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Property and Cohabitation: Understanding the Family Law (Scotland) Act 2006

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A. INTRODUCTION

In its 1992 Report on *Family Law*, the Scottish Law Commission proposed that greater legal recognition should be given to cohabiting couples by conferring the right to make certain claims to each other's property.¹ The Commission's view was based on the increased incidence of cohabitation throughout the UK and on the responses received during its consultation process. However, the rationale for the Commission's recommendations was not fully articulated; instead, it stated rather vaguely that there was "a strong case for some limited reform of Scottish private law to enable certain legal difficulties faced by cohabiting couples to be

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1 Scottish Law Commission, Report on *Family Law* (Scot Law Com No 135, 1992) part XVI.

overcome and to enable certain anomalies to be remedied”.² Its definition of cohabitation was based on marriage but it also sought to link its recommendations relating to cohabitants with its recommendation that irregular marriage be abolished. “Cohabitation” was, accordingly, defined as “the relationship of a man and a woman who are not legally married to each other but are living together as husband and wife, whether or not they pretend to others that they are married to each other”. In order to retain the distinction between marriage-like relationships and marriage itself, so as neither to undermine marriage nor to limit the freedom of those who had opted out of marriage, the Commission confined the scope of its recommendations to “the easing of certain legal difficulties and the remedying of certain situations which are widely perceived as being harsh and unfair”.³ The way in which these two, possibly conflicting, objectives were to be reconciled – giving legal recognition to cohabiting relationships while at the same time continuing to privilege both marriage and individual choice – was not, however, any clearer than their underlying rationale. The overall impression was that the Commission’s recommendations flowed from no more than an intuition that in some cases, something – but not too much – ought to be done.

No legislation followed publication of the Commission’s Report until 2004, when the Scottish Executive revived the issue of cohabitant rights.⁴ Some thirteen years after initial publication, the question of what sorts of rights or claims cohabitants should have to each other’s property was finally addressed by sections 25-30 of the Family Law (Scotland) Act 2006.⁵

The 2006 Act makes a series of wide-ranging changes to family law in Scotland but our primary concern here is with those provisions which have an impact on the property rights of cohabitants.⁶ The recommendations made by the Scottish Law Commission have, largely, been implemented: the right of a cohabitant to make claims from his or her partner in certain circumstances has been introduced and marriage by habit and repute has been abolished. Taken together, these reforms represent an attempt to draw a clear line between marriage and marriage-like relationships, but the definitional problems inherent in non-registered relationships are resolved no more successfully than they were before. An important difference between the recommendations of 1992 and the legislation now enacted

2 Report on *Family Law* para 16.1.

3 Report on *Family Law* para 16.1.

4 Scottish Executive, *Family Matters: Improving Family Law in Scotland* (2004), available at <http://www.scotland.gov.uk/consultations/justice/lfis-00.asp>.

5 These provisions came into force on 4 May 2006: see Family Law (Scotland) Act 2006 (Commencement, Transitional Provisions and Savings) Order 2006, SSI 2006/212.

6 The quasi-property rights conferred by the Matrimonial Homes (Family Protection)(Scotland) Act 1981 (and amended by the 2006 Act) will not be considered.

is the degree to which apparently clearer justifications for reform have been put forward. This paper sets out to examine what these justifications are and to assess whether and how far the legislative framework may be understood to have met them. It also considers a series of broader questions. In particular, it asks whether a coherent understanding of the phenomenon of cohabitation is possible and, if so, what it might amount to. It also opens up areas of further research into what kinds of property rules might be appropriate to cohabitation.

B. THE CONTENT OF THE REFORM

Before going on to discuss whether, how far, or in what ways the provisions of the Family Law (Scotland) Act 2006 meet the justifications made for them, we must first set out the three areas in which entitlements are conferred on cohabitants.

In order to benefit from those entitlements, a claimant must establish the existence of cohabitation. Section 25(1) of the 2006 Act defines “cohabitant” as

either member of a couple consisting of –

- (a) a man and woman who are (or were) living together as if they were husband and wife; or
- (b) two persons of the same sex who are (or were) living together as if they were civil partners.⁷

In deciding whether cohabitation exists, courts are directed to have regard to: (a) the length of time the couple have lived together (though no minimum period is set); (b) the nature of the relationship; and (c) the nature and extent of any financial arrangements which exist or existed between the couple.⁸ Sections 26-29 then set out the three areas in which entitlements are conferred on a person qualifying as a cohabitant.

(1) Presumption of common property in household goods

Like the equivalent provision in the Family Law (Scotland) Act 1985,⁹ section 26 of the 2006 Act creates a presumption of common ownership of household goods. This presumption is rebuttable,¹⁰ although the grounds for rebuttal and any limitations to which they may be subject are not set out. Clearly a contrary agreement could be used to rebut the presumption, while it might be implied from the

7 Family Law (Scotland) Act 2006 s 25 defines “cohabitants” by reference to civil partners as well as spouses; for the sake of simplicity, references to marriage in this paper should be taken to include civil partnership. This is not, however, to foreclose the question of whether marriage and civil partnership are identical, either conceptually or practically.

8 Family Law (Scotland) Act 2006 s 25(2).

9 FL(S)A 2006 s 25.

10 FL(S)A 2006 s 26(2).

general law that an item bought by a cohabitant on his or her own is owned by that cohabitant alone.¹¹ There is also a presumption of common ownership in money and property deriving from housekeeping allowances.¹²

(2) Financial claim on termination of cohabitation other than by death

Where cohabitation ends other than by death, either partner has the right to claim financial provision from the other.¹³ This can be a capital payment, calculated by reference to any economic advantage gained at the claimant's expense by the defender or by a child of the parties.¹⁴ It can also include a contribution to the economic burden of caring for such a child.¹⁵

(3) Financial claim on death of a cohabitant

This right only arises if the cohabitant dies intestate.¹⁶ Although the cohabitant's claim takes preference over any legal rights of children (and could, in fact, leave them with nothing) it is postponed to the prior and legal rights of a surviving spouse.¹⁷ In deciding whether to make an award the court must consider: the size of the estate; any benefit received by the survivor triggered by the death of the cohabitant from a source outwith his or her estate; the nature and extent of other claims on the deceased's estate (e.g. children's legal rights); and any other matter it considers relevant.¹⁸

C. THE RATIONALES FOR REFORM

The Policy Memorandum which accompanied the Family Law Bill expressed the rationale for reform in the following terms:¹⁹

The policy objective is to introduce greater certainty, fairness and clarity into the law by establishing a firm statutory foundation for disentangling the shared life of cohabitants when their relationship ends.

