Cohabitants, unjustified enrichment and law reform (Part 2)

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IV. COHABITATION AND THE FAMILY LAW (SCOTLAND) ACT 2006

In the first part of this article we concentrated on how the common law of unjustified enrichment deals with the breakdown of a cohabitation relationship between two living parties. In this second part we turn to how the matter is treated under section 28 of the Family Law (Scotland) Act 2006 before going on to look at the problems where the relationship is ended by the death of one of the parties. This is dealt with not only by section 29 of the 2006 Act, but also, it is suggested, possibly by unjustified enrichment as a claim against even a testate deceased's estate.

(1) *Defining cohabitants*

Very important for the continuing possibilities of the common law outside the 2006 Act is how that legislation defines cohabitants. It avoids the creation of any sort of new status for cohabitants which might be thought to detract from the institutions of marriage or civil partnership. The parties rather than the relationship receive statutory definition, in section 25. A cohabitant is either member of a couple who are (or were) living together as if they were married to each other, including two people of the same sex who are (or were) neither married nor in civil partnership with each other.[1] The use of the word 'couple' excludes living arrangements involving more than two people (e.g. flat-sharing),[2] although it might well be the case that a couple will be cohabiting while also living with others.[3]

What then is meant by living together as if married or as if civil partners? The Act directs a court determining the question to have regard to three factors: (1) the length of time for which parties live together; (2) the nature of their relationship during that period; and (3) the nature and extent of the financial arrangements subsisting during that period. Sexual relations from the outset within the cohabitation are often thought to be of critical importance.[4] This means that many relationships which involve cohabitation but, generally, not sex (e.g. parent-child, siblings, elderly persons living together for mutual support, live-in carers/housekeepers, flat-sharing) are excluded from the rights under the Act even although there may well be vulnerability and potential for its exploitation.[5]

(2) *Section 28: financial provision upon breakdown*

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[1] This reads s 25 in the interpretive light cast by the Marriage and Civil Partnership (Scotland) Act 2014 s 4.

[2] See L Gordon & J Nobbs, 'Cohabitation: the new legal landscape' (2006) 51(5) *Journal of the Law Society of Scotland* 20; *Lyle v Webster*, unreported, Dunfermline Sheriff Court, 12 February 2018, Sheriff S G Collins QC.

[3] For an example of such arrangements see N Lacey, *A Life of H L A Hart: The Nightmare and the Noble Dream* (2004), chs 4 and 5. Hart lived with Jenifer Williams from 1937 and from 1939 they also shared accommodation with a married couple (the Douglas Jays) and a number of other friends. These arrangements continued until 1945, although Hart and Williams married in 1941.

[4] KMcK Norrie, *Annotations to the Family Law (Scotland) Act 2006 (asp 2)* (2006) 59-60; J Thomson, *Family Law Reform* (2006) paras 2.29-2.30. See also the same author's *Family Law in Scotland* 7 ed (2014), para 8.2. Note however that husband and wife are not obliged to have sexual relations: *consensus non concubitus facit matrimonium*. See recently *In the matter of X (a child)* [2018] EWFC 15.

[5] See for another example *Gutcher v Butcher*, unreported, 23 September 2014, Kirkwall Sheriff Court (Sheriff Principal DCW Pyle).

The rights created for cohabitants specifically by the 2006 Act do not include anything akin to the marital or civil partnership obligations of mutual support. Most of the actual rights are however otherwise modelled on, although by no means exact imitations of, those existing in marriage or civil partnership. Those of principal relevance to the present paper are in sections 28 and 29 of the Act. In this part of the article we concentrate on the former, turning to the latter in Part 2.

Section 28 gives the court discretion to make an order for financial provision between parties whose cohabitation has ended for reasons other than death, including orders for payment of a capital sum by one party to the other. Any application under these provisions must be made within one year of the day on which the parties cease to cohabit.[6] The time limit reflects a conscious desire not to allow too much scope for cohabitation-based claims.

