge that in some cases, there will be arguments that P should and should not be treated as a CP. In those cases, it will be for the AAs to take a judgment call based on all of the circumstances and their risk appetite.</i>	
8.1	<u>Facts of the case</u> M and P lived together for 18 years. M entered a care home three years before M’s death because M required continuous nursing care. During that period: • P remained in the former shared home; • M and P continued to regard themselves as a couple; • P visited M several times each week; • M’s pension was used mainly to meet the care fees; • M and P continued to own the former shared home jointly; • M’s savings paid for buildings insurance and major repairs; and • P paid the mortgage, council tax, utilities and routine maintenance costs. <u>Our view</u> In our view, it would be reasonable for the AA to determine that P meets the CP requirements. In fact, we consider this to be a relatively uncontentious case. To run through the CP requirements: • <i>Ability to marry</i> – There is no suggestion that M or P were unable to marry. • <i>LTMC</i> – We consider that the seven Kimber v Kimber “signposts” point to this requirement being met (see row 3.1 above), with particular reference to the “Stability and permanence” and “Financial arrangements” signposts. Even if this were not the case, there is an argument that the four factors from the Tax Credits regime (see row 3.3 above) suggest that this requirement is met because the couple have maintained contact and (it appears that) their intention is to continue to be a couple (despite the absence exceeding 24 months). • <i>Not living with a TP as if they are married</i> – There is no suggestion that this would cause an issue. • <i>Financial dependence</i> – Whilst some further information would be required in practice (e.g. precise sums and whether P could reasonably maintain their current standard of living without M’s savings and pension), our view is that the facts provided point towards this requirement being met (via financial interdependence).	
8.2	<u>Facts of the case</u>	

M and P lived together for 25 years. M was admitted to hospital eight months before M's death.

The evidence shows that:

- the admission was caused entirely by M's medical needs;
- M's belongings remained in the shared home;
- M and P expected M to return home if M's condition improved;
- P visited M regularly;
- M's pension continued to be paid into the joint account;
- the joint account continued to meet the mortgage and household bills; and
- neither M nor P regarded the relationship as having ended.

Our view

In our view, it would be reasonable for the AA to determine that P meets the CP requirements. In fact, we consider this to be a simple case.

To run through the CP requirements:

- *Ability to marry* – There is no suggestion that M or P were unable to marry.
- *LTMC* – We consider that the seven Kimber v Kimber “signposts” point to this requirement being met (see **row 3.1** above), with particular reference to the “Stability and permanence” and “Financial arrangements” signposts. Even if this were not the case, in our view, the four factors from the Tax Credits regime (see **row 3.3** above) would suggest that the absence from the family home was insufficient to mean they do not meet the LTMC requirement (i.e. because of the length of absence, maintaining contact, and their future intentions).
- *Not living with a TP as if they are married* – There is no suggestion that this would cause an issue.
- *Financial dependence* – Whilst some further information would be required in practice (e.g. precise sums and whether P could reasonably maintain their current standard of living without M's savings and pension), our view is that the facts provided point towards this requirement being met (either via P being financially dependent, or there being financial interdependence).

Schedule 3

Ability to Marry Requirement (Care Home / Hospital Case)

1 INTRODUCTION

- 1.1 Under the Two LGPS Regs, in order to qualify as a “*cohabiting partner*”, the following condition must have been satisfied – “*M is able to marry, or form a civil partnership with P*”.
- 1.2 Please note that the Scottish 2018 Regs, in our view, provide that this requirement must be assessed at the date of the member’s death; whilst the E&W 2013 Regs provide that it must be assessed with reference to the two continuous years prior to the date of the member’s death. For brevity, we have referred to the two-year requirement under the E&W 2013 Regs throughout the remainder of this schedule; and so Scottish AAs should read the remainder of this schedule accordingly.
- 1.3 One of the consequences of the ability to marry requirement is that the “*cohabiting partner*” definition cannot be met where either the member or partner was still married to another person within the two-year period up until the member’s death. Further, the member and partner both must have been old enough to have got married and they must not be barred from marrying the other due to their family relationship. We have not considered in detail other possible reasons that the ability to marry requirement may not be met, beyond the below section.

2 MENTAL CAPACITY

- 2.1 We note that, theoretically, an argument could be made that the ability to marry requirement requires that M and P must both have had mental capacity to marry the other for two continuous years as at the member’s death.
- 2.2 However, having liaised with the LGA on this point, we understand that the argument in paragraph 2.1 above would not align with the policy intention. In other words, we understand that the policy intention (both in England and Wales, and in Scotland) is for a person to meet the CP requirements even where M or P lacked mental capacity to marry during the two years before M’s death.
- 2.3 We have therefore not advised in relation to this argument in any further detail.

Schedule 4

LTMC Requirement (Care Home / Hospital Case)

1 INTRODUCTION

- 1.1 Under the Two LGPS Regs, in order to qualify as a “*cohabiting partner*”, the following condition must have been satisfied for at least two years as at the date of the member’s death – “*M and P are living together as if they were [married⁹ / a married couple¹⁰] or as if they were civil partners*”.
- 1.2 This schedule provides a summary of the legal position in the event of a care home / hospital case, resulting in there being complications as to whether the LTMC requirement can reasonably be assessed as having been met by the AA.