11 See Scottish Law Commission, Report on *Family Law* (n 1) para.16.10.

12 FL(S)A 2006 s 27.

13 FL(S)A 2006 s 28.

14 FL(S)A 2006 s 28(2)(a), (3)-(6). By s 28(10)(b) this includes a child who was accepted by the cohabitants as a child of the family even if they are not the biological parents.

15 FL(S)A 2006 s 28(2)(b).

16 FL(S)A 2006 s 29(1)(a). The Scottish Law Commission's proposal was for a right to claim from the estate of the deceased in all cases, similar to the (English) Inheritance (Provision for Family and Dependents) Act 1975, though not restricted as there to a claim for maintenance: see Report on Family Law (n 1) paras 16.31-16.36.

17 FL(S)A 2006 s 29(10) (definition of "net intestate estate").

18 FL(S)A 2006 s 29(3).

19 *Policy Memorandum* (available at <http://www.scottish.parliament.uk/business/bills/36-familyLaw/b36s2-introd-pm.pdf>) para 64.

However, the notion that the 2006 Act introduces a new dawn of legal certainty and clarity is problematic for a number of reasons, some of which are explored in this paper. Further, the suggestion that the reforms are motivated by and directed towards the achievement of fairness contains a number of sub-themes that serve rather to conflate the issues and confuse the basic question of what the reforms are for. One of those sub-themes is fairness *per se*, seemingly based on the intuitive view that, whilst not wishing to give cohabitation the same status as marriage, there was something wrong with a law which, for example, gave no rights to claim from property left on the death of a partner, even after a lifelong cohabitation.

A second theme emphasised in the Policy Memorandum is protection of the vulnerable, whether adults or their children.²⁰ This general theme was carried forward by the Justice 1 Committee during the progress of the Bill, at which point two further and more specific themes emerged: the needs of children for economic protection,²¹ and the justice of granting financial compensation to a party economically disadvantaged by the relationship.²² All four themes are summed up in the Deputy Justice Minister's view that the function of the law is to be "protective and remedial".²³ A final justification, albeit of a different order, is that the reforms are a response to demographic changes and to a corresponding change in public opinion.²⁴ In addition to these general rationales, others, considered below, are specific to the presumption of common property in household goods.

All of these rationales were subject to the more general constraint of keeping marriage distinct from cohabitation.²⁵ A further limiting factor was the inability of the Scottish Parliament to change rules regarding taxation where these might discriminate between cohabitants and spouses. A final point is that the rationales seem remote from the sorts of argument which are commonly used to justify the allocation of property rights.²⁶ The desire to make the legislation flexible enough to apply to a variety of different and distinct factual situations has actually created a lack of both certainty and clarity, a fact that will have an impact on public perceptions.

20 *Policy Memorandum* paras 61, 64, 65, 72, 77, 79, 81.

21 Scottish Parliament, *Official Report*, Justice 1 Committee, cols 2360, 2370 (23 Nov 2005).

22 Scottish Parliament, *Official Report*, Justice 1 Committee, cols 2351, 2354, 2371 (23 Nov 2005).

23 Scottish Executive, *Response to the Justice 1 Committee Stage 1 Report* 14, available at <http://www.scottish.parliament.uk/business/committees/justice1/reports-05/SEResponseFamilyLawStage1.pdf>.

24 Scottish Parliament, *Official Report*, Justice 1 Committee, col 2071 (14 Sept 2005).

25 See, for example, the comments of the Deputy Justice Minister that "we are not talking about introducing marriage-equivalent rights or equating cohabitation with marriage" (Scottish Parliament, *Official Report*, Justice 1 Committee, col 2371 (23 Nov 2005)).

26 See, for example, A Ryan, *Property* (1987); S Munzer, *A Theory of Property* (1990).

(1) Legal certainty and clarity

The fundamental difficulty with the legislation lies in the uncertainty as to when a couple living together are to be regarded as cohabiting and thus entitled to make claims on termination of the relationship. To the requirement in section 25(1) that they are living together as husband and wife or civil partners²⁷ (which is used in other legislation²⁸) are added other factors set out in section 25(2) which the court must consider in determining whether the parties are, or have been, cohabitants.²⁹

First is the length of the relationship. Although a minimum period of two years was set out in an early draft of the Bill, the Act as passed does not prescribe any minimum period and it is presumably possible that a very short relationship could qualify as a statutory cohabitation depending on the court's assessment of the other factors.

The second factor is the nature of the relationship. According to the Scottish Executive:³⁰

By "nature" we seek to point towards those many factors (not all of which may be present in any given relationship) which reflect a common life. These might include financial arrangements, the use and maintenance of a joint home, the existence of and caring for any children of the relationship, any outward signs of commitment, the manner in which the couple present themselves *as a couple* to friends and wider family, and evidence of decisions or actions reflecting expectations by the parties that they would remain a couple.

The final factor is the nature and extent of any financial arrangements, the focus here being on evidence of financial interdependence.³¹

Even with this additional gloss on the definition set out in section 25 of the Act, the legislation still leaves considerable doubt as to the full range of factors which may be relevant as well as to the precise scope and meaning of terms specifically

27 The notion of what is involved in living together as civil partners is rather obscure. The only thing which distinguishes what was a cohabitation but which now (by virtue of the Civil Partnership Act 2004) can be transformed into a civil partnership is the entering into the partnership; but since by definition cohabitants have *not* done this, it is difficult to see how they can ever live together "as if they were civil partners".

28 E.g. Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 18. It was considered desirable to have a different definition for the purposes of the 2006 Act because, unlike the 1981 Act, where the purpose is to avert risk, the focus of the 2006 Act is on commitment (Scottish Executive, *Response* (n 23) 16.

