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PLAYING THE PERCENTAGES: NEW ZEALAND, SCOTLAND AND A GLOBAL SOLUTION TO THE CONSEQUENCES OF NON-MARITAL RELATIONSHIPS?

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This article offers a comparative analysis of the property consequences of non-marital relationships in New Zealand and Scotland. The article summarises and critiques the New Zealand system, where de factos are dealt with alongside married couples through the Property (Relationships) Act 1976, before analysing the provisions of the Family Law (Scotland) Act 2006 which establish a scheme for regulation of non-marital couples entirely separate from existing divorce law. An alternative regime, based on assessment of a percentage entitlement to the claim a spouse would have received in equivalent circumstances, is then proposed as a solution to the difficulties in both jurisdictions.

A. Introduction

As part of the continuing discussion on the appropriate legal response to the social trend of non-marital cohabitation in western societies,¹ a comparison of the systems employed in New Zealand and Scotland is an intriguing prospect. In regulating the property consequences following on the termination of such relationships, the two jurisdictions have adopted approaches as diametrically opposed as their respective positions on the globe. In New Zealand, non-marital partnerships have been equated with legally formalised relationships, meaning de facto couples participate in the same property sharing regime as they would do on divorce. In Scotland, an entirely separate scheme has been introduced for non-marital couples, focusing not on the nature of their relationship, but on the contributions made during it. Has one of these approaches proved more successful than the other? Would it be possible to combine the strengths of each system into a third model which might counteract the weaknesses in both?

This article offers a comparative examination of the legal treatment of non-marital partnerships in the two jurisdictions. It will begin with an explanation and evaluation of the New Zealand model, followed by an analysis of the Scottish system. A set of aims for a compromise solution will be extrapolated from these analyses. The article will then consider whether such a solution might be developed through modification of a scheme recently proposed by the

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1 The literature is vast, but recent examples may be found at A Barlow and J Smithson "Legal assumptions, cohabitants' talk and the rocky road to reform" (2010) 22 CFLQ 328; G Douglas, J Pearce and H Woodward "Cohabitants, property and the law: a study of injustice" (2009) 72 MLR 24; M Briggs "The formalization of property sharing rights for de facto couples in NZ" in B Verschraegen (ed) *Family Finances* (Jan Sramek Verlag, Vienna, 2009); B Atkin "The legal world of unmarried couples: reflections on 'de facto relationships' in recent NZ legislation" (2008) 39 VUWLR 793.

Scottish Law Commission in the context of succession.² That scheme employs a framework in which the claim of a former cohabitant is expressed as a percentage of the claim a spouse would have had in the same circumstances. Whether and how such an approach could operate in the context of relationship breakdown is discussed with reference to some practical examples.

In this article, the term “non-marital relationship” is used to describe an intimate adult relationship which has not been formalised by a legal process such as marriage. In New Zealand, the term of art used in the legislation is “de facto relationship”; in Scotland, the term is “cohabitation.” This terminology will be employed where appropriate. In addition to marriage, available only to opposite sex couples,³ New Zealand also recognises the institution of civil union⁴ (available to any couple⁵) and Scotland recognises the institution of civil partnership⁶ (available only to same sex couples.⁷) In neither jurisdiction do the property sharing regimes distinguish between these different institutions. Reference to marriage or divorce within this paper is accordingly intended to encompass all equivalent formal relationships and their termination processes. Applicants for a remedy on the breakdown of a relationship are referred to as female and respondents as male, although it is recognised that in many situations the sexes may be reversed, or the parties may be of the same sex.

B. New Zealand

1. The legislative framework – the Property Relationships Act 1976

Discussion of this area of law in New Zealand centres round the Property (Relationships) Act 1976 (or “PRA”.) This statute, originally known as the Matrimonial Property Act 1976, was substantially revised by the Property (Relationships) Amendment Act 2001 to reflect the significant social changes which had taken place in the years since it came into force. The amendments were designed to deliver a greater degree of fairness in this area of family law,⁸ both through promoting substantive economic equality of the parties on the dissolution of a relationship,⁹ and by recognising de factos (including same sex couples)¹⁰ as equivalent to married couples in terms of the property

2 Part 4 of Scottish Law Commission *Succession* (Scot Law Com 215, 2009) [*Report on Succession*].

3 Regulated in New Zealand by the Marriage Act 1955, and in Scotland by the Marriage (Scotland) Act 1977.

4 See generally Civil Union Act 2004, in force since April 2005.

5 Civil Union Act, s 4(1).

6 See generally Civil Partnership Act 2004, Part 3, in force since December 2005.

7 Civil Partnership Act 2004, s 86.

8 A detailed history of the reforms and their progress through the legislative process can be found in B Atkin and W Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) chapter 1.

9 A broader definition of “relationship property” in s 11 and the economic disparity provisions in s 15 were the key reforms here.

10 At the time of the 2001 Act, a same sex couple had no legal mechanism by which to formalise their relationship.

consequences of their relationships. All forms of relationship are accordingly dealt with as part of the same legislative scheme.

The purposes of the legislation, set out in s 1M, include recognising the equal contributions of parties to their relationship¹¹ and providing for a just division of the relationship property on separation or death, taking account of any children.¹² Detailed principles are provided to guide the achievement of the purpose of the Act:¹³

- (a) The principle that men and women have equal status, and their equality should be maintained and enhanced
- (b) The principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal
- (c) The principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union or de facto relationship
- (d) The principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply and speedily as is consistent with justice.