2 LGPS-SPECIFIC GUIDANCE AND CASE LAW

- 2.1 We are not aware of any statutory guidance or case law (including PO decisions) in relation to this topic.

3 NON-LGPS STATUTE WITH SIMILAR WORDING AS THE LTMC REQUIREMENT

Introduction

- 3.1 We have summarised below the legislation that uses wording similar to that within the LTMC requirement. As above, please note that because none of these directly relate to either of the Two LGPS Regs, this is an unsettled area of law.

Legislation	Operative Term	Definition
E&W 2013 Regs	Definition of: “ <i>cohabiting partner</i> ”	Defines the term with reference to four requirements, one of which being that “ <i>M and P are living together as if they were married or as if they were civil partners</i> ”.
Scottish 2018 Regs	Definition of: “ <i>cohabiting partner</i> ”	Defines the term with reference to four requirements, one of which being that “ <i>M and P are living together as if they were a married couple or as if they were civil partners</i> ”.
The State Pension Credit Regulations 2002; the Welfare Reform Act 2012; Family Law Act 1996; Social Security Contributions and Benefits Act 1992; and the Tax Credits Act 2002 (together, the “<u>Relevant Welfare Legislation</u>”)	Definition of: “ <i>a couple</i> ”	These all define the term, broadly speaking, as including “ <i>two people who are not married to, or civil partners of, each other but are living together as if they were a married couple or civil partners</i> ”.
Adoption and Children Act 2002	Definition of: “ <i>a couple</i> ”	Defines the term as including “ <i>two people (whether of different sexes or the same sex) living as partners in an enduring family relationship</i> ”. Given that the definition of the term here is materially different to the LTMC requirement, we have not considered this Act in any further detail.
Inheritance (Provision for Family and Dependants) Act 1975; and the Larceny Act 1916	Requirement for certain provisions to be triggered	Requires that the person “ <i>was living – (a) in the same household as the deceased, and (b) as the husband or wife of the deceased</i> ”
Income Tax Act 1918	Requirement for certain provisions to be triggered	Requires that the “ <i>married woman [was] living with her husband</i> ”.

⁹ E&W 2013 Regs

¹⁰ Scottish 2018 Regs

Summary

- 3.2 In relation to deciding whether the LTMC requirement is met in the event of a care home / hospital case, the relevant terminology within the Relevant Welfare Legislation is materially the same as the E&W 2013 Regs and identical to the Scottish 2018 Regs. Therefore, we consider that guidance relating to the Relevant Welfare Legislation can be treated as:
- (a) Highly persuasive in relation to the Scottish LTMC requirement, given that the drafting is identical; and,
 - (b) Also highly persuasive in relation to the E&W LTMC requirement¹¹, although there is a marginal additional aspect of risk here given the wording not being identical.
- 3.3 The other pieces of legislation referred to above do not use terminology that is materially the same. We therefore suggest that guidance and case law in relation to said legislation should be given less weight, when deciding how to interpret the LTMC requirement within the Two LGPS Regs.

4 SUMMARISING THE PRINCIPLES FROM RELEVANT WELFARE LEGISLATION

- 4.1 As above, we consider that the principles from the Relevant Welfare Legislation can be treated as highly persuasive in respect of interpreting the LTMC requirement within the Two LGPS Regs when dealing with a care home / hospital case. Below, we summarise the key principles from the Relevant Welfare Legislation, both generally on the term “living together as if they were a married couple” and specifically on how absence may shape the definition.

General principles on “living together as if they were a married couple”

- 4.2 *Kimber v Kimber* [2000] 1 FLR 383 is the key case on defining this term. The court identified seven “signposts” that are relevant to determining whether a couple are cohabiting as if they were married.
- (a) Living together in the same household — whether the parties share a home
 - (b) A sexual relationship — the existence of an intimate relationship (though its absence is not determinative)
 - (c) Stability and permanence — the duration and settled nature of the relationship
 - (d) Financial arrangements — the degree to which parties share finances, pool resources, or maintain joint accounts
 - (e) Children — whether the couple have or care for children together
 - (f) Public acknowledgement — whether the couple hold themselves out publicly as a couple
 - (g) Domestic arrangements — the sharing of domestic tasks and responsibilities.
- 4.3 The court emphasised that no single factor is decisive and that the question is one of overall assessment. It could therefore be that a couple are “living together as if they were a married couple” even if they have not been complying with (a) (living together in the same household) for an extended period of time (assuming that (b) - (g), when considered on the whole, point towards the couple “living together as a married couple”).

Specific principles on how absence may impact “living together as if they were a married couple”

- 4.4 Please refer to the table immediately below.

¹¹ We have considered *Hansard* and connected guidance and consultation documentation relating to the E&W 2013 Regs and conclude that it is unlikely that the different drafting was a deliberate decision.