29 See B. above.

30 Scottish Executive, *Response* (n 23) 16.

31 Scottish Executive, *Response* (n 23) 16; Family Law (Scotland) Act 2006 s 25(2)(c). See, however, C Vogel, "Cohabiting couples: rethinking money in the household at the beginning of the 21st century" 2005 *Sociological Review* 1, which reviews evidence regarding financial arrangements which might make interdependence difficult to establish, though this might depend on a further layer of interpretation of what the notion of interdependence implies.

used within the Act. In the light of uncertainties about the essential nature of marriage such as were highlighted by a recent “sham” marriage case³² – including whether marriage is a matter of bare legal form, how consent is to be construed, whether cohabitation is necessary and how outward signs are to be interpreted – it is hardly surprising that providing a legal definition of cohabitation is no easy matter. As a consequence of social change, cohabitants no longer feel the need to hold themselves out as a married couple. Moreover, the definition of cohabitant (even as expanded by section 25(2)) suffers from precisely the same problems that led to the abolition of marriage by habit and repute. What is a sufficient length of cohabitation? What if one of the parties denies that he or she ever cohabited or even intended to cohabit with the other, within the meaning of the Act? If cohabitation is agreed or established, on what date did it commence? As the qualifying condition for acquiring the status of “cohabitant”, and thus for certain sorts of property claims, cohabitation seems as “inherently vague and unregulated” as irregular marriage.³³

Since the existence of legally-recognised cohabitation is the foundation of the other rights conferred in the Act, it is unfortunate that the definition remains obscure; it is an obscurity that will, one imagines, make it difficult to give clear legal advice in many instances. An additional difficulty is the lack of clarity over when cohabitation, if such it is deemed to be, starts. One assumes that if A moves in with B on 14 February, cohabitation will not exist as at 15 February or even, possibly, 15 August. Let us suppose that legal cohabitation did not begin until 14 July of the following year. What is the start date of cohabitation from which legal consequences follow? Is it 14 July (the date of legally-recognised cohabitation), or is 14 February in the previous year (when the parties actually began to live together)? Establishing this date has consequences for the sorts of claims that may be made under the Act on termination of the relationship.

Some of the potential problems with the nature and type of the property claims that may be made are now considered.

(a) Common property in household goods

At first sight the provision on the presumption of common property in household goods – section 26 of the 2006 Act – is clear.³⁴ However, unlike the comparable provision in the case of marriage³⁵ from which section 26 is drawn, there is no

32 *SH v KH* 2006 SC 129, discussed in J Mair, “Marriage: legal status or personal relationship?” (2007) 11 *EdinLR* 117.

33 Scottish Law Commission, Report on *Family Law* (n 1) para 7.4.

34 See B. (1) above.

35 Family Law (Scotland) Act 1985 s 25.

precise starting time for the operation of this presumption. As noted above, there are two possibilities: the start of any living-together and the start of legal cohabitation. If the latter is intended by section 26, then matters are reasonably clear (provided it is possible to fix the date), though the presumption would not then satisfy the dispute-resolution objective identified by the Scottish Law Commission³⁶ as the items not covered by the presumption would have been acquired longest ago and therefore, presumably, memories would be less clear as to whom they belonged. If the former is intended, this then leads to complications. What is the property position regarding household goods prior to legal cohabitation? Are they in the outright ownership of one or other of the prospective cohabitants?³⁷ Does the position change once legal cohabitation has been established so that the presumption of common property is backdated? If the presumption of common property is to be backdated, should each prospective cohabitant be regarded as a quasi-trustee for the other against the prospect of this happening or is their relationship to the property more like that of a *mortis causa* donee, subject to an obligation to take no action which might be detrimental to the position of the prospective cohabitant co-owner? These issues may not be of great importance during the cohabitation, but may be important after it ends where it is sought to establish what was to be presumed to be common property.

A final doubt is how easy it will be to rebut the presumption: for example will it be overcome by producing a receipt showing who purchased the property? That the presumption can be overcome in this way is implied by the normal rules of property law in which ownership vests in the purchaser. Yet making the presumption so easily rebuttable is difficult to square with the suggestion that:³⁸

The justification for this is that cohabitants, as much as married couples, set up home with a range of possessions for the use of themselves and any children as part of the same household.

36 See Scottish Law Commission, Report on *Family Law* (n 1) para 16.9. One function of the presumption was to resolve disputes when proof of actual ownership was lacking (especially where purchase took place a long time prior to the dispute arising).

37 Professor Kenneth Reid has suggested to us that, in the absence of the statutory provision, the common law would apply and, since this implies ownership from possession, there would be presumptive common ownership of all moveable property arising from the shared possession of the cohabitants. Of course, as Reid points out, this does not help to resolve ownership after the end of a relationship as, when possession is lost, so is presumed ownership. In fact we are not convinced that the presumption does apply here or operate in this way – no such presumption seemed to arise in the case of marriage (*Harper v Adair* 1945 JC 21) and the consequences of applying it in cohabitation are unattractive. It would apply to all cases of cohabitation (and include children) and extend beyond household goods to all property in the shared home (though this would depend on the answer to another question which Reid's suggestion raises: what type of possession is required for ownership to be presumed). Space does not permit a fuller discussion here and our point is simply to highlight some of the uncertainties arising from the statutory provision.

38 Scottish Executive, *Family Matters* (n 4) 29.

Alternatively, should account be taken of whether the decision to purchase was a joint one (which might, of course, be evidence tending to support the existence of cohabitation in the first place)? In the case of marriage, the presumption of co-ownership is not rebutted “by reason only that while the parties were married and living together the goods in question were purchased from a third party alone or by both in unequal shares”.³⁹ This provision is omitted from the legislation on cohabitants on the basis that it “risks imposing co-ownership on them contrary to their wishes.”⁴⁰ Yet in the context of marriage, the Scottish Law Commission pointed to the artificiality of allocating ownership to one or other spouse where which spouse purchases what may be purely contingent and the decision on purchase has in fact been a joint one;⁴¹ and there seems no good reason why the same consideration should not apply in the case of cohabitation. As it is, the provision’s absence puts pressure on what section 26 means when it applies the presumption to household goods “acquired” during cohabitation.

(b) Financial provision on termination otherwise than by death

Section 28 allows a possible claim for financial provision where parties cease to cohabit.⁴² One source of difficulty is the need to establish cohabitation in the first place. Another is that it is not entirely clear how courts will interpret the criteria they are given. As we discuss below in the context of the aim of protecting the vulnerable,⁴³ there seems to be a tension between the largely backward-looking intentions of the Executive and the requirement to take into account possible disadvantage in terms of earning capacity (including, it must be assumed, *future* earning capacity). In addition, it is not clear what factors will have to be taken into account in determining the “economic burden” of childcare. Is this to be restricted to actual costs or should it take account of the broader economic disadvantages of childcare such as present and future impact on earning capacity? It is also worth noting Thomson’s comment on the provision of the Family Law (Scotland) Act 1985 on which section 28 is based, that “claims under this principle are particularly difficult to quantify.”⁴⁴

39 Family Law (Scotland) Act 1985 s 25(2).

40 Report on *Family Law* (n 1) para 16.9; though this may be difficult to square with the Scottish Executive view set out in the quotation accompanying n 38.