There are also deliberate contrasts with what the court can do in divorce or dissolution of a civil partnership under section 9 of the Family Law (Scotland) Act 1985 (which in other respects provides something of a template for section 28 of the 2006 Act).[7] Section 28 makes no reference to fairness between the parties, unlike section 9. There is no power to order transfers of property such as a house or a pension, as in section 9(1)(a) of the 1985 Act. Nor does section 28 contain any over-arching principle that the net value of the cohabitants' property is to be shared equally.[8] And there is no failsafe provision to protect a cohabitant from serious financial hardship as a result of the break-up of the cohabitation.[9]

It is up to the defender against whom an order is made under section 28 from whence the money to fulfil it comes.[10] The section gives complex formulae by which the amount to be paid is to be worked out. Speaking very broadly, the parties' respective economic advantages from the other's contribution, and the disadvantages suffered in the interests of the other, must be determined and balanced against each other. An economic advantage includes gains in capital, income and earning capacity, and economic disadvantage is to be construed accordingly. A contribution may be financial or non-financial and includes looking after a house and children.

How would these rights have applied in the cohabitation disputes that the courts dealt with under the common law? All those discussed above in this paper centred upon the home in which the parties had lived; no children were involved. Each could now be the subject of a section 28 claim to a capital sum. The court would first examine whether the defender derived economic advantage from contributions made by the applicant, and whether and to what extent the pursuer had suffered economic disadvantage in the interests of the defender.

In *Shilliday v Smith*, F laid out her money on improvements to M's house in which the parties lived together. M's economic advantage lay in not having to pay for the improvements, and the increased value of his house. F was economically disadvantaged by the amount she had spent in M's interest, i.e. on his house. In *Satchwell v McIntosh*, M

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[6] For an example showing the difficulties of assessing when cohabitation ends, see *MB v JB*, unreported, 5 September 2014, Edinburgh Sheriff Court, Sheriff Principal MM Stephen.

[7] Contrast the position in New Zealand where since amendments in 2001 the Property (Relationships) Act 1976 makes financial provision upon separation of *de facto* cohabiting parties identical to the claims arising upon the ending of marriage by divorce or the dissolution of a registered civil union other than by death of one of the parties. See further Norrie, *Commentaries*, 209-213. Note also R Gilmour, 'Section 28 and section 9(1)(b) – how do they relate?' 2013 SLT (News) 265.

[8] 1985 Act s 10(1).

[9] 1985 Act s 9(1)(e).

[10] Norrie, *Annotations*, 68.

claimed to have contributed towards the purchase price of F's house in which they cohabited, and towards the refurbishment of the property; again the economic advantage was the increased value of the house.

In each case the defender's economic advantage, if any, would have to be offset by any economic disadvantage that party had suffered in the interests of the pursuer. Perhaps the easier of the two cases in which to see this as a possibility is *Satchwell*, where F had for a period cared for M while he was suffering from multiple sclerosis. But it is not clear to what extent this involved specifically *economic* disadvantage, unless F laid out money on care, or turned down opportunities to increase earning capacity so as to remain available to M. Otherwise it would have to be seen as a non-financial contribution by F.

Finally, the pursuer's economic disadvantage in the interests of the defender has to be offset by any economic advantage gained by the pursuer thanks to the defender's contribution. In cases where the parties have lived together in a house belonging to only one of them, the obvious advantage gained by the non-owner (as in *Shilliday* and *Satchwell*) is living rent- or mortgage-free in the other's property for the duration of the cohabitation. In *Satchwell*, the pursuer may also have had an economic advantage in not having to pay for domestic care in respect of his multiple sclerosis.

What would not have been necessary in any of this would have been exploration of the questions of the beliefs and purposes with which the parties made their contributions to their cohabitation arrangements. Nor is it relevant to consider whether one party was making a gift of his or her contribution to the other party. Instead, the questions are about both parties' financial and non-financial contributions (including looking after the house), their respective interests, and the resulting economic advantages and disadvantages.

Moreover, since the crucial decision of the UK Supreme Court in *Gow v Grant*,[11] we know that this assessment is not to be a matter of precise calculation seeking to quantify appropriate compensation for any clear economic imbalance resulting from the cohabitation. Instead a 'rough and ready' approach is to be used, reflecting the kinds of imbalance arising out of a non-commercial relationship where parties are quite likely to make contributions or sacrifices without counting the cost or bargaining for a return. In a formulation owing something to the unimplemented recommendations of the English Law Commission's 2007 report on cohabitation, the court is to have regard to where the parties were at the beginning of their cohabitation and where they were at the end.[12] Even although the 2006 Act does not use the word, the overriding principle is one of fairness, not precise economic calculation.[13]

The facts of *Gow v Grant* were that the pursuer (F) had sold her home in order to move in with the defender (M) when the parties were respectively 65 and 59. F had given up work at M's request to look after his house and enjoy their life together. The cohabitation lasted for between four and five years. The sale proceeds were used, not only to fund cruises and the purchase of a painting by the couple, but also to pay off her debts and make a loan to

[11] *Gow v Grant* 2013 SC (UKSC) 1.