Topic Area	Position regarding State Pension Credit ¹²	Position regarding Universal Credit ¹³	Position regarding Tax Credits ¹⁴	Comment
General position on the impact of an absence	A temporary absence (including in a care home or hospital) will not automatically mean that the couple are “living apart”. However, a permanent absence (including in a care home or hospital) will mean that the couple are “living apart”.			Given this is a common theme amongst all three pieces of the Relevant Welfare Legislation with statutory guidance, we consider it reasonable for LGPS funds to apply this principle when interpreting the LTMC requirement.
Determining when an absence is to be treated as “permanent”	The person is absent, or expected to be absent, from the household for longer than 52 weeks. Although, in exceptional circumstances (e.g. hospital admissions), absence may exceed 52 weeks and not sever the ‘living together’ status.	The person is absent from the household and that absence is expected to exceed, or exceeds, six months.	Rather than a singular cut-off point being applied, there is a holistic, factor-based approach used. The factors, which should be assessed with reference to the position over the two years before the member’s death, are: a) The length of the absence, b) The expected further length of the absence¹⁵, c) Whether the couple have maintained contact, and d) The couple’s future intentions.	Given that there are three different approaches taken here, there is no clear steer provided by the Relevant Welfare Legislation. We suggest that the position within the Tax Credits Act 2002 may be most appropriate to adopt, given it weighs up wider factors rather than simply adopting an arbitrary cut-off point (which, broadly speaking, is more conducive to the general approach taken by AAs to discharging their fiduciary duties). Given that the State Pension Credit position also has an element of flexibility (with the reference to “<i>exceptional circumstances</i>”), we note that the Tax Credits approach is also not unique in not using a single cut-off point. It would also be reasonable to adopt the positions taken in respect of State Pension Credit and Universal Credit, if preferred.
The impact of the length of absence and further expected length of absence	We suggest that (with reference to the State Pension Credit and Universal Credit regimes): - If the total of (a) and (b) in the row above is six months or less, then generally, the absence length should not be fatal to the LTMC requirement; - If the total of (a) and (b) in the row above is more than six months but not more than twelve months, then the AA should consider (c) and (d) in the row above as being the determinative factors as to whether the LTMC requirement is complied with; - If the total of (a) and (b) in the row above is more than twelve months but not more than twenty-four months, then the AA should require (c) and (d) in the row above to be very strongly in favour of the			

¹² The statutory position here is provided by The State Pension Credit Regulations 2002 (see regulation 1 in particular, which defines “a couple”). Guidance in relation to the Regulations is accessible [here](#) and [here](#).

¹³ The statutory position here is provided by The Welfare Reform Act 2012 (see section 39 in particular, which defines “a couple”). Guidance in relation to the Act is accessible [here](#).

¹⁴ The statutory position here is provided by The Tax Credits Act 2002 (see section 3(5A)(b) in particular, which defines “a couple”). Guidance in relation to the Act is accessible [here](#).

¹⁵ Where M or P returned home (from the care home or hospital) before M’s death, we suggest that this is treated as being zero. Where M or P remained in the care home or hospital up until M’s death, we suggest this number is generally ascertained with reference to input from a medical practitioner, although in extreme cases (e.g. where it appears clear that the admission would only be very short-term or that it would be permanent) then the AA may reasonably feel comfortable with proceeding with only high-level input from M/P’s carers in the hospital or care home (although care should be taken to ensure an adequate paper trail in any event).

	couple “living together as a married couple” in order to proceed on the basis that the LTMC requirement is complied with; and - If the total of (a) and (b) in the row above is more than twenty-four months, then the AA should generally consider the LTMC requirement not to be complied with, unless (c) and (d) in the row above are exceptionally strong. Please note that this is an untested area of law and the above should be treated as guidelines only.		
Specific approach for “trial periods” at a care home	The person will be treated as continuing to live at home for up to 52 weeks where they have gone to the care home as a “trial period” ¹⁶ .	No specific approach provided (apply general approach above).	Whilst only an aspect of the State Pension Credit regime, given neither of the other regimes contradict this position, we consider it reasonable for LGPS funds to apply this principle when interpreting the LTMC requirement. This process could be adopted in place of the “general approach” taken, where applicable.
Specific approach for sub-52-week hospital or care home admissions	In addition to the stay being less and being expected to be less than 52 weeks, the person must: - Intend to return to live in the original home (this intent must be unqualified and unconditional), and - Not have let or sub-let the original home.	No specific approach provided (apply general approach above).	We note that: - This is an aspect of the State Pension Credit regime only, and - This is a restrictive position to adopt (i.e. may result in some additional people not meeting the “<i>cohabiting partner</i>” definition, when they otherwise would have under the general approach). We consider it reasonable either to adopt or not adopt this approach.

5 SUMMARISING THE PRINCIPLES FROM THE OTHER LEGISLATION

- 5.1 As above, we consider that the principles established in respect of the other legislation¹⁷ should be treated as less persuasive than the Relevant Welfare Legislation, given that the relevant terminology used in this legislation less closely aligns with the LTMC requirement within the Two LGPS Regs. That being said, we have provided some principles from the other legislation in case funds wish to apply it, either generally or in respect of a specific case. Please note, though, that doing so does carry additional legal risk given the precedent is less likely to be relevant for interpreting the Two LGPS Regs.