41 Scottish Law Commission, Consultative Memorandum on *Matrimonial Property* (Scot Law Com CM No 57, 1983) para 6.3; Scottish Law Commission, Report on *Matrimonial Property* (Scot Law Com No 86, 1984) para 4.6.

42 See B.(2) above.

43 See C.(2) below.

44 J M Thomson, *Family Law in Scotland*, 5th edn (2006) para 7.17.

(c) *Financial provision on death*

Financial provision on death is regulated by section 29.⁴⁵ Again, the difficulty here is in establishing the existence of cohabitation, especially when the process by which this is to be done is not clear. A practical issue is the administration of the estate. Presumably the executor will have to await the conclusion of any proceedings under section 29; but will the executor also have to wait six months from the date of death to see if such a claim is forthcoming in the first place?

The factors to be taken into account by the court in determining applications under section 29⁴⁶ give little practical guidance on how the value of any award is to be assessed, especially as the court can take into account “any other matter it considers appropriate”.⁴⁷ The suggestion in section 29(4) that any award made can be no greater than that to which a spouse or civil partner would be entitled provides little further assistance. Indeed, it may complicate matters further if it is taken as a presumptive figure from which deductions are to be made to take account of the factors set out in section 29(3).⁴⁸ In addition, it seems reasonable to envisage that, assuming cohabitation is established and the estate sufficiently large, the onus will shift to the defender to show why the surviving cohabitant should *not* receive the same provision as a surviving spouse. Aside from financial provision on divorce (where the guidelines are much fuller and clearer, operating from an initial presumption), this sort of discretionary entitlement has never been a feature of Scots law and it is difficult to see how it contributes to legal certainty.

Of course, as the Scottish Law Commission indicated, uncertainty may be the price which has to be paid for a system flexible enough to cope with widely differing circumstances:⁴⁹

Where, as in the case of a spouse, there is a choice between a system of fixed rights and a system of discretionary provision the advantages of a system of fixed rights appear to us to outweigh the advantages of a discretionary system. Where, however, the relationship giving rise to the claim is of a *less certain character* and where, accordingly, the choice may have to be between a system of discretionary provision and no provision at all, we think that the disadvantages of a discretionary system are tolerable.

This conclusion represented a reversal of the position taken in the Commission's earlier Report on *Succession*⁵⁰ and was based on changes in the views of some of

⁴⁵ See B.(3) above.

⁴⁶ Family Law (Scotland) Act s 29(3). Compare these with the factors suggested in Scottish Law Commission, Report on *Family Law* (n 1) para.16.33, and with those in the (English) Inheritance (Provision for Family and Dependents) Act 1975 s 3.

⁴⁷ FL(S)A 2006 s 29(3)(d).

⁴⁸ As a technical matter, it is not clear whether the sum paid to the surviving cohabitant is to be drawn from heritage or moveables or whether it is to be apportioned between them, though in practical terms this may make little difference.

⁴⁹ Report on *Family Law* (n 1) para 16.29, emphasis added.

⁵⁰ Scottish Law Commission, Report on *Succession* (Scot Law Com No 124, 1990) paras 3.2-3.7.

those consulted, and on the suggestion that existing discretionary systems worked well enough in practice.⁵¹ The emphasis on the relationship being of a “less certain character” is understandable in the context of the Commission’s original proposals, which would have involved the court having to consider factors such as the length of the relationship, whether there were any children, and so on.⁵² However, it cannot function as a justification in the scheme ultimately adopted by the Executive.

(2) Protection of the vulnerable

As already mentioned, a declared purpose of the reform was the protection of the vulnerable. It is not always clear who is to fall into this group. In some of the discussion that took place during the legislative process, reference was made to legal vulnerability, suggesting that the issue was mainly one of a disadvantageous comparison with married couples.⁵³ In other discussions, however, vulnerability extended to those who might be physically vulnerable because of their exposure to risk and harm,⁵⁴ or to those who might be financially vulnerable when cohabitation came to an end.⁵⁵

In respect of the first of these (legal vulnerability), the legislation goes some way towards conferring rights on cohabitants, as already described. However, given uncertainties over the extent and possible value of these rights, there may be a question as to whether legal vulnerability has been satisfactorily removed.

How the legislation assists physical vulnerability arising from exposure to risk and harm is unconnected with its property provisions⁵⁶ and so beyond the scope of this paper.

The third aspect of vulnerability (financial vulnerability) is not much improved by the new presumption of common ownership in household goods,⁵⁷ for the value of the goods is likely to be low, and the relative ease with which the presumption appears to be rebuttable is a further deficiency. Section 28, allowing for the possibility of financial provision on termination of a relationship, is more important and more effective. But in considering its appropriateness as a method of addressing financial vulnerability, one might ask how far the vulnerability of

51 Report on *Family Law* (n 1) para 16.29.

52 Report on *Family Law* para 16.33.

53 E.g., *Policy Memorandum* (n 19) para 64.

54 Scottish Executive, *Response* (n 23) 14.

55 Scottish Executive, *Response* (n 23) 14; Justice 1 Committee, *8th Report, 2005* (SP Paper 401, available at <http://www.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-08-vol01-01.htm>) para 193; *Explanatory Notes* to the Family Law (Scotland) Act 2006, para 44.