The definition of “de facto relationship” is given in some detail in s 2D. The relationship must be between two people aged 18 or over who live together as a couple and are not married to or in civil union with one another. A list of relevant factors is then provided to aid in the determination of whether two persons “live together as couple.”¹⁴ The relevant factors are as follows:¹⁵

- (a) The duration of the relationship
- (b) The nature and extent of common residence
- (c) Whether or not a sexual relationship exists
- (d) The degree of financial dependence or interdependence, and any arrangements for financial support, between the parties
- (e) The ownership, use and acquisition of property
- (f) The degree of mutual commitment to a shared life
- (g) The care and support of children
- (h) The performance of household duties
- (i) The reputation and public aspects of the relationship

The court is not bound to consider every factor in every case that comes before it. Rather, it has a broad discretion to attach weight to any matters it

11 Property (Relationships) Act 1976, s 1M(b).

12 Property (Relationships) Act 1976, s 1M(c).

13 Property (Relationships) Act 1976, s 1N.

14 Property (Relationships) Act 1976, s 2D(1).

15 Property (Relationships) Act 1976, s 2D(2).

considers appropriate in the circumstances.¹⁶ No individual factor will be determinative of whether a de facto can be said to exist: a sexual relationship is not in itself a requirement¹⁷ (although the definition will not apply to non-intimate relationships such as an elderly couple sharing a home for convenience¹⁸) and nor is a shared residence.¹⁹

Couples who meet the definition in s 2D are subject to the same regime for relationship property as married couples and those in civil union provided, in each case, that the relationship has endured for three years or longer.²⁰ The scheme provides in essence that each member of the couple is entitled to share equally in the relationship property,²¹ with that term defined broadly to include the family home and chattels (whenever acquired), property owned jointly or in common by the parties, property acquired by either or both during the relationship, and property acquired in contemplation of the relationship for the common use or benefit of both.²² Property falling outside this definition, including specific exceptions such as property (other than the family home and chattels) acquired by succession, survivorship, as a beneficiary under a trust or by gift,²³ is termed “separate property” and is not subject to the equal sharing requirement.²⁴ Increases in separate property can become relationship property, however, where the increase is attributable to the use of relationship property, or to contributions by the other party.²⁵

The court has discretion to deviate from the principle of equal sharing in two main situations. The first is where the extraordinary circumstances of a particular case would render such a division repugnant to justice. In that case, shares in the property should be determined based on the contributions made to the relationship by each party.²⁶ This might occur where, for example, substantial sums of money were inherited by one party but applied to the relationship. The application of the extraordinary circumstances test has been described as fact-specific but stringent,²⁷ with alterations rarely made on this basis.

The second situation is where the relationship does not meet the qualifying three year time limit, known in the terminology of the Act as a “relationship of

16 Property (Relationships) Act 1976, s 2D(3).

17 *Horsfield v Giltrap* (2001) 20 FRNZ 404 (CA).

18 *Sloan v Cox* [2004] NZFLR 777 (HC).

19 *Scott v Scragg* [2005] NZFLR 577 (FC); *Scragg v Scott* [2006] NZFLR 1076 (HC).

20 Where this time limit is not met, alternate rules exist for “relationships of short duration,” in which a distinction is drawn between married/civil union couples and de factos. This is discussed further below.

21 Property (Relationships) Act 1976, s 11.

22 Property (Relationships) Act 1976, s 8(1).

23 Property (Relationships) Act 1976, s 10.

24 Property (Relationships) Act 1976, s 9(1).

25 Property (Relationships) Act 1976, s 9A(1). Where the increase is attributable to contributions, ownership of the increase will be split proportionately on the basis of those contributions: Property (Relationships) Act 1976, s 9A(2)

26 Property (Relationships) Act 1976, s 13(1).

27 *Atkin and Parker*, above n 8, at [4.3.1].

short duration.”²⁸ For marriages and civil unions of short duration, the principle of equal sharing is disapplied for certain categories of property, such as assets already owned by one party at the start of the relationship.²⁹ It will also be disapplied to relationship property as a whole where the contribution of one party has been disproportionately greater than the contribution of the other.³⁰ In these situations, shares in the property will be determined on the basis of the contributions actually made by each party.³¹ De facto relationships of short duration will not come within the remit of the legislation at all unless (a) there is a child of the relationship or the applicant has made a substantial contribution to the relationship; and (b) the Court is satisfied that failure to make an order under the PRA would result in serious injustice.³² If both these conditions are met, the court will make an order based not on the principle of equal sharing, but again on the basis of contributions actually made by each party.³³

Since 2001, the court has also been empowered to make an additional order where, subsequent to equal sharing of relationship property, the post-relationship income and living standards of one party are likely to be significantly higher than those of the other as a result of the division of functions within the relationship.³⁴ The court is directed to consider the likely earning capacity of each party, their childcare responsibilities and “any other relevant circumstances.”³⁵ This section was designed to take account of the continuing economic impact likely to be felt by, for example, the homemaker in a relationship where parties had taken on traditional breadwinner/homemaker roles. Notwithstanding general support for the substantive economic equality aims of s 15, there are concerns that the section is too widely drawn at present, introducing conceptual incoherency into the framework of the Act³⁶ and opening the door to awards based purely on one party’s needs as opposed to what they are entitled to in consequence of the relationship.³⁷ The more pragmatic concern that the courts are not making

28 There is provision in the legislation for the duration of a short period of cohabitation followed by a short marriage/civil union to be added together to make a complete relationship in excess of the three year requirement where neither the cohabitation nor the marriage/civil union individually lasted as long as three years: see ss 2B and 2BAA.