Income Tax Act 1918

- 5.2 This Act requires that the “*married woman [was] living with her husband*” in order for certain provisions to be triggered.
- 5.3 In case law interpreting this (Nugent-Head v Jacob [1948] AC 321), it was established that even a long time away from each other (including by reason of illness) can still mean they are “living with” each other. Whilst the case does not explicitly state any upper limit on the time of that absence; in this case, the husband was away for more than three years and it was still deemed that they “lived together”.

¹⁶This term is defined within Pension Credit guidance as where:

- They intend to return to live in their original home (which must be unqualified, present at the start of the period of absence, and not be conditional),
- Their home has not been let or sub-let to another person,
- They are receiving care in a care home, and
- The absence is unlikely to exceed 52 weeks (or, in exceptional circumstances, to substantially exceed 52 weeks).

¹⁷Being the Inheritance (Provision for Family and Dependents) Act 1975, the Larceny Act 1916, the Income Tax Act 1918, and the Divorce Reform Act 1969.

- 5.4 As above, the statutory wording here does not closely align with the Two LGPS Regs. However, the case goes to show how long a couple could be living apart but still, under law, be deemed to be *“living together”*.

Larceny Act 1916

- 5.5 This Act requires that the wife and husband are “living together” in order for certain provisions to be triggered.
- 5.6 In case law interpreting this (R v Creamer [1919] 1 KB 564), it was confirmed that physical separation (in the words of Darling J in the judgment, *“even if they are separated by the high seas”*) does not automatically mean that the couple are no longer “living together”.

Schedule 5

Not Living with a TP as if they are Married Requirement (Care Home/Hospital Case)

1 INTRODUCTION

- 1.1 Under the Two LGPS Regs, in order to qualify as a *“cohabiting partner”*, the following condition must have been satisfied for at least two years as at the date of the member’s death – *“neither M nor P is living with a third person as if they were [married¹⁸ / a married couple¹⁹] or as if they were civil partners”*.
- 1.2 We are not aware of any circumstances in a care home / hospital case that would mean that the not living with a TP as if they are married requirement would be at a heightened risk of not being complied with. We have addressed it here for completeness, though.

¹⁸ E&W 2013 Regs

¹⁹ Scottish 2018 Regs

Schedule 6

Financial Dependence Requirement (Care Home/Hospital Case)

1 INTRODUCTION

- 1.1 Under the Two LGPS Regs, in order to qualify as a *“cohabiting partner”*, the following condition must have been satisfied for at least two years as at the date of the member’s death – *“either P is financially dependent on M, or M and P are financially interdependent”*.
- 1.2 To emphasise, the financial dependence requirement is therefore focused on P – in that either P must be financially dependent, or there must be interdependence. Therefore, if the only financial dependence is M being financially dependent on P, P will not be a *“cohabiting partner”*.

2 APPLYING THIS IN A CARE HOME / HOSPITAL CASE

- 2.1 We expect that AAs will already be aware of the rules applying and factors to be considered for assessing financial dependence and interdependence. We therefore do not consider these in this paper.
- 2.2 Below, we have set out some comments specific to how these rules may apply in the context of a care home / hospital case.
- (a) Even if M is in a care home/hospital, it is still possible for P to be financially dependent or interdependent. For example, M may have a pension or income from insurance which enables P to live their life in the manner that they do. A relevant question for the AA to ask themselves here is whether M’s income exceeds M’s maintenance costs (particularly if in a care home)²⁰.
 - (b) If it is P that is in a care home/hospital, then it may be easier to ascertain P as being financially dependent or interdependent. However, this is not clear cut, especially if either...
 - (i) P’s care home fees are being covered solely by state benefits, or
 - (ii) P requires no maintenance because of being in hospital. Although, in this case, we would expect a holistic consideration to take place as to also inform whether P would be financially dependent or interdependent if living at home.

3 SUMMARY

- 3.1 Overall, AAs should apply the usual process for assessing financial dependence and interdependence in the event of a care home / hospital case.

²⁰ Because if M’s income is higher than the costs of M’s maintenance, then there are surplus funds which could be being used for P’s own maintenance. NB that if M’s income is lower than the costs of M’s maintenance, then the question would become whether M and P are financially interdependent.

Schedule 7

Other Legal Considerations

1 INTRODUCTION

- 1.1 In applying the requirements to be a “*cohabiting partner*” within the Two LGPS Regs, AAs may find that they are rejecting claims that, morally, they feel should be accepted.
- 1.2 Rejecting the claim would carry with it the lowest risk profile in terms of legal invalidity. That being said, AAs may feel, in some cases, inclined to provide the partner with what they consider to be the more morally acceptable outcome (i.e. providing the benefits).
- 1.3 This schedule sets out the risks incurred in treating P as a “cohabiting partner” where it is not clear cut as to whether the CP requirements are all complied with or not.
- 1.4 Where it is clear that the CP requirements are not met, the claim should be rejected in order to avoid a breach of the regulations, a breach of fiduciary duty, and acting ultra vires.