[12] *Gow v Grant*, para 40 (Lord Hope of Craighead), 54 (Lady Hale). See further Law Commission Report 307 Cohabitation: The Financial Consequences of Relationship Breakdown (2007).

[13] In developing this approach the court was clearly influenced by the criticisms of the Inner House decision in the case (2011 SC 618) made by Malcolm *et al*, *Cohabitation*, paras 1.08-1.31 (compare Lord Hope's judgment at paras 25-36). One of the co-authors was junior counsel for the appellant in *Gow v Grant*. Note too that in the draft Bill produced by the Scottish Law Commission in its Report on Family Law (Scot Law Com No 135, 1992), Part XVI, there was a provision (clause 36(2)(b)) that an award should be 'fair and reasonable' in all the circumstances of the case.

her adult son. M accordingly argued that F's contribution had been made in her own rather than his interests. The Supreme Court held however that, while the sale proceeds as such should be left out of account in assessing the award, the end result of the cohabitation was that F no longer had a major capital asset or employment, while M still had both. She had therefore lost the benefit of an increase in value of her former home, and in fairness that could be the basis for an award of £39,500.

The Supreme Court thought that, despite the deliberate differentiation of section 28 from section 9 of the 1985 Act in general, there was still something to be learned in the application of the former from the way in which the courts approach or have approached the somewhat similar criteria applied to financial provision on divorce and dissolution of civil partnerships. Under section 9(1)(b) of the 1985 Act, fair account is taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of their family.[14] But as commentators have pointed out, section 9(1)(b) has actually not been much used because the section 9(1)(a) claim to fair sharing of matrimonial or partnership property has tended to obviate the need for further balancing between the parties. There is nothing in the 2006 Act to parallel that provision for cohabitants.[15] As has been observed judicially, the rebuttable presumption at the stage of the dissolution of a marriage or civil partnership is that property will be shared fairly if it is shared equally, but the rebuttable presumption at the end of cohabitation is that each party will retain his or her own property.[16]

Shortly after the 2006 Act came into force, Professor Norrie urged the courts to adopt a broad brush approach and give the provisions teeth.[17] Prior to *Gow v Grant*, this was more or less exactly what the courts tended not to do.[18] But the situation is different now, even if, as observed by one sheriff principal, one is 'left with some unease that too much reliance on the broad approach of fairness runs the risk of doing violence to the terms of S. 28(3)(a).'[19] In *M v S*, for example, a couple separated after almost 20 years of cohabitation. The parties had entered their relationship with the defender (M) having assets worth about £102,000 while the pursuer (F) had assets of approximately £127,500. By the end of the relationship M was worth £5,691,624, while F had assets totalling £1,085,721. Both had therefore increased their wealth significantly during the relationship. F had continued her career but on an 80% basis after the birth of the couple's two children. A nanny was employed to care for them until they went to school. F sought an order for financial provision in respect of two items: one the net increase in value of a farm owned by M (which had been used as the couple's home) brought about by renovations which F had partly funded, minus the capital contributions thereto by M; the other loss of income resulting from her reduction in working hours in the interests of the parties' children but accepting that only half of this should be

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[14] See Thomson, *Family Law*, para 7.17; *Gloag & Henderson*, para 44.31 (at pp 1240-1241) for further detail.
[15] Norrie, *Annotations*, pp 68-69; Thomson, *Family Law*, ch 8.6 (at p 208); Malcolm *et al*, *Cohabitation*, para 1.10.
[16] *F v D* 2009 Fam LR 111, para 7 (Sheriff M G Hendry), quoted approvingly by Lord Hope in *Gow v Grant*, para 32.
[17] Norrie, *Annotations*, 69.
[18] See e.g. *Jamieson v Rodman* 2009 Fam LR 34; *F v D* 2009 Fam LR 111; *M v S* 2008 SLT 871; *Selkirk v Chisholm* 2011 Fam LR 56; *Gow v Grant* 2011 SC 618; *JG v JF*, unreported, April 2011, Falkirk Sheriff Court, Central and Fife at Falkirk, Sheriff T McCartney. But cf *Gow v Grant* 2010 Fam LR 21; *Lindsay v Murphy* 2010 Fam LR 156; *Mitchell v Gibson* 2011 Fam LR 53; *Russo v Scott*, unreported, Hamilton Sheriff Court, 16 December 2011, Sheriff Principal BA Lockhart.
[19] *Smith-Milne v Langler* 2013 Fam LR 58, para 12. This is all the more so when the 2006 Act omits the 'fairness and reasonableness' approach originally recommended by the Scottish Law Commission (above, note 56).