56 Except insofar as it is related to poverty.

57 Family Law (Scotland) Act 2006 s 26.

female cohabitants is structural, that is, the product of the overall economic and legal structure of society. If the problems are structural, then there is at least a question as to whether it is appropriate or effective to try to achieve redistribution of wealth in the individualised context of two cohabitants.⁵⁸

While, however, the purpose of section 28 was, presumably, to address any vulnerability which flows from the existence of the relationship, this is not captured clearly by the statutory requirement to weigh up economic advantages and disadvantages. Nor is it clear what the main focus of the assessment of a claim should be. The discussion in Parliament seemed to envisage that the assessment would be mainly backward-looking, in other words trying to assess the contributions and benefits given and received during the relationship.⁵⁹ This suggests a very limited approach, involving the comparison of contributions which are not really commensurate and where there is a historical tendency to undervalue certain types of contribution, for example the home-making contribution of the female partner. It is also possible that, as has happened in the past, disadvantages suffered during the relationship might be regarded as already compensated for by provision made at the time.⁶⁰

The exception to this essentially backward-looking assessment is the requirement to consider, as part of the disadvantage suffered, the effect on the applicant's earning capacity.⁶¹ This captures an aspect of relationship breakdown which has been regarded by some commentators as the most significant potential effect of a relationship as far as the female partner is concerned.⁶² It is also a detriment which will long outlast the relationship and will require a forward-looking assessment before any claim is determined. As Parkinson notes:⁶³

[O]n separation, one partner leaves with his earning capacity intact while the other's earning capacity is not only hindered for as long as the children continue to live with her, but is impaired in the long term by the effects on her earning capacity of years of withdrawal from the workforce, or occupation in jobs which are most compatible with her child-rearing responsibilities.

58 On structural inequalities in employment see R Berthoud and M Blekesaune, "Persistent employment disadvantage, 1974 to 2003", Institute for Social and Exonomic Research, Working Paper 2006-9. See also C J Frantz and H Dagan, "Properties of marriage" (2004) 104 Colum L Rev 75 noting (at 94) that "marital property law cannot completely free women from gender subordination", but arguing that it can make a contribution.

59 See, for example, Scottish Executive, *Response* (n 23) 17, and the comments of Margaret Mitchell MSP during Stage 2 of the parliamentary process (Scottish Parliament, *Official Report*, Justice 1 Committee, col 2360 (23 Nov 2005)): "The bill seeks to ensure that, in the case of dispute, [cohabitants] have a right to get out of a relationship in financial terms what they put into it and no more."

60 See L Edwards and A Griffiths, *Family Law*, 2nd edn (2006) para 13.64.

61 Family Law (Scotland) Act 2006 s 28(9).

62 E.g., P Parkinson, "The property rights of cohabitantes – is statutory reform the answer?", in A Bainham and D Pearl (eds), *Frontiers of Family Law*, 2nd edn (1995) 301 at 314.

63 Parkinson at 315. This will continue, of course, after retirement in a reduced pension entitlement.

No guidance is given on the relationship between the different parts of the assessment or on the process or basis for calculating effects on earning capacity. It remains unclear how the courts will apply the criteria for assessing whether any payment should be made and, if so, what size it should be. Of particular interest is how much they will focus on past contributions and how much on the forward-looking consequences of effects on earning capacity. The main focus should be on the second, as being the principal form of disadvantage suffered by women at the end of a relationship. But cases will vary, thus highlighting the difficulty of addressing issues of economic vulnerability by means of a criterion of relative economic disadvantage. Obviously, the success of an application under section 28 will be dependent on the availability of resources on the part of the former partner. This means that in many (possibly most) cases there may be little point in making a claim at all, with the result that objective financial vulnerability will remain without a remedy. It seems worth adding that whereas windfall gains are available for distribution on divorce, financial “compensation” for cohabitants is limited to a sort of net loss or gain

The final means employed of addressing financial vulnerability is the provision in section 29 for a claim to be made on the intestate estate of a deceased cohabitant. This has limitations, the most obvious being that it applies only in the case of intestacy (total or partial), and is limited by any claims available to a surviving spouse of the deceased. Why this is the case is not entirely clear. As noted below, there seems to be general support for such a claim even in cases where a will is left and where there is a surviving spouse,⁶⁴ and the original Scottish Law Commission proposal was for the right to be exercisable in all cases and not restricted to intestacy.⁶⁵ Quite why this proposal – which also appeared in the Scottish Executive Consultation Paper, *Family Matters*⁶⁶ – came to be limited to intestacy is not entirely clear, though comments made by a civil servant at a meeting of the Justice 1 Committee suggest two reasons.⁶⁷ One was to preserve a clear distinction between marriage and cohabitation; the other was the review of succession law being undertaken by the Scottish Law Commission. Both are slightly disingenuous: the first because the discretionary nature of the claim already distinguishes surviving cohabitants from surviving spouses, the second because the existence of a review in an area of proposed legislation is not always seen by the Executive as an impediment to legislation which it considers necessary or desirable.⁶⁸

64 See notes 74 and 77 below and associated text.

65 Report on *Family Law* (n 1) paras 16.24-16.37.

66 Scottish Executive, *Family Matters* (n 4) 30.

67 Scottish Parliament, *Official Report*, Justice 1 Committee, cols 1636-1637 (16 March 2005).

68 Compare, for example, s 15 of the Management of Offenders etc (Scotland) Act 2005 with the points made regarding it in the letter from the Sentencing Commission for Scotland dated 10 June 2005, available at: <http://www.scottishsentencingcommission.gov.uk/docs/Options%20Paper%20Response.pdf>.

(3) Protection of children

A further purpose of the reform was the protection of children. Some financial protection is given by section 28 of the Act in the form of the possibility of making an application for an award to cover the economic burden of childcare after the ending of the cohabitation.⁶⁹ This, however, is subject to two limitations. The first is that before any payment can be claimed it will be necessary to establish the existence of cohabitation, and it will not be all instances of living together and producing or accepting a child that will be classified as cohabitation for the purposes of the Act.⁷⁰ The second is that it will be dependant on the availability of resources on the part of the person from whom the payment is sought.

While those accepted as a child of the family are, potentially at least, advantaged by the provisions of section 28 if the relationship between the parties terminates during both their lives, the children of a deceased and intestate cohabitant are potentially disadvantaged by section 29 in that their right to claim legitim and a share in the intestate estate may be displaced entirely by a discretionary award made to a surviving cohabitant. In part, this seems to reflect the view of the Scottish Law Commission that it may be difficult to justify legal rights for children when most children will be mature by the time any claim comes to be made and will not be in financial need.⁷¹ Whether this is either true or relevant seems open to question. For example, it is far from clear that the justification for legal rights for children has ever been the needs of those children.⁷² Be that as it may, however, the possible exclusion of children by an award to a surviving cohabitant amounts to preferring the common life of partners to the common life of children and parents,⁷³ albeit that the rationale is not clearly articulated, far less justified.