2 TREATING UNMARRIED AND MARRIED COUPLES SIMILARLY

- 2.1 One argument that funds may consider strengthens the argument to provide the benefits in a “borderline case” is the principle that all couples should be treated in a similar way.

Tax Credits guidance

- 2.2 Namely, in guidance relating to the Tax Credits Act 2002 (which is one of the Relevant Welfare Legislation using identical wording to the Scottish 2018 Regs, and materially the same wording as in the E&W 2013 Regs) (TCTM09301), the following is stated:

“The general principle is that all couples should be treated in a similar way. For example an unmarried couple who are living together as if they were married should be treated in the same way as if they were married or in a civil partnership. The principle behind this is that an unmarried couple should not be treated more or less favourably than married couples or civil partners”

The “Brewster” case

- 2.3 In the legal case of “**Brewster**”²¹, the Supreme Court held that, for the Northern Ireland Local Government Pension Scheme, Ms Brewster as a surviving unmarried cohabiting partner was in an analogous position to a surviving spouse or civil partner, and that the only real issue was whether the additional nomination requirement imposed only on unmarried partners was objectively justified. Lord Kerr held that the nomination form added nothing material because the regulations already required proof of a genuine, subsisting cohabiting relationship, and there was no rational connection between equalising treatment and imposing this extra hurdle on unmarried couples. The requirement was therefore unjustified discrimination, and it was disapplied so that Ms Brewster was entitled to the survivor’s pension.
- 2.4 In essence, the case established that pension schemes must not impose unnecessary / unjustifiable additional procedural barriers to an unmarried couple receiving a benefit that a married couple would have received without said barrier.

Against

- 2.5 That being said, in a PO decision relating to the Teachers’ Pension Scheme (PO-23576)²², the PO rejected an argument by a pension scheme member that Brewster should apply to his case to provide him with the relevant benefits. By way of a summary of this case:

(a) Mr S’s partner, Ms N, was a member of the Teachers’ Pension Scheme.

²¹Denise Brewster for Judicial Review (Northern Ireland) [2017] UKSC 8

²² Accessible [here](#).

- (b) On 21 July 2017, Ms N was taken into hospital. Shortly after, her health deteriorated and hospital staff and social services said she lacked capacity to marry, resulting in their planned wedding being delayed.
- (c) On 5 October 2017, Ms N died, before she could marry Mr S.
- (d) As Mr S and Ms N had been living together for three years before her death, Mr S applied for a dependant's pension from the Scheme. However, because Mr S's divorce only came through on 14 July 2017, the requirement for the couple to have been "able to marry" (under regulation 90 of the Teachers' Pension Scheme Regulations 2010 (which mirror the wording in the Two LGPS Regs)) was not met for two continuous years before Ms N's death on 5 October 2017. The scheme therefore rejected Mr S's application.
- (e) Mr S brought a claim to the PO, referring to a recent case (presumed by the PO to be the *Brewster* case) to argue that it would be "fair" and within the "spirit" of the regulations to award Mr S a pension, in the circumstances.

2.6 The PO rejected the argument regarding *Brewster*, stating that:

"I do not agree that Mr S' case is comparable to the Brewster case. The Brewster case related to the unfairness of a condition that required unmarried but not married couples, to complete a nomination form. The issue here is whether Mr S fulfilled the substantive conditions in regulation [90]..."

Summary

2.7 Overall, whilst there is clearly a principle in law regarding treating married and unmarried couples similarly, the extent of this principle appears to be in regard to ensuring that there are no unnecessary and unjustifiable procedural barriers to receive a pension benefit applicable to some couples but not others. The PO-23576 case made it clear that the PO does not view the principle as extending to the disapplication of explicit, substantive requirements from statute.

3 RISK OF MEMBER CHALLENGE

3.1 We note that one practical argument in favour of providing the benefits in a "borderline case" would be that it avoids the risk of a complaint from the benefit applicant.

In favour – limiting costs

3.2 There is a duty on AAs to administer the monies of the fund in a proportionate manner. This includes ensuring that expenses are proportionate.

3.3 If a complaint is made by the benefit applicant when the AA rejects the application, this could lead to two stages of the IDRP, plus a PO case – likely resulting in material time being expended and fees on advisers being incurred. An argument could therefore be made that, to administer the fund in a proportionate manner, the AA should accept the benefit application in the first instance (especially if the benefit payable was relatively low, e.g. lower than the expenses incurred in dealing with a complaint).

Against – low risk of successful complaint

3.4 Based on the PO's decision document in the PO-23576 case, there appears to be a very low risk of the PO ordering benefits to be put into payment where the CP requirements are not all met. In that case, the PO stated:

"there is no scope within the Regulations for me to direct [the scheme] to pay [Mr S] a dependent's pension when he does not fulfil all the statutory requirements."

3.5 That being said, we note that PO cases do not, technically, set a precedent so a similar case could (although we do not expect it to be the case) have a different outcome.