awarded because otherwise the whole economic disadvantage involved would be shifted on to M. Taking the fairness approach set out in *Gow v Grant*, and avoiding making precise mathematical calculations, the court awarded F £912,000.[20] The purpose of section 28, the court also commented, was not the relief of poverty but the redress of any economic disadvantage.[21]

The cases on section 28 tend to emphasise compensation for economic disadvantage rather than the reversal of economic advantage: in other words, loss rather than enrichment is the basis of recovery. Moreover, since *Gow v Grant*, the picture tends to be looked at in the round rather than contribution by contribution as would most probably have to be the case in an enrichment case at common law. Thus, in *M v S*, while F's financial contribution to the renovations of M's farm could probably have been recovered via the CCDCNS or the COCF, it would have been very difficult if not impossible to make any such claim about her loss of income over almost 20 years. Similarly in *Gow v Grant* itself. But while at one level section 28 is easier to understand than the requirements of enrichment law, it cannot be said that the factual inquiry required is any less complex; and the outcome of any balancing exercise remains extremely difficult to predict with confidence.

(3) Claims under section 29 upon death and intestacy of cohabitant

Section 29 of the Act enables the survivor of a deceased intestate cohabitant to make claims to (1) a capital sum payable from the deceased's net intestate estate, and/or (2) the transfer of property, heritable or moveable, from that estate to the survivor. A valid will of the deceased thus prevents any claim being made. Whether or not an order is made is entirely within the discretion of the court. The claim must be made within six months of the death of the deceased cohabitant; another deadline which causes difficulties in practice but to which again the section provides no exceptions. Nor does it provide any guidance on the ends to which the discretion should be exercised, such as meeting the needs of the surviving cohabitant or recognising the contribution that party may have made to the deceased's estate.

The cohabitants must have been living together in Scotland immediately before the death.[22] Further, 'net intestate estate' cannot include immoveable property located outside Scotland.[23] Otherwise it is what remains after payment of inheritance tax, rights having priority over the prior and legal rights of a surviving spouse or civil partner, and, of course, such legal and prior rights themselves. While a surviving cohabitant may thus lose out to a surviving spouse or civil partner, the former can pre-empt the legal rights claim of the deceased's children and their issue, which are not protected against the claim.[24] Finally, the

[20] *M v S* [2017] CSOH 151. See also *Whigham v Owen* [2013] CSOH 29; *Smith-Milne v Langler* 2013 Fam LR 58; *Cameron v Lukes* Glasgow Sheriff Court, 2 December 2013, Sheriff Principal CAL Scott QC; *Saunders v Martin* [2014] Fam LR 86; *Harley v Thompson* unreported, September 2014, Livingston Sheriff Court, Sheriff PGL Hammond); *W v M* 2016 SLT (Sh Ct) 14; *Melvin v Christie* [2016] CSIH 43 (First Division); *Jackson v Burns*, Falkirk Sheriff Court, 12 February 2018, Sheriff SG Collins QC.

[21] *M v S,* para 144.

[22] A period in hospital or a care or nursing home before death, rather than under the same roof as the surviving cohabitant, would probably not defeat the survivor's claim, despite the use of the word 'immediately' in the Act: Thomson, *Family Law*, para 8.7 (p 210); Norrie, *Annotations*, 75.

[23] *Kerr v Mangan* 2015 SC 17.