(4) Demographic change

There has been a significant increase in the number of cohabiting couples in Scotland. There is also evidence of considerable misunderstanding on the part of the general public as to the legal position of cohabiting couples. For example, a

69 Family Law (Scotland) Act 2006 s 28(2)(b). This seems to indicate a lack of trust in the Child Support Agency: see Scottish Law Commission, Report on *Family Law* (n 1) para 16.16.

70 This is consistent with the view expressed by the Scottish Law Commission that the justification for a claim lay in the "breakdown of a family situation of some commitment and stability" rather than the mere birth of a child: see Discussion Paper on *The Effects of Cohabitation in Private Law* (Scot Law Com DP No 86, 1990) para 5.17.

71 Report on *Succession* (Scot Law Com No 124, 1990) paras 3.8-3.12. This appears to remain the Commission's view in its current review of the law of succession.

72 On one view, legal rights ought properly to be regarded as a debt due from the estate, with the claims of children arising from the community of family property. See also J C Gardner, *The Origin and Nature of the Legal Rights of Spouses and Children in the Scottish Law of Succession* (1928).

73 The notion of "common life" comes from Scottish Executive, *Response* (n 23) 16.

recent survey showed that 22% of those surveyed thought that, after a long period of cohabitation, cohabitants had the same rights to financial support as married couples.⁷⁴ It is worth noting, however, that this lack of understanding seems to be diminishing: in 2000 as many as 35% of respondents shared the same mistaken view.⁷⁵ In terms of attitudes towards the rights that cohabiting couples should have in relation to each other's property, there is some support (40% of respondents) for the proposition that cohabiting couples should have rights to financial provision, and very strong support (91% of respondents) for the suggestion that, where one partner dies intestate leaving a house in his or her name, a cohabitant should have the same rights to keep the house as if he or she were married.⁷⁶ There is also strong support for a right of a cohabitant to claim from the estate of a predeceasing partner, even where there is a will or a surviving spouse.⁷⁷

A persistent divergence exists between commonly-held beliefs about the law and the law itself. Common belief seems in many cases to be impervious to legal reality, even where this legal reality is of long or relatively long standing. Two examples illustrate the point. It has *never* been the case in Scotland that unmarried fathers have parental responsibilities and rights⁷⁸ in respect of their children. Nonetheless, 34% of those surveyed in 2004 considered that an unmarried father had the same rights to take decisions about medical treatment as a married father.⁷⁹ Another example – taken this time from England – is the persistence of belief in the existence of “common law marriage” despite its abolition in that jurisdiction in 1753.⁸⁰ Whether the changes introduced by the 2006 Act will result in members of the public holding more accurate opinions on the state of the law remains to be seen, but this evidence is not encouraging. Indeed it might be argued that the legislation will simply make matters worse, with people being unable to distinguish between the rights provided by the 2006 Act and those inhering in married couples and civil partners.

74 F Wasoff and C Martin, *Scottish Social Attitudes Survey 2004 Family Module Report* (2005; available at <http://www.scotland.gov.uk/Publications/2005/08/02131208/12092>) table 2.4. The misunderstandings do not all concern cohabitants: 26% of those asked thought that married couples had no right to financial support (table 2.2).

75 Scottish Executive, *Family Matters* (n 4) 25.

76 Wasoff & Martin, *Scottish Social Attitudes Survey 2004* (n 74) tables 2.3 and 2.7.

77 In both cases the proposition was supported by 81% of respondents: Scottish Executive, *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey* (2005, available at <http://www.scotland.gov.uk/Publications/2005/07/18151328/13297>) figures 13 and 14.

78 Previously parental rights.

79 Wasoff & Martin, *Scottish Social Attitudes Survey 2004* (n 74) table 2.10. In fact the question was not a very good one as respondents with a thorough knowledge of the law might have had s 5 of the Children (Scotland) Act 1995 in mind.

80 S Duncan, A Barlow and G James, “Why don't they marry? Cohabitation, commitment and DIY marriage” (2005) 17 *Child and Family Law Quarterly* 383.

On the other hand, if the legal consequences that distinguish marriage and civil partnership from cohabitation came to be understood by the general public, any support for maintaining them might fall away. For if there is no very clear line between registered and non-registered relationships, what, it might be asked, is the purpose of having a line at all? The basis for the public support called in aid of the present limited reforms could very well be transformed into a public perception that, in the absence of any opt-out provision for those who do not wish to be subject to the 2006 Act and no very clear reason for making the distinction, no distinction ought to be made. The logical extension of this view is that no legal consequences should follow from marriage or cohabitation, or alternatively that all cohabiting relationships, whether registered or not, should be subject to an identical regime of legal rights and responsibilities.

D. COHABITATION, MARRIAGE AND PARTNERSHIP

Some of the difficulties of interpretation discussed above derive from a lack of clarity in formulating the underlying rationale for the cohabitation reforms incorporated in the 2006 Act. There are three questions which are not satisfactorily answered: why give cohabitants rights in the first place? what sort of rights should they have? and why should there be a distinction between the position of cohabitants and that of spouses?

Some commentators have argued that cohabitation is functionally identical to marriage (at least where children are involved):⁸¹

namely a joint enterprise principally of sexual intimacy, companionship, emotional and financial support, home making and child bearing and rearing, which is helpful to society as a whole...

Arguments of this kind are neither uncontroversial nor clear,⁸² and may conceal variations within cohabitation relationships and marriages. In addition, these arguments often seem to focus, as in the quotation above, on the existence of children, which might lead one to suggest that the distinction should not be between spouses and cohabitants but between parents and others.⁸³ Even if we accept the arguments about functional and other similarities, it does not follow that cohabitants should be treated in the same way as spouses – as opposed to

81 A Barlow and G James, "Regulating marriage and cohabitation in 21st century Britain" (2004) 67 MLR 143 at 153. Also J Eekelaar and M Maclean, "Marriage and the moral basis of personal relationships" (2004) 31 *Journal of Law and Society* 510 at 538.

82 See, for example, the differences in financial relationships discussed by Vogel (n 31), the evidence cited by P Parkinson, "Quantifying the homemaker contribution" (2003) 31 *Federal Law Review* 1 at 12, and the views of cohabitants reported by Duncan, Barlow & James (n 80).

83 Parkinson (n 82) at 13.

changing the way in which spouses are treated to take into account the sorts of factors which are brought into play when considering the entitlement of cohabitants. In other words, the arguments beg the more general question of the basis of entitlement to a financial settlement arising out of the existence and subsequent termination of a relationship. Again, in the background to the 2006 Act there is little consideration of this issue aside from general references to fairness; yet the reasons for conferring rights clearly influence what rights are actually conferred and how these are formulated and put into practice.