4 FIDUCIARY DUTY AND UNAUTHORISED PAYMENT RISK

4.1 Further, we note that accepting a benefit application where there is an argument that the CP requirements are not complied with brings about a risk of:

- (a) Breaching fiduciary duty (by possibly administering the fund in a way that is not compliant with regulations), and
- (b) Making an unauthorised payment and incurring the connected tax charges.

4.2 That being said, these risks could be viewed as being low likelihood given the low risk that anyone would complain about the benefit being put into payment. Although a complaint could be made if someone else seeks to claim the same benefit down the line (so the likelihood is not completely trivial).

5 DUTY TO SELF-REPORT REGULATORY BREACHES

5.1 Further, we note that AAs have a duty to report themselves where they understand that they have acted in breach of regulations (subject to the requirements of the provisions of the Pensions Act 2004). This further supports, in particular, our view that where it is clear that the CP requirements are not met, the claim should be rejected (otherwise, the AA would be obliged to report this breach upon putting the benefit into payment).

6 WORDING OF THE TWO LGPS REGS

6.1 In our view, the use of the term “*satisfied*” within the Two LGPS Regs²³ implies that the AA is the arbiter of the CP requirements and provides AAs with an element of flexibility, particularly in cases that are not clear cut. AAs may therefore take some comfort from this when considering determining a “borderline case” in favour of the partner.

7 FLEXIBILITY OF THE COURT IN INTERPRETING “LIVING TOGETHER” WORDING

7.1 One of the points to draw out from the case law interpreting legislation mentioned throughout **Schedule 4** above (including, but not limited to, the Relevant Welfare Legislation) is that the courts have typically taken a purposive and practical approach to defining any legislative requirement for two people to be “living together” or to be “living together as a married couple”. For example:

- (a) In *Nugent-Head v Jacob* [1948] AC 321, it was established that despite spending three years away from each other (because of military service), the couple still met the requirement to have been “living with” each other.
- (b) Similarly, in *R v Creamer* [1919] 1 KB 564, it was confirmed that physical separation (in the words of Darling J in the judgment, “*even if they are separated by the high seas*”) does not automatically mean that the couple can no longer meet the requirement to have been “living together”.

7.2 As above, in our view, these cases demonstrate a practical approach from the court when dealing with a requirement for a couple to be “living together”. AAs may again take some comfort from this when considering determining a “borderline case” in the favour of the partner.

²³ In relation to the four CP requirements, the Two LGPS Regs require that the AA is “*satisfied [the person] fulfils*” the requirements.

Schedule 8

Procedural Considerations

1 INTRODUCTION

- 1.1 Broadly speaking, one legal risk for AAs when considering whether someone meets the definition of “*cohabiting partner*”, particularly in the event of a care home / hospital case, is how the decision is made. Namely, as per the legal case *Edge v Pensions Ombudsman*, it was confirmed that trustees (and, similarly, AAs) must:

- (a) Direct themselves correctly in law,
- (b) Take into account all relevant but no irrelevant factors,
- (c) Ask themselves the correct questions, and
- (d) Reach a decision which was not perverse.

2 RISK OF A SUBSTANTIVE BREACH

- 2.1 It is only (d) above which relates to the substance of the case, and broadly, the requirement for the decision not to be “*perverse*” is arguably a relatively low bar to comply with.
- 2.2 That being said, we consider that the court or PO is likely to determine that paying benefits to someone who quite clearly does not meet the plain requirements of the Two LGPS Regs (e.g. as an extreme case, someone who had not been living with the member for ten years at the point of the member’s death because the member had been in a care home for that period, visited the member only once a year during that period, and whose finances had since become independent) would meet the threshold for a “*perverse*” decision.
- 2.3 **Schedules 3 to 6** above provide further information on the risk of coming to a “*perverse*” decision when applying the Two LGPS Regs in the event of a care home / hospital case.

3 RISK OF A PROCEDURAL BREACH

- 3.1 As above, there is also a legal risk to AAs of making a “*procedurally unreasonable*” decision when dealing with the benefit application arising from a care home / hospital case – particularly given the legal complexity in determining whether the LTMC requirement and the financial dependence requirement are met in such cases.
- 3.2 AAs should ensure, therefore, that they:
- (a) Direct themselves correctly in law,
 - (b) Take into account all relevant but no irrelevant factors (*generally speaking, factors and considerations referred to in Schedules 3 to 6 above should be referred to as guidance*), and
 - (c) Ask themselves the correct questions (*the main question being whether the person meets the definition of “cohabiting partner”*).
- 3.3 In terms of the level of enquiry expected of AAs to obtain information and evidence regarding the relevant factors (to take one example, the financial position of M and P so that the AA can ascertain whether the financial dependence requirement is complied with or not), we note as follows²⁴:
- (a) AAs should complete ‘reasonable enquiries’ in order to obtain this information.
 - (b) The level of enquiry required in order to be ‘reasonable’ will depend on all of the circumstances, including but not limited to:
 - (i) The sum of the benefit to be paid,
 - (ii) The materiality of the specific information to whether the CP requirement is met, and

²⁴ We have not been asked to advise on this area in detail, and provide our comments here as some broad guidelines for AAs.