[24] Norrie, *Annotations*, 76-77; Thomson, *Family Law*, para 8.7 (p 211). For an enrichment case involving a dispute between a surviving cohabitant and the child of the deceased cohabitant and his widow (from whom he had never been divorced) see *Christie's Executor v Armstrong* 1996 SLT 948.

amount to be awarded to the surviving cohabitant must not exceed what that person would have received as a surviving spouse or civil partner.[25]

The section 29 claim on intestacy of a deceased cohabitant is revolutionary in Scots law, inasmuch as it confers a very wide discretion upon a court to interfere with the usually fairly rigid rules of intestate succession in the interests of a party with no other claim under these rules. In the few cases that have arisen, however, the courts have tended to exercise their discretion narrowly,[26] and it has been held in the Inner House of the Court of Session that the overall fairness approach set out in *Gow v Grant* for section 28 cases has no application in section 29 cases.[27] But on at least one occasion the court was able to arrive at what appears to be a humane and fair outcome in a difficult case. In *Windram v Giacopazzi's Executrix*,[28] the cohabitation lasted 24 years, producing two children, aged 15 and 9 at the time of the case. The couple's home was owned by the intestate deceased cohabitant (M), although subject to a mortgage. M had also owned a business. The surviving cohabitant (F) cared for the children and the home, worked part-time, and occasionally assisted in M's business. The couple pooled their income but had only one asset in joint names (an insurance policy in favour of their son). M had a pension fund of £25,451 which on his death from an aggressive cancer aged 46 was payable directly to F and did not form part of his estate. When they learned the cancer was inoperable, the couple planned to marry but were not given the time to put these plans into effect, or for M to draw up a will. He died just three days later.

Under the Succession (Scotland) Act 1964 the children were entitled to M's whole estate. As the children's guardian, however, F was appointed as executrix-dative to M's estate, and then raised an action in her own right but in effect against herself as executrix to claim a share of the estate. An independent curator *ad litem* was appointed to represent the children's interest. As the sheriff pointed out in her judgment—

> Had the deceased been survived by a spouse, that spouse would have been entitled to prior rights consisting of the deceased's interest in the house … subject to the secured loan by the Bank of Scotland, the furniture and plenishings in said house, and the sum of £42,000 ... A surviving spouse would also have been entitled to receive legal rights from the moveable estate, which in this case, following payment of the sum due as a prior right, would have amounted to just over £3,000.[29]

The sheriff made an order for the transfer of the house to F, with the loan secured over it to be repaid with the pension lump sum paid to F plus cash payments from the estate. A sum was also to be paid over from the estate to meet repairs and maintenance of the house. It was noted that in total this was about £11 000 less than F would have received as a surviving spouse, while still leaving £148 500 in the estate. This meant that after expenses had been met each child would still receive £70 000. The humanity of the decision lies in the sheriff's obvious trust, presumably formed from impressions gained in the course of proceedings, that F would in due course pass her share of the estate on to the children. The sheriff's decision in

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[25] 2006 Act, s 29(4).
[26] *Savage v Purches* 2009 SLT (Sh Ct) 36; *Chebotareva v King's Executrix* 2009 Fam LR 66; *Simpson v Downie*, unreported, 17 August 2011, Forfar Sheriff Court, Sheriff Principal RA Dunlop QC; *Fulwood v O'Halloran* unreported, 6 January 2014, Glasgow Sheriff Court, Sheriff IHL Miller.
[27] *Kerr v Mangan* 2015 SC 17. But cf Malcolm *et al*, *Cohabitation*, para 1.40.
[28] *Windram v Giacopazzi's Executrix*, 2009 Fam LR 157 (Jedburgh Sheriff Court, Sheriff JM Scott QC). Sheriff Scott would later be senior counsel for the successful appellant in *Gow v Grant* 2013 SC (UKSC) 1.
[29] *Windram v Giacopazzi's Executrix*, para 7.

effect discounted as minimal the risks that in future F and the children might become estranged, or that she might marry or enter a new cohabitation relationship, or that she would cease to meet her legal obligation to maintain her children if they left home before reaching the age of 25.

V. ENRICHMENT CLAIMS UPON DEATH OF COHABITANT

The question now arises as to whether the law of unjustified enrichment has any role to play in cases of cohabitant intestacy. It must be acknowledged that no enrichment claim has ever been made against a deceased person's estate by one who had been cohabiting with the deceased in a manner that would have been recognised under the 2006 Act; so there is an initial contrast with the position in respect of financial provision where the relationship breaks down rather than being dissolved by death. There have however been cases where a deceased's will contained no or inadequate provision for another party who had been living together with the deceased, not as a cohabitant, but as a carer, in the expectation, justified by statements of the deceased in life, of a bequest to acknowledge the services provided in that role.[30]