Commentators have suggested a variety of possible rationales, such as the existence of a relationship between the parties,⁸⁴ the existence of a sexual relationship, marriage, parenthood, intention, contribution, reliance, partnership and need.⁸⁵ Each presents difficulties. Intuitively it may be difficult, for example, to see the justification for compensation for the termination of a sexual relationship or the failure of intimacy. Similarly, it is difficult to see how, in themselves, other factors (such as the fact of marriage or parenthood) justify a compensatory award, and difficult to apply the justifications in practice. How, for example, should contributions be assessed, especially where their nature is radically different? Importing the concept of compensation into a relationship may be artificial and give rise to difficulties such as those experienced in the concept of implied intention and the nature of reliance within a relationship in English trust law.⁸⁶ In the end the compensatory argument usually seems to resolve itself into a notion of compensation for the economic detriment suffered by one of the parties as a result of the relationship.⁸⁷ This is captured by Mee who argues that the justification for legislating in this area lies in:⁸⁸

the state's interest in avoiding injustice upon the termination of a relationship where the parties were economically and emotionally interdependent and relied on the relationship rather than their separate legal entitlements to secure their financial well-being.

Conferring property rights on cohabitants might also be justified by the sorts of arguments which are traditionally invoked to justify property rights and particular allocations of private property.⁸⁹ So, for example, a property right might be based on labour (or more broadly, overall contribution to the partnership), desert,

84 In some cases defined widely so as to include rights for carers: e.g. the Property (Relationships) Act 1984 (NSW).

85 Parkinson (n 82). Intention and reliance have been important matters in determining the existence of constructive trusts in English law: see Law Commission, *Sharing Homes: A Discussion Paper* (Law Com No 278, 2002) part II.

86 See for example the discussion in Law Commission, *Sharing Homes* part II.

87 See Parkinson (n 62); J Mee, "Property rights and personal relationships: reflections on reform" (2004) 24 *Legal Studies* 414.

88 Mee (n 87) at 426.

89 See J W Harris, "Doctrine, justice and home-sharing" (1999) 19 OJLS 421.

contract (express or implied), or general considerations of distributive justice. Some of these are attended with difficulty. For example, assessing labour faces the same problems as apply to assessment of contribution in the compensatory approach, and there is scope for discussion and disagreement as to the basis of desert.⁹⁰

Whatever the rationale for compensation, there remains the issue of how such compensation is to be assessed. Two possible approaches have been identified.⁹¹ One focuses on compensation for loss, for example in respect of any financial contribution made to property used in the cohabitation as well as for the value of economic detriment. The other views the cohabitants as economic partners and looks at the whole wealth of the cohabitation with a view to reaching a fair sharing of assets. Clearly, the outcome produced by such approaches may often be different. Take, for instance, the case of a cohabitation lasting 25 years where the home was, and remained, in the name of one partner and was improved by him or her out of income, while the other partner limited his or her participation in the workforce in order to look after children who are now grown-up. Adopting a contribution approach would focus on financial and other contributions made as well as possible economic advantage or disadvantage. A partnership approach would take a broader view and focus on the value of partnership assets, which could for these purposes be regarded as including the house where much of the increase in value is likely to have taken place.

Given the similarities between marriage and cohabitation, the more fundamental question of why spouses and cohabitants should be dealt with differently is not made clear either by the Executive or by the Scottish Law Commission. There seems to be an underlying assumption that marriage is in some way distinctive; but, aside from the fact that some formal process has been undergone, it is difficult to extract what the differences are supposed to be. The priority given to marriage is made more difficult to understand by the comment of the Deputy Justice Minister that the 2006 Act is not designed to promote marriage;⁹² yet if marriage is not worth promoting, it is unclear why it should remain distinctive and confer far greater rights to property than cohabitation. To this there are a variety of possible answers. One is that when a couple marry (or enter into a

90 There is a vast literature on the justifications of property, and it would be impossible to cite even the most important sources here. For an overview of the arguments, see, for example: J Waldron, *The Right of Private Property* (1998); J W Harris, *Property and Justice* (1996).

91 See Parkinson (n 62) at 308-310; Mee (n 87) at 435-443. The view adopted may be related to the more fundamental issue of how families are regarded: see, for example, M Minow and M L Shanley, "Relational rights and responsibilities: revisioning the family in liberal political theory and law" (1996) 11 *Hypatia* 4.

92 Scottish Parliament, *Official Report*, Justice 1 Committee, col 2370 (23 Nov 2005).

civil partnership) they take a deliberate decision in the knowledge of the legal consequences. As we have seen, however, it appears that the public grasp of these legal consequences is at least as vague as the grasp of the legal consequences of cohabitation.⁹³ In addition, marriage, like cohabitation,⁹⁴ is likely to be entered into for reasons unconnected with legally conferred rights. Furthermore, the law has already intervened to confer rights on cohabitants and otherwise treat them in the same or a similar way to spouses. Examples of the former include occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and rights to inherit tenancies both in the public and private sectors.⁹⁵ Examples of the latter include the benefits and tax systems.⁹⁶ Thus the suggestion that there is some basic policy that couples should not acquire rights and responsibilities without some overt commitment is flawed, and no convincing case is made for distinguishing rights on separation and death from other types of rights which cohabitants already have.

We offer no view here as to which of these rationales should be adopted,⁹⁷ but merely point out that different rationales can bring about different outcomes. For example, the justification of the 2006 Act as protecting the vulnerable suffers, perhaps fatally, from the difficulty of defining the precise nature of the vulnerability and how it is to be assessed. What this justification does raise, however, is the question of whether the problem which the 2006 Act (and other legislation in the same area) is seeking to address involves broader social issues. One such issue is the relative economic position of men and women as a consequence of either direct or indirect discrimination. For example, part-time work during childcare may have a continuing adverse effect on economic prospects. Another issue arises from the fact that many of those who cohabit and have children are economically vulnerable (although not as a result of the cohabitation).⁹⁸ In such cases, the partner is unlikely to be able to ameliorate the position on termination of the relationship as that partner too will be economically vulnerable. In both of these cases one might ask whether a remedy which focuses on individual applicants at the end of individual relationships is either an appropriate or an effective method of proceeding.