29 Property (Relationships) Act 1976, s 14(2)(a) and (b) and s 14AA(2)(a) and (b).

30 Property (Relationships) Act 1976, ss 14(2)(c) and 14AA(2)(c).

31 Property (Relationships) Act 1976, ss 14(3) and 14AA(3).

32 Property (Relationships) Act 1976, s 14A(2).

33 Property (Relationships) Act 1976, s 14A(3).

34 Property (Relationships) Act 1976, s 15(1).

35 Property (Relationships) Act 1976, s 15(2).

36 N Peart “The Property Relationships (Amendment) Act 2001: a conceptual change” (2008) 39 VUWLR 813.

37 J Miles “Financial provision and property division on relationship breakdown: a theoretical analysis of the New Zealand legislation” (2004) 21 NZULR 268.

effective use of these provisions by failing to set awards at the correct level has also been expressed.³⁸

Against the background of the fairly rigid statutory scheme outlined above, it should be emphasised that couples retain the right to opt out of the Act, regulating the property consequences of their relationships through contract instead.³⁹ The legal recognition of contracting out agreements offers an important element of flexibility, creating a balance with default rules which offer little discretion to the court. This option may be of less utility to de factos, however, who may not consider themselves to be part of a relationship regulated by the Act and so would not consider an opt out to be necessary.⁴⁰ The complications arising for de factos here is expanded upon in the discussion of the case law below.

Notwithstanding the specific criticisms touched on above, and leaving to one side the treatment of de factos which will be discussed below, it appears that the PRA framework functions tolerably well and there are, at least, no calls within the literature for root and branch reform of the system. The 2001 amendments appear to have been a relatively successful attempt at modernising a deferred community property regime which, despite growing out-dated in terms of its applicability to various types of relationship and property, remained sound in its central principles of property division.⁴¹

2. *De factos and the Property Relationships Act: The reasons for a relationship parity model*

In a recent paper on the position of de factos in the New Zealand legislation, Bill Atkin concisely summarises the key arguments for and against relationship parity:⁴²

There are good reasons for distinguishing marriage (plus civil unions, civil partnership or similar institutions) from non-marriage: freedom of choice and association; “one size does not fit all”; the wide variety of relationships makes it inappropriate to equate them to marriage; priority should be given to marriage either for ideological and cultural reasons or because of a sense that the public commitment in marriage makes it a better bet for secure family life.

However, there are also good reasons why the law should treat unmarried partners much the same as married couples: their relationships are usually functionally very similar to marriages with similar needs and problems requiring resolution; there are advantages in drawing upon the same body of jurisprudence instead of re-inventing the wheel each time an issue arises; recognising unmarried relationships in financial statutes is unlikely to undermine marriage because the legal issues that arise in each case are usually when the marriage or relationship is in in strife or when one of the parties has died; many countries have laws that militate against discrimination on

38 M Henaghan and N Peart “Relationship Property Appeals in the New Zealand Court of Appeal 1958–2008: The Elusiveness of Equality” in R A Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oxford, 2009).

39 Property (Relationships) Act 1976, s 21.

40 Peart, above n 36, at 823–824.

41 Atkin and Parker, above n 8, at chapter 1 and [12.12].

42 B Atkin “The legal world of unmarried couples: reflections on ‘de facto relationships’ in recent New Zealand legislation” (2008) 39 VUWLR 793 at 794.

the basis of marital or other status; and definitions of the relevant relationships and a duration requirement as a condition of jurisdiction can weed out the fringe associations that should be outside a marriage-based regime.

A review of the Parliamentary debates preceding the 2001 amendments to the PRA demonstrates that, although consideration was given to many of the points outlined by Atkin, the question of equality was at the centre of the discussion. In opening the second reading debate, the Minister of Justice highlighted the confusion amongst the public as to the legal position of *de factos* and the unsatisfactory nature of the remedies available to them through the law on constructive trust. He noted the view of some that *de factos* should be entitled to avail themselves of the same remedies as married couples since both types of relationship are essentially the same, and also the view of others that such equivalence would obscure the distinctive institution of marriage, and impose unlooked-for obligations on *de facto* couples.⁴³

Through the debates, the matter of the functional equivalence of the relationships was repeatedly emphasised with some speakers offering personal anecdotes about friends or constituents in *de facto* relationships who had fared poorly under the existing law,⁴⁴ others appealing to public opinion.⁴⁵ The prevailing position was neatly summarised by Georgina Te Heuheu during the second reading debate:⁴⁶

Some of the most longstanding and stable relationships are in the nature of *de facto* relationships, and it reflects badly on the principle of the proper recognition of the value of both partners' contribution to a relationship if the present law is not amended to rectify the situation ... a *de facto* relationship for all intents and purposes has the same strengths and features as a marriage, and therefore deserves to have the same recognition.

In a legislature seeking to promote equality in various forms, this view of *de factos* was the one that prevailed in enacting the legislation. It was also considered to accord with the state's obligations under the Bill of Rights Act 1990, s 19 and the Human Rights Act 1993, s 21(1)(a) by which discrimination on the basis of marital status is prohibited. Accordingly, a relationship parity approach was adopted, at least for relationships exceeding the three year jurisdictional limit.

3. Critique of the New Zealand model

In the academic literature surrounding the treatment of *de factos* within the PRA, a number of criticisms appear repeatedly. There is uncertainty as to why the age limit for establishment of a *de facto* couple is 18 when individuals can marry with parental consent at 16, and unhappiness about the fact that a different definition of "de facto relationship" is given in the Interpretation Act

43 (26 March 1998) 38 NZPD 7916–7918.

44 See, for example, Hon Robyn McDonald (Minister for Senior Citizens) at (26 March 1998) 38 NZPD 7921.

45 Clem Simich (5 May 1998) 40 NZPD 8229.

46 (5 May 1998) 40 NZPD 8235.

1999⁴⁷ to that used in the PRA. Arguably more fundamental are concerns that the PRA operates retrospectively, meaning that, on the date of its introduction into force, the legal consequences of de facto relationships which may already have been in existence for some time had been altered overnight without the consent, or perhaps even the knowledge, of the parties involved.