- (iii) Whether or not further attempts to obtain the information/evidence are likely to result in the information/evidence being obtained (i.e. if the AA reasonably believes that further attempts will not result in success, then it may be that it is reasonable to cease enquiries).
- (c) Broadly speaking, AAs should consider whether there is anyone else that can be contacted for the information/evidence (rather than focusing on one person for the information/evidence, not receiving it, and concluding that the information/evidence is unobtainable).
- (d) The lower risk option is, where in doubt, to conduct further enquiries to obtain the information/evidence. Whilst a risk-based decision may in some instances be taken (i.e. with reference to (i) to (iii) immediately above), AAs should note that risk would be mitigated by conducting further enquiries. If opting to cease enquiries, to mitigate the legal risk we would recommend the AA ensures a detailed paper trail is in place (which may include legal advice in support of the approach) which captures the rationale for that decision.

4 STEP-BY-STEP GUIDE

- 4.1 We have provided a step-by-step guide to dealing with a care home / hospital case to assist with mitigating the risk of a decision being either substantively or procedurally unreasonable – please see **Schedule 2** above.

Schedule 9

Further Information Regarding Analogous Law for the LTMC Requirement

No.	Source Title	Summary of Relevant Points	Key Takeaway(s)
1)	<i>Crake v Supplementary Benefits Commission</i> [1982] 1 All ER 498	<u>Legislative context</u> This is the foundational social security case which established the criteria for determining whether two people are "living together as husband and wife" for benefits purposes. The court identified six "admirable signposts" (subsequently adopted by the DWP and widely relied upon across family law). <u>Defining Cohabiting</u> 1. Whether the parties live in the same household 2. The stability of the relationship 3. Financial support 4. Sexual relationship 5. Children 6. Public acknowledgement of the relationship These criteria have been adopted and applied well beyond social security law and remain the standard framework referred to in family law practice.	This case establishes that any combination of these factors may indicate cohabitation, though these are hallmarks that will indicate cohabitation, rather than set requirements which all must be present.
2)	<i>Kimber v Kimber</i> [2000] 1 FLR 383	<u>Legislative Context</u> Under section 137(1) of the Social Security Contributions and Benefits Act 1992, a couple is defined as <i>"two people who are not married to, or civil partners of, each other but are living together as if they were a married couple or civil partners otherwise than in prescribed circumstances"</i>. Following on from <i>Crake</i> (applying section 137(1) of the Social Security Contributions and Benefits Act 1992), this is the leading authority on the indicators of cohabitation in Family Law. The court identified seven "signposts" that are relevant to determining whether a couple are cohabiting as if they were married. <u>Defining Cohabiting</u> 1. Living together in the same household — whether the parties share a home 2. A sexual relationship — the existence of an intimate relationship (though its absence is not determinative) 3. Stability and permanence — the duration and settled nature of the relationship 4. Financial arrangements — the degree to which parties share finances, pool resources, or maintain joint accounts 5. Children — whether the couple have or care for children together 6. Public acknowledgement — whether the couple hold themselves out publicly as a couple 7. Domestic arrangements — the sharing of domestic tasks and responsibilities. The court emphasised that no single factor is decisive and that the question is one of overall assessment.	As above.

3)	G v F (Non-Molestation Order: Jurisdiction) [2000] Fam 186	<u>Legislative Context</u> This case concerned whether the parties were former “cohabitants” for the purpose of Section 62(1)(a) of the Family Law Act 1996. <u>Defining Cohabitation</u> Wall J determined that the court should take a purposive approach when considering whether parties fall within the category of cohabitants. The case involved parties in a relationship where the respondent stayed at the applicant's house for two or three nights during weekdays and the applicant stayed at the respondent's flat at weekends. Wall J concluded that the evidence supported the finding that the parties were former cohabitants, noting there was a sexual relationship, evidence they lived in the same household, and they operated a joint bank account.	This case applies the criteria set out above, and confirms that not all of these have to be present, and that the court will take a purposive approach and look at the overall circumstances in each case.
4)	Santos v Santos [1972] 2 All ER 246	<u>Legislative context</u> This case concerned section 2(1)(d) and (e) of the Divorce Reform Act 1969, which require for the couple to have been “living apart”. <u>Defining “living together”</u> Sachs LJ observed first at page 262 and then at page 263: <i>“... use is again made of words with a well settled matrimonial meaning—'living together', a phrase which is simply the antithesis of living apart, and 'household', a word which essentially refers to people held together by a particular kind of tie, even if temporarily separated...”</i> However, this case also established that parties may be “living apart” even whilst under the same roof if there is no common household — i.e., if they are not sharing domestic life as a couple. By implication, it confirmed that cohabitation requires more than merely sharing a physical address; there must be shared domestic life and a mutual intention to live as a couple.	This case, again, takes the position that a “household” can remain intact “even if temporarily separated”. <i>It also confirms however that living under the same roof together will not prove cohabitation.</i>
5)	Churchill v Roach [2002] EWHC 3230 (Ch)	<u>Legislative context</u> The requirement under section 1(1A) of the Inheritance (Provision for Family and Dependents) Act 1975 is that the person: <i>“was living – (a) in the same household as the deceased, and (b) as the husband or wife of the deceased”</i> <u>Defining what “living in the same household” means</u> Norris QC states as follows at 1004: <i>“It is, of course, dangerous to try and define what 'living in the same household' means. It seems to me to have <u>elements of permanence</u>, to involve a consideration of the frequency and intimacy of contact, to contain an element of mutual support, to require some consideration of the degree of voluntary restraint upon personal freedom which each party undertakes, and to involve an element of community of resources. None of these factors of itself is sufficient, but each may provide an indicator.”</i> (our emphasis added) The court also held however that the applicant had not satisfied the statutory test, emphasising that the couple had maintained largely separate lives and finances, notwithstanding spending considerable time together. Norris QC states as follows at 1004 and 1005: <i>“It is perfectly possible to have one household and two properties. But what does seem to me to be the case is that there were two separate establishments with two separate</i>	Case law provides that there has to be some level of permanence for a couple to be “living in the same household”, but that this alone will not evidence that they had been “living together”.