In *Gray v Johnston*, decided in 1928, the carer's claim of recompense was unsuccessful despite his management over 16 years having been responsible for accumulating almost the entire value of the intestate deceased's estate and the anticipated return being, thanks to statements made by the deceased during his time with the carer, a bequest of the whole estate.[31] In *Harris v Sales' Executors*, decided in 2003, a carer and his girlfriend moved in with and looked after an elderly couple during their final years at a house in Scone between 1988 and 1997. The elderly couple stated their intention to leave sufficient funds to the carer to enable him to purchase the house with his girlfriend, in recognition of the services they were providing. In the event the carer and girlfriend were left only £5,000 each by the wife of the elderly couple. The carer raised an action of recompense against the estates of the deceased couple; the claim was held relevant and sent for proof.[32] The defenders pleaded the subsidiarity of the enrichment claim to a contractual one which might have been made, but the judge rejected the defence as no contract was made out on the pleaded facts.[33] She did not analyse the basis for the enrichment claim, but in a post-*Shilliday* world, the case looks like one of CCDCNS, as does *Gray v Johnston* (which was not cited in *Harris*).

The 2006 Act would clearly provide no remedy now in cases like *Gray* and *Harris* because the parties were not cohabitants living together as husband and wife and, in *Harris*, because the deceased parties had not died intestate. But a claim in unjustified enrichment would surely be open to the carers in respect of services provided with a common

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[30] Note in addition to the Scottish cases mentioned below the well-known decision of the Supreme Court of Canada, *Deglman v Guaranty Trust Co of Canada* [1954] SCR 725 (carer who had acted under an unenforceable informal agreement with the beneficiary (his aunt) that his services would be rewarded with a bequest in his favour held entitled to recover the value of his services when she died intestate; parties lived under same roof only briefly). In South Africa (unlike Scotland) a *pactum successorium* is illegal and unenforceable as a contract; but it may give rise to an enrichment claim for the non-beneficiary: Visser, *Unjustified Enrichment*, 440, 456.

[31] *Gray v Johnston* 1928 SC 659 (Second Division). The court also found that the statements did not amount to a binding promise which in any event could not be proved, as the law then required, from any writings by the deceased.

[32] *Harris v Sales' Executors*, unreported, 14 February 2003, Outer House Court of Session (Lady Paton).

[33] Possibly an example of 'weak' subsidiarity: see above, text accompanying note 66.

understanding amongst all concerned that the carer would one way or another be able to continue to live in the house where the care had been provided and the parties lived together.

Suppose however the carer to be also a cohabitant of the intestate deceased at the time of the latter's decease within the meaning of the 2006 Act, who nonetheless failed to make a claim under section 29 within the very tight deadline of six months from the death. If the logic of *Courtney's Executors* is followed in such a case, the caring cohabitant's enrichment claim will be defeated by its subsidiarity to the section 29 claim. This will be so even if the parties had understood that the survivor would be provided for by way of a will made by the other but that intention had been frustrated by, say, the death occurring in an accident or (as in the *Windram* case) by a suddenly fatal illness.

As already remarked, it would be unfortunate indeed if legislation intended to improve the legal position of cohabitants was left having the formal effect of cutting off rights that they might otherwise have. But if *Courtney's Executor* is left untouched by either the higher courts or the current moves to reform, that will be the result. Clearly the statutory schemes for both financial provision and intestacy are better geared than unjustified enrichment to untangling the often complicated economic issues arising from long-term relationships. That is especially so if the basic *Gow v Grant* approach of comparing the parties' economic position at the beginning and end of the cohabitation is properly embodied in any revised legislation. But, as the examples discussed in this paper show, not every case is quite so complex, and if the door to an enrichment claim is closed and locked, injustices may arise, not only as between the former cohabitants themselves, but also between cohabitants as a class and other people in closely analogous situations.[34] Nor should the possible relevance in cases involving longer-term relationships of the enrichment defence of 'change of position' or 'loss of enrichment' be overlooked.[35] To adapt slightly some wise words of Kenneth Norrie, the needs of the parties and the justice of claims should not be dependent on the legal form their relationship happens to take.[36]

[34] The Law Society of Scotland Report (above, note 2) also makes this point.
[35] For a detailed treatment of this defence, see Evans-Jones, *Unjustified Enrichment*, vol 1, paras 9.56-9.94.
[36] Norrie, *Commentaries*, 209.