The biggest criticism levelled at the new scheme, however, surrounds the s 2D definition of a de facto relationship and the way in which it has been interpreted and applied by the courts. There is little question that judicial discretion is a necessary element of any regime which has to deal with the wide variety of relationships in current society. The task of the judiciary in working with s 2D was summed up in the opinion of the High Court in *Scragg v Scott*.⁴⁸

The test must inevitably be evaluative, with the Judge having to weigh up as best he or she can all of the factors – not only those contained in 2D, but also any others there may be – and applying a common sense objective judgment to the particular case ... Generalisations are to be avoided because every case is fact specific.

Notwithstanding appeals by the judiciary to the individuality of every case, questions remain as to whether the resulting decisions lack the minimum level of certainty required to make the legislation workable in practice. The barrister Simon Jefferson, having carried out a detailed review of relevant jurisprudence on each of the factors listed in s 2D, concludes:⁴⁹

Case law reveals a sociologically fascinating array of relationships and the apparently infinite capacity of people to involve themselves in all manner of tangles. Beyond stating the obvious (that the Court is required to assess all the evidence and view cumulatively in all of the circumstances) the fact-specific nature of the enquiry which must be undertaken in such cases makes it almost impossible to distil any universal principles from the cases which have received judicial consideration; whether or not, in each case, the outcomes can truly be regarded as redolent of “common sense” is another matter entirely.

The need for some level of certainty is considered to be particularly important within the New Zealand framework because qualification as a de facto couple has critical consequences. As discussed above, the equal sharing regime which will then apply leaves little room for adjustment dependent on the potentially complex circumstances of individual cases, so that even where qualification as a de facto couple has been very borderline, the rewards for the applicant can be as significant as for a couple who overwhelmingly fulfil the requirements. Margaret Briggs notes:⁵⁰

The court has little to no discretion on the issue of the division of relationship property. While there are some provisions that allow a departure from equal sharing, these provisions are designed to apply in exceptional cases only. None relates to a discretion so central as that found in s 2D, where the court must rule on

47 Section 29A(1)(a) defines a de facto relationship as “a relationship in the nature of marriage or civil union”.

48 *Scragg v Scott* [2006] NZFLR 1076 (HC) at [37].

49 S Jefferson “De facto or ‘friends with benefits’?” (2007) 5 NZFLJ 304 at 309.

50 M Briggs “The formalization of property sharing rights for de facto couples in New Zealand” in B Verschraegen (ed) *Family Finances* (Jan Sramek Verlag, Vienna, 2009) at 337.

the status of the relationship, which in turn, either qualifies or disqualifies entry to the Act's inflexible equal sharing rules. Such an uncertain access route into a rigid code can turn the process into an expensive gamble for potential applicants.

Examples of borderline cases are not difficult to find in the reported jurisprudence. A comparison is frequently made between two appeal decisions handed down by the High Court in 2006, *Benseman v Ball*⁵¹ and *Scragg v Scott*.⁵²

In *Benseman*, the Court was asked to determine the date at which an admittedly existing de facto relationship had come to an end. The parties had lived together for some years, initially in the respondent's house, and then in a property in Tauranga built by the claimant but title for which was held in the respondent's name. In 1997, the claimant moved to Opotiki and the respondent to Auckland for work. They continued to spend their weekends together in the house in Tauranga. In 1999, the respondent moved back to Tauranga, where the claimant continued to stay with her two or three days a week until her death in 2002. Of importance in the case was an agreement entered into by the parties in 2001 providing that, on the respondent's death, the claimant was to receive \$40,000 from the proceeds of the sale of the house to cover the costs of the build. The respondent made a will at the same time, in which no provision was made for the claimant. In a claim subsequent to the respondent's death, the claimant said they had shared a "never say die, never say goodbye" relationship. However, the Court was satisfied that, as of the respondent's return to Tauranga in 1999, the couple were no longer de factos. Although they remained close and continued a sexual relationship, they no longer shared a house, spent much less time together and, according to witnesses, no longer presented as a couple. The 2001 agreement evidenced a lack of commitment to a shared life, in the view of the court. The de facto relationship had therefore come to an end prior to the introduction of the PRA into force in 2001.

By comparison, *Scragg v Scott* dealt with a couple who had lived in different countries for the majority of their relationship. The parties had commenced a romantic relationship in the late 1980s, and in 1990, Scragg bought a house at Lake Rotoiti where Scott proceeded to live. The relationship continued in some form until 2003. Throughout this period, Scragg lived and worked in Guam whilst Scott, aside from a period of around nine months in Guam in 1999, remained in New Zealand. The parties visited each other frequently and continued a sexual relationship, although neither was faithful. Scott was financially dependent on Scragg. In 2000, Scragg commenced living with another woman in Guam, although Scott was unaware of this. In 2001, Scragg had a solicitor prepare a contracting out agreement in respect of the PRA, although Scott refused to sign it. In July 2002, Scott paid an unannounced visit to Guam and discovered that Scragg was living with another woman. The relationship came to an end not long thereafter. Having reviewed the evidence, the Court was satisfied that the parties had been in a continuing and significant de facto relationship notwithstanding the absence of a shared residence. The relationship was seen to be under strain following Scott's

51 *Benseman v Ball* [2007] NZFLR 127 (HC).

52 *Scragg v Scott* [2006] NZFLR 1076 (HC).

abortive attempt to settle in Guam in 1999, with the contracting out agreement pointing to a weakening of commitment on the part of Mr Scragg, although the relationship was not held to have been brought to an end until Scott's discovery of the "other woman" in July 2002.

In each of these cases, the court emphasised that the decisions taken were heavily fact specific and would not apply to other cases which must turn on their own facts. In each of these cases, the court offered clear accounts of their reasoning in reaching the decision that was eventually made. Nonetheless, two cases decided so closely together in which a couple who shared a residence for at least a few days each week were not considered *de facto*, whereas a couple who lived in different countries were considered *de facto*, are difficult to parse.