One of the reasons for not making more far-reaching provision in the case of

93 See n 74 above.

94 See, for example, Scottish Executive, *Family Matters* (n 4) 25.

95 Rent (Scotland) Act 1984 s 3A, Sch 1A; Housing (Scotland) Act 1988 ss 31, 42; Housing (Scotland) Act 2001 s 22.

96 For example, a cohabitating couple are treated as husband and wife or civil partners for the purposes of entitlement to job seekers allowance: Jobseekers Act 1995 s 3.

97 We intend to return to this in a future article.

98 See C Smart and P Stevens, *Cohabitation Breakdown* (2000).

cohabitants was the desire to avoid infringing personal autonomy.⁹⁹ What is not specifically addressed is how this conclusion is consistent with the considerable intervention into the lives of cohabitants which existed prior to the Act (and is noted above) or why any particular point is the correct point for state intervention to end. Also lacking is any real consideration of whether broader social concerns about justice, redistribution or vulnerability justify a greater degree of intervention than that effected by the Act. It is true that many couples enter cohabitation with the deliberate intention of avoiding the financial consequences of marriage, but the question is whether the needs of this group are adequately addressed by the possibility of opting-out of the legal regime set out in legislation. One might argue that this group is more likely to be aware of the consequences of cohabitation and take the appropriate steps to avoid them than the sizeable group who believe that cohabitation produces more rights than it actually does. In other words, the provisions of the Act go too far for those who most value personal autonomy but not far enough for those who think that cohabitants already have more rights than they actually do. While the former may choose to opt-out of the provisions of the Act by contractual agreement (although separate problems may arise if such agreements were to be tested in the court), the latter may find themselves disappointed by the relative weakness of the provisions.

There are also further difficulties regarding the coherence of the project. Despite the claims made by the Scottish Executive as to flexibility, the provisions of the 2006 Act treat cohabitation as if it were a category with clear boundaries and a substantial core of meaning shared by all cohabitants. There is considerable evidence that this is not the case. Recent research has shown that the reasons given by cohabitants for not marrying fall into four broad categories. First, there are those who believe that cohabitation carries the same legal consequences as marriage (the so-called “myth” of common-law marriage). Secondly, there are those who wish to distinguish emotional from financial commitment and believe that the avoidance of legal consequences renders their relationship more “pure”. Thirdly, there are those who see themselves as being “as good as married” and do not see any need for a formal ceremony unless accompanied by lavish and expensive celebration at some later date. Lastly, there are those who actively wish to avoid marriage either as a manifestation of patriarchy or as a result of personal

99 See, for example, Scottish Executive, *Family Matters* (n 4) 27 (referring to a “need to avoid undue Government intervention in private lives”); Scottish Law Commission, Report on *Family Law* (n 1) para 16.15 (“We do not favour a comprehensive system of financial provision on termination of a cohabitation comparable to the system of financial provision on divorce in the Family Law (Scotland) Act 1985. That would be to impose a regime of property sharing, and in some cases continuing financial support, on couples who may well have opted for cohabitation in order to avoid such consequences.”)

disillusionment.¹⁰⁰ Given these differences, the question of why and in what form legal intervention may be justified becomes particularly important. How relevant are individual motives, and how (if at all) can they be taken into account in legislation?

The issue of personal autonomy also raises the question of whether and to what extent it should be possible to contract out of legislation. The position appears to be that parties are free to enter into their own agreements about the financial consequences of cohabitation, including an agreement to opt out of the statutory provisions – although the Scottish Law Commission’s proposal to make this explicit in the Act was not taken up.¹⁰¹ It will be interesting to see whether such agreements are common, as well as how they are regarded by the courts. For example, in view of possible inequalities in power, will the courts require that cohabitants have had access to legal advice before renouncing a claim?¹⁰²

E. CONCLUSION

The provisions on cohabitants in the Family Law (Scotland) Act 2006 raise a number of issues. The policy reflected in the Act as passed reflects only confusion about where boundaries between personal choice, public policy and the role of the courts are to be placed and how conflicts between them are to be reconciled. We have sought to explore the meaning and coherence of the rationales put forward by the Scottish Executive in introducing the legislation and we conclude that neither the rationales themselves nor their meanings are clear. The “firm statutory foundation” that the Executive sought to provide has not, we think, been achieved. While aiming to provide remedial measures to rectify injustices experienced by cohabitants, the provisions of the Act have exposed a series of complex questions relating to the nature of intimate relationships, the expectations of the parties, and the relationship between property rights and affective ties. Unsurprisingly, all of these are manifested in the incoherence of the property rules set out in the 2006 Act. Furthermore, the broader justifications for making financial or property provision in this context are deserving of more consideration from a Scottish perspective. Fuller consideration is also needed as to how these – or indeed the rationales put forward by the Scottish Executive – might be implemented.¹⁰³

100 E.g. Duncan, Barlow & James (n 80).

101 Report on *Family Law* (n 1) para 16.46.

102 On the model of the approach taken to standard securities granted by a spouse for the other spouse’s business, though this protection is now very limited: see, for example, *Royal Bank of Scotland plc v Wilson* 2004 SC 153. See also the proposal made in Barlow & James (n 81) at 174-175.

103 Some of the discussion in other jurisdictions seems to be influenced by the fact that cohabitants may

The legislation throws up a number of other, practical, issues which are worthy of more detailed consideration and investigation. How will the courts interpret the provisions of the Act – will they, for example, adopt a contribution or a partnership approach? Will there be changes in the practice of cohabiting couples in making their own arrangements for financial provision, and what impact will this have on public understanding? How will the reform of the law of succession develop and will it reflect the implicit bias in the 2006 Act away from children and towards partners? If so, how should we account for this? Will the statute book be clearer or will the giving of rights, which in some respects are analogues of those enjoyed by spouses, further muddy the waters? In relation to marriage and marriage-like relationships, the Act has raised more questions than it has answered and, perhaps unwittingly, may even have succeeded in undermining the very project which it sought to promote.

It is clear that these questions require further research, both theoretically and empirically. It is also clear that they may become more fully understood over the course of time, if and when litigation reaches the courts and if and when the law of succession has been reformed. We have hoped to highlight some of the relevant questions and to signpost areas of fruitful research for the future.

be able to acquire a beneficial interest in property through a resulting or constructive trust or by the operation of proprietary estoppel.