		<i>domestic economies. There was, of course, a degree of sharing when the two met at weekends and some of those weekends were long. But that does not mean that they lived in one household. On that ground I reject the claim under this head, because the claimant cannot satisfy the 2-year requirement."</i>	
6)	Gully v Dix [2004] EWCA Civ 139	<u>Legislative context</u> The requirement under section 1(1A) of the Inheritance (Provision for Family and Dependents) Act 1975 is that the person: <i>"was living – (a) in the same household as the deceased, and (b) as the husband or wife of the deceased"</i> <u>Facts of the case</u> Here, Mrs Gully was <i>"extremely stressed because of her domestic situation... [which] caused her to lose such a lot of weight... [and] the specialist [concluded] that her symptoms were due to the stress of her domestic situation"</i>. She ultimately decided to leave the house temporarily because of the detrimental effect on her health. <u>Defining what "living together" means</u> In essence, Ward LJ agreed with previous case law (see Santos v Santos above in particular) that "living together" is linked to the concept of living in the same <i>"household"</i>. <u>Defining what "living in the same household" means</u> Ward LJ at [24] states that: <i>"Thus they will be in the same household if they are tied by their relationship. The tie of that relationship may be made manifest by various elements, not simply their living under the same roof... If... the interruption is transitory... then they will be living in the same household..."</i>	Similar to the above, this case confirmed that where an <i>"interruption is transitory... then they will be living in the same household"</i>.
7)	Nugent-Head v Jacob [1948] AC 321	<u>Legislative context</u> Under General Rule 16 of the Income Tax Act 1918, the relevant requirement was that the <i>"married woman [was] living with her husband"</i>. <u>Impact of absence on the requirement to have been "living with" the husband</u> Per Viscount Simon at page 324, the wife was "living with her husband" who had been absent on military service for more than three years because there had been <i>"no rupture of matrimonial relations"</i>. The judge further stated that: <i>"The fact that one of them is physically away from the other for a time, even for a long time, whether from duty or illness or other cause, is no reason for saying that the wife is not "living with her husband"."</i>	This case establishes that even a long time away from the family home (including by reason of illness) can still mean they are <i>"living with"</i> each other. The case does not explicitly state any upper limit on the time of that absence (in this case, the husband was away for more than three years and it was still deemed that they <i>"lived together"</i>).
8)	R v Creamer [1919] 1 KB 564	<u>Legislative context</u> Under section 36 of the Larceny Act 1916, the requirement is that the wife and husband are <i>"living together"</i>.	This case establishes that physical separation

		<u>Impact of absence on the requirement to have been “living together”</u> Darling J stated that: <i>“A husband and wife are living together not only when they are residing together in the same house, but also when they are living in different places, even if they are separated by the high seas, provided the consortium has not been determined.”</i>	(even if far) does not automatically mean that the couple are no longer “living together”.
9)	Re Watson (Deceased) [1999] 1 FLR 878	<u>Legislative context</u> The requirement under section 1(1A) of the Inheritance (Provision for Family and Dependents) Act 1975 is that the person: <i>“was living – (a) in the same household as the deceased, and (b) as the husband or wife of the deceased”</i> <u>Facts</u> Mr Watson entered hospital around the middle of March 1996 and died on 8 April 1996. During this time, Mrs Watson was unable to visit him due to her own health issues; although Mr Watson did leave hospital once to visit Mrs Watson at home. <u>Interpretation</u> Neuberger J [882 and 883] states that: <i>“as a matter of ordinary language, the fact that someone is in hospital for a period, possibly for a long period, at the end of which he dies, does not mean that, before his death, he ceased to be part of the household of which he was part, until he was forced by illness to go to hospital, and to which he would have returned had he not died...”</i>	Case law has established that <i>“the fact that someone is in hospital for a period, possibly for a long period, at the end of which he dies, does not mean that, before his death, he ceased to be part of the household of which he was part”</i> .