It is possible to argue that the complex circumstances of both cases would be borderline under any regime for non-marital couples. However, these cases are not unique in their awkwardness. A review of even the most recently reported decisions under s 2D provides many other illustrations. Consider *Z v F*,⁵³ in which the parties, both Chinese nationals, married in China in December 1999 before emigrating to New Zealand in 2002. In December 2003, both signed a document entitled "divorce agreement" and subsequently obtained a legal divorce in China on a visit in June 2004, but continued to live together in New Zealand along with the child of their marriage. A *de facto* relationship was held to exist. Consider *B v F*,⁵⁴ in which the respondent installed the claimant and the children of her previous marriage in a flat near to his parents' home and provided her with significant financial support. The respondent split his time between the claimant's flat and his parents' home, where he kept the majority of his possessions and continued to sleep several times a week. His mother often did his laundry. A *de facto* relationship was held to exist. Consider *KGV-H v LAH*,⁵⁵ in which the claimant and respondent had embarked on a romantic relationship shortly after the claimant started working for the applicant's Australian company in 1996. As of June 1998, the couple had jointly signed a tenancy agreement on a flat in Queensland, paid for by the respondent's company, although the respondent was still primarily based in Auckland, near to his son from a previous relationship. In 1998, the respondent gave the claimant a Christmas card addressed "to my wife." In 2000, the claimant accepted a marriage proposal from the respondent, and also agreed to resign her employment with his company at least partly on the basis that their relationship was creating conflict in the work environment. No *de facto* relationship was found to exist until December 2002, at which point the claimant, already pregnant with the couple's first child, moved to Auckland.

It is not disputed that each of these cases is factually complex, and there is no intention to suggest that the decisions ultimately reached in each example were incorrect. However, it is difficult to ignore the fact that, in each case, it would have been possible to construct a solid argument in support of an alternative finding to the one that was actually made. It is trite to say that hard cases make bad law, but in the reports of decisions under s 2D, there seem to

53 *Z v F* HC Auckland CIV-2010-404-1424, 10 December 2010.

54 *B v F* [2010] NZFLR 67 (HC).

55 *KGV-H v LAH* FC Waitakere FAM-2009-090-2093, 21 December 2010.

be a huge variety of hard cases, and they are not in short supply. If it is accepted that this legislation must deal with the “infinite capacity of people to involve themselves in all manner of tangles” as Simon Jefferson describes, can it really be appropriate to do so on the basis of the “all or nothing” principle operated under s 2D? This concern is brought into particularly sharp relief by the rigid consequences which result from the finding that a *de facto* exists, compounded by the probable absence of the protection available to married couples through the opting out provisions: a defendant who is surprised by a finding that he is in a *de facto* relationship is unlikely to have considered contracting out of the statutory regime beforehand.⁵⁶

Bill Atkin offers an eloquent defence of the current position for *de factos*:⁵⁷

[G]iven the inherently volatile condition of human affairs, it is a forlorn task to try and come up with a black and white definition of a *de facto* relationship. This will be so whether the legislative framework is a unified one as in New Zealand or one where there is separate legislation for *de facto* relationships. Inevitably there will be difficult cases around the edges, for example where there has been no regular common residence or where there has been infidelity. These fringe cases are the ones that end up in court. In the middle, one suspects that the vast majority of unmarried couples are much the same as married and civil union couples and fall uncontroversially within the framework of any relevant legislation.

Without the benefit of empirical research, it is difficult to say with any certainty whether the assertion that the majority of *de facto* relationships are comfortably dealt with within the existing framework is correct. It may, however, be possible to take issue with the suggestion that the majority of unmarried couples are much the same as married and civil union couples. More precisely, if we assume couples are functionally similar regardless of their legal status, then the infinite variety of relationship approaches adopted by *de facto* couples must presumably be replicated by couples who are married or in civil union. The only statement which can be universally true for all married and civil union couples is that they have made the choice to have their relationship formally legally recognised. That being the case, to say that unmarried couples operate in the same way cannot carry much meaning.

This point was emphasised by Virginia Grainer, commenting that the PRA:⁵⁸

...is a blunt instrument and it does not easily accommodate the individual circumstances of people in *de facto* relationships who, unlike their married spouses, have chosen not to be subject to the legal incidents of marriage.

Ultimately, then, it might be correct to say that the critique of the relationship parity approach adopted by the New Zealand legislation is that it does not, in fact, treat equivalent relationships in the same way. The argument can be made that fairness demands not that *de factos* be treated like married

56 Moreover, the cases described earlier suggest that even pre-emptive preparation of an opting out agreement may in itself lend weight to the idea that a *de facto* relationship exists, which is something of a catch-22.

57 Atkin, above n 42, at 811.

58 V Grainer “What’s yours is mine: reform of the property division regime for unmarried couples in New Zealand” (2002) 11 *Pac Rim L & Pol’y J* 285 at 316.

couples or those in civil union, but rather that de factos be treated on the basis of what their individual relationships are actually like. Fairness cannot be achieved by imposing a bright line standard in de facto cases specifically because these couples did not sign up for the bright line approach represented by formal legal recognition of their relationship. A more nuanced approach might allow for a less dramatic result in the variety of borderline cases that seem to be proliferating in the New Zealand family courts.

C. Scotland

1. *The legislative framework – the Family Law (Scotland) Act 2006*

Although animated by many of the same concerns that underlay the amendments to the PRA in New Zealand, a relationship parity approach to regulation of the property consequences of the breakdown of non-marital relationships was expressly excluded by the Scottish Parliament. The Policy Memorandum⁵⁹ which accompanied the introduction of the Family Law (Scotland) Bill in 2006 notes: “The Scottish Ministers are clear that marriage has a special place in society and that its distinctive legal status should be preserved.”⁶⁰ In addition: “The Scottish Ministers do not believe it would be right to impose comprehensive and strenuous obligations equivalent to those attaching to marriage on individuals who have not deliberately selected them.”⁶¹

Nonetheless, it was recognised that the breakdown of cohabitation could have unjust consequences in some relationships, compounded by confusion amongst the Scottish public as to what the exact rights of cohabitants were in such a situation.⁶² It was considered appropriate to introduce legislation which would create legal certainty and protect those who might find themselves in a situation of economic vulnerability at the conclusion of a cohabiting relationship, including former cohabitants themselves as well as children of the family.⁶³

The new regime was set out in ss 25 to 29 of the Family Law (Scotland) Act 2006. The definition of cohabitant is given in s 25.

- (1) In sections 26 to 29, “cohabitant” means 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.

59 SP Bill 36-PM (Policy Memorandum) <www.scottish.parliament.uk>.

60 Ibid, at [71].

61 Ibid, at [70].

62 Former cohabitants may have had some remedy in unjust enrichment, although such cases were difficult to prove and fell far short of the “common law marriage myth” which seemed to retain a hold in the public consciousness. For further discussion, see H MacQueen “Unjustified Enrichment and Family Law” (University of Edinburgh School of Law Working Paper 2010/01, 2010).

63 Policy Memorandum, above n 59, at [64] and [65].

- (2) In determining for the purposes of any of sections 26 to 29 whether a person (“A”) is a cohabitant of another person (“B”), the court shall have regard to—
- (a) the length of the period during which A and B have been living together (or lived together);
 - (b) the nature of their relationship during that period; and
 - (c) the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.

Claims for financial provision where the relationship ends otherwise than by death are dealt with under s 28.⁶⁴ The court is empowered to award a capital sum, a payment in respect of childcare or such interim order as it thinks fit after ‘having regard to the matters mentioned in subsection (3).’⁶⁵ That subsection reads as follows:

Those matters are—

- (a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and
- (b) whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of—
 - (i) the defender; or
 - (ii) any relevant child

If awarding a capital sum, the court is also directed to consider the extent to which economic advantage obtained by the defender is offset by economic disadvantage sustained by him in the interests of the applicant or any relevant child.⁶⁶ The applicant’s disadvantage is similarly to be offset against any economic benefit she has derived.⁶⁷

Definitions of key terms are provided in s 28(9). As might be expected, “contributions” includes indirect and non-financial contributions. Economic advantage is construed to encompass gains in capital, income and earning capacity, with economic disadvantage defined as the opposite.

2. Critique of the Scottish model

The impact of the provisions to date is somewhat difficult to assess. Empirical research into practitioners’ experiences with the new legislation⁶⁸ suggests that parties are consulting with their solicitors about potential claims under the Act,

64 Unlike the Property (Relationships) Act 1976, which applies the same property sharing regime whether the relationship has come to an end through breakdown or death, Scots law operates a separate system of property entitlement for surviving spouses on death. The position for both surviving spouses and cohabitants in Scotland is discussed further below.

65 Family Law (Scotland) Act 2006, s 28(2).

66 Family Law (Scotland) Act 2006, s 28(4) and (5).

67 Family Law (Scotland) Act 2006, s 28(4) and (6).

68 F Wasoff, J Miles and E Mordaunt “Legal practitioners’ perspectives on the provisions of the Family Law (Scotland) Act 2006” (October 2010) Centre for Research on Families and Relationships <www.crfr.ac.uk>.

and indeed that settlements are being negotiated on the basis of the new provisions. However, the number of reported cases to date remains fairly modest. It could, of course, hardly be to the credit of the legislation if every application ended up before a judge: the current emphasis in family law in Scotland as in other western jurisdictions is on negotiated, extra-judicial resolutions as preferable to litigation, particularly where care of children is concerned. However, another potential explanation for the small number of reported decisions is that a lack of certainty over the meaning and application of the provisions leaves practitioners wary of taking cases forward.

The courts have not found the construction of s 28 to be a straightforward process. The essence of the difficulty appears to be a lack of clarity in the legislation as to the redistributive rationale upon which any award should be based.⁶⁹ It is clear that contributions of whatever kind must have been made, and that an advantage must have been received or a disadvantage suffered, but what is intended to be the connection between these elements? It is possible to discern at least three potential models from the case law so far.

In one of the earliest decisions, *CM v STS*,⁷⁰ the Court took the view that the cohabitation regime should operate on similar principles to the law governing financial provision on divorce, as set out in the Family Law (Scotland) Act 1985. In Scotland, as in New Zealand, what might loosely be termed a deferred community property regime is operated. Property acquired by either party during the marriage (subject to exceptions) is, at the point of divorce, deemed matrimonial property and to be divided between the parties.⁷¹ The first principle governing the division is that property should be shared fairly,⁷² presumed to mean equally.⁷³ The second principle governing the division is that fair account should be taken of economic advantage obtained or economic disadvantage suffered by one party in the interests of the other, or of the family.⁷⁴ Lord Matthews was of the view that the similarity in wording between this latter principle and the provisions of s 28 was so marked that Parliament could not have intended other than that the same approach should inform the application of both.⁷⁵ Accordingly, he considered the relationship to be a joint endeavour, and essentially split both the benefits and the burdens which had arisen over the course of the cohabitation between the parties. Use was made of the divorce jurisprudence to inform his conclusions.

Such an approach was, however, in clear conflict with the expressed intention of the legislature to retain a distinction between marriage and non-marital relationships. In the academic commentary, it was pointed out that there was no reference to “fair sharing” in the 2006 provisions,⁷⁶ and through

69 F McCarthy “Cohabitation: lessons from north of the border?” (2011) 23(3) CFLQ 277.

70 *CM v STS* 2008 SLT 871 (OH), also reported as *C v S* and *M v S*.

71 Family Law (Scotland) Act 1985, s 10(4).

72 Family Law (Scotland) Act 1985, s 9(1)(a).

73 Family Law (Scotland) Act 1985, s 10(1).

74 Family Law (Scotland) Act 1985, s 9(1)(b).

75 *CM v STS* 2008 SLT 871 (OH) at [269]–[278].

76 J Thomson “Palimony – Scottish style” [2008] Scottish Law Gazette 95.

the subsequent jurisprudence it seems that the *CM v STS* model has now been thoroughly discredited. The recent appeal decision of *Gow v Grant*⁷⁷ noted:⁷⁸

[Sections 8–10 of the 1985 Act] are concerned with the rights of a spouse on divorce. They establish a scheme for, among other things, the fair distribution of matrimonial property acquired by one or other or both spouses during the subsistence of a marriage. That scheme operates by reference to the principles set out in section 9(1) of the 1985 Act. Section 28, by contrast, is not concerned with the distribution of property. It permits a court to make financial provision for a former cohabitant in certain defined circumstances. That financial provision is in the nature of compensation for an imbalance of economic advantage or disadvantage. Thus the scheme of section 28 is quite different, both in substance and in form, from sections 8-10 of the 1985 Act, and cases on the latter provisions cannot be regarded as guidance in the construction of section 28.

Gow v Grant concerned a couple who had embarked on a relationship later in life. Both had adult children from previous relationships who had since left home. Both were owner-occupiers of their own houses, subject to mortgage debt. The claimant sold her property in order to move in with the defender in his house, although she used the majority of the proceeds of the sale for her own purposes, such as loaning money to her son. At the end of the relationship, the defender's home had increased greatly in value, but the claimant was no longer in a financial position to buy a house of her own.

In the first instance decision,⁷⁹ the sheriff had adopted a compensation type approach to interpretation of the provisions. The claim was valued on the basis that the claimant should be returned to the position she would have been in had the cohabitation never happened.⁸⁰ Accordingly, she was awarded a figure made up primarily of the amount by which the property she had owned at the start of the relationship would have increased in value by the end of the relationship, minus the debt which would have remained outstanding at that time.⁸¹ The decision seemed quite surprising, in that the award to the claimant placed her ultimately in a much stronger financial position than the defender: he would essentially have been required to pay the majority of the increased equity in his own home over to the claimant to remedy the increased equity on which she had “lost out.” This was so notwithstanding the fact the claimant had used the proceeds of the sale, the “nest egg” which might have enabled her to make a future house purchase, for her own purposes rather than applying them in the course of the relationship. On the other hand, the compensation approach did have the benefit of protecting the claimant, now an economically vulnerable former cohabitant, as the legislature had intended.

As with the deferred community property model suggested in *CM v STS*, however, the compensation approach seems to have been discredited by subsequent jurisprudence.⁸² *Gow v Grant* was overturned on appeal.⁸³ The

77 *Gow v Grant* 2011 Fam LR 50 (IH (2 Div)).

78 *Gow v Grant* 2011 Fam LR 50 (IH (2 Div)) at [3].

79 *Gow v Grant* 2010 Fam LR 21 (SC).

80 *Gow v Grant* 2010 Fam LR 21 (SC) at [39]–[47].

81 *Gow v Grant* 2010 Fam LR 21 (SC) at [59].

82 See Sheriff Peter G L Hammond's remarks at [99] of *Selkirk v Chisholm* 2011 Fam LR 56 (SC).

appeal court did not consider a compensation approach to be an appropriate interpretation of the statute, and instead used a model based on restitutionary principles. A restitutionary interpretation has been employed in a preponderance of the reported cases to date,⁸⁴ with the most recent decisions in particular seeming to cement it as the correct understanding of the provisions. This approach starts from the proposition that legal title to assets at the conclusion of the relationship should not be disturbed, unless there is proof that the applicant has made contributions that would justify some alteration in that title. In other words, the applicant must have “earned a share.”⁸⁵

The reasoning set out in the recent decision of *Selkirk v Chisholm*⁸⁶ seems to be a clear statement of restitutionary principles. The parties to the case had cohabited for around nine years in a house held in the defender’s sole name. They had no children. Both parties worked for the majority of the relationship, the defender becoming self-employed running a “bodyshop” for motor repairs after a few years. Broadly speaking, the claimant undertook the majority of the homemaking work but contributed little financially to the household, spending her wages on her own interests. The defender paid the household bills, including the mortgage repayments.

The applicant was ultimately unsuccessful in her pursuit of an award. The sheriff noted that she had made no financial contribution towards the household, but went further to say that even if she *had* made regular payments towards the bills, this would not represent an economic advantage to the defender: bills would have to have been paid by both parties regardless of their relationship. Even had the claimant contributed every month towards the mortgage repayments, the only advantage that would have accrued would be the diminution in the mortgage debt resulting from the payments. Specifically, such payments would *not* entitle the claimant to any share in the increased equity in the home over the course of the relationship, since this was down entirely to market forces, rather than any contribution by the parties.⁸⁷ The same logic is applied in respect of her non-financial contributions.⁸⁸

This strict restitutionary approach, focusing on contributions to the property rather than contributions to the relationship as a whole and their consequences, is a valid reading of the provisions of s 28. Indeed, the popularity of the approach in the reported jurisprudence suggests it may be the most obvious reading of the provisions. However, if it is the correct reading of

83 *Gow v Grant* 2011 Fam LR 50 (IH (2 Div)).

84 *Jamieson v Rodhouse* 2009 Fam LR 34 (SC), *Falconer v Dods* 2009 Fam LR 111 (SC), *Lindsay v Murphy* 2010 Fam LR 156 (SC) and *G v F* 2011 GWD 21-483 (SC) largely adopted a restitutionary approach, in addition to *Selkirk v Chisholm* 2011 Fam LR 56 (SC), discussed below, and the appeal decision in *Gow v Grant* 2011 Fam LR 50 (IH (2 Div)).

85 Further discussion of this approach can be found in P Parkinson “Property rights of cohabitants – is statutory reform the answer?” in A Bainham, D Pearl and R Pickford (eds) *Frontiers of Family Law: Part II* (John Wiley & Sons, Chichester, 1995) at 309 and G Douglas, J Pearce and H Woodward “Cohabitants, property and the law: a study of injustice” (2009) 72 MLR 24 at 29–30.

86 *Selkirk v Chisholm* 2011 Fam LR 56 (SC).

87 *Selkirk v Chisholm* 2011 Fam LR 56 (SC) at [116]–[118].

88 *Selkirk v Chisholm* 2011 Fam LR 56 (SC) at [120].

s 28, then the legislation must necessarily fall some way short of the objectives claimed for it by the legislature at the time of its enactment.⁸⁹ For one thing, it is not clear that this interpretation of s 28 is distinct from the unjust enrichment principles which might previously have allowed a cohabitant who had contributed financially to property held in the name of their former partner to make a claim for restitution.⁹⁰ Given that the uncertainty engendered by these somewhat arcane common law rules was one motivation for the introduction of the statute, it is difficult to understand how a similarly arcane statutory restatement of the same principles could alleviate that difficulty.

More significantly, the legislation sought specifically to protect economically vulnerable former cohabitants and their children on the breakdown of a relationship.⁹¹ The restitutionary approach adopted simply does not achieve this goal. If homemaker contributions, and even direct financial contributions, cannot entitle a party to any share in a family home to which they do not hold title, vulnerability will frequently result. As hypothesised elsewhere, imagine that the couple had children and Ms Selkirk had not contributed financially to the household as a result of taking on the homemaker/carer role full time.⁹² Following the reasoning in *Selkirk v Chisholm*, her application would have been just as unsuccessful in these circumstances. Ms Selkirk would leave the relationship with no claim on the family home, an uncertain level of employability and quite possibly primary responsibility for the couple's child. In fact, the earlier decision of *Jamieson v Rodhouse*⁹³ illustrates precisely this type of outcome to a s 28 claim. Ms Jamieson emerged from 30 years of cohabitation, the majority of which she had spent as homemaker and primary carer of the child of the family, without an award. At her stage in life and after so many years out of the labour market, her employment prospects seemed bleak. Her former partner was entitled to retain ownership of the family home including the equity therein, the only real asset of the couple, as a beneficiary of "the good fortune of property price appreciation."⁹⁴

In summary, then, the Scottish cohabitation regime may at this stage be said to be in something of a state of confusion. The legislation is ambiguously drafted, and no one reading of the provisions can be proved correct, leaving the courts, practitioners and cohabitants themselves in an unenviable situation. The expertise developed over the past 25 years in respect of the regime for financial provision on divorce cannot assist with construction or application of the 2006 legislation. Perhaps of most concern, the restitutionary understanding of the provisions that seems to be emerging from the jurisprudence fails to meet the objectives of the cohabitation scheme, neither improving on the pre-

89 Policy Memorandum, above n 59.

90 The leading Scottish authority in this area is *Shilliday v Smith* 1998 SC 725 (IH (1 Div)). See also *Grieve v Morison* 1993 SLT 852 (OH), *Moggach v Milne* 2005 GWD 8-107 (SC) and *Satchwell v McIntosh* 2006 SLT 117 (SC).

91 Policy Memorandum, above n 59, at [64] and [65].

92 F McCarthy "Progress towards principles on the breakdown of cohabitation: *Selkirk v Chisholm*" (2011) 15 Edin LR 270.

93 *Jamieson v Rodhouse* 2009 Fam LR 34 (SC).

94 *Jamieson v Rodhouse* 2009 Fam LR 34 (SC) at [48].

existing common law provision nor protecting the people it was designed to protect.

It should be noted, however, that in contrast to the position in New Zealand, the statutory definition of cohabitant has given rise to little concern in the Scottish jurisprudence to date. The fact of cohabitation has been admitted in every reported decision.⁹⁵ Whether this consensual approach results from the increased discretion available to the court in determining the level of any award after cohabitation is established is not possible to say, but it is certainly true that meeting the definition in Scotland does not have the dramatic consequences that can result in New Zealand.

D. A Compromise Solution: A Percentage Scheme?

1. Identifying the aims of a compromise solution

Drawing on the evaluation of the different systems operated in New Zealand and Scotland, it is possible to set out some general principles required of a compromise regime workable in both jurisdictions.

In the first place, it is submitted that there is much to be gained from a system that builds on the existing law of property division on divorce. One aspect of this argument is pragmatic: it allows the expertise that has developed in the area of relationship property to be employed in respect of a broader range of relationships. In other words, it saves reinventing the wheel. De factis in New Zealand have been able to take advantage of the evolution of the PRA from 1976 to the present day. Although the system is not free from criticism, its purpose and application are well understood on the whole. It has been refined over the years with the help of the judiciary and with legislative intervention where appropriate. The system is solid. This stands in marked contrast to the position in Scotland, where the rules of financial provision on divorce are quite distinct from the cohabitation scheme. In itself, this does not explain the ambiguity which has plagued the 2006 Act: it would, presumably, have been possible to enact a legislative scheme with distinct and yet clearly articulated principles applicable to cohabitants only. Nonetheless, the wisdom of such an approach seems questionable for a small jurisdiction like Scotland (as for New Zealand), where opportunities for judicial clarification are limited by the size of the population and related volume of litigation that results. Tapping into this pre-existing expertise increases certainty not only for judiciary and practitioner, but also saves the need for the public to educate themselves in an entirely new area of legislation, which is to be welcomed particularly given the widespread application of such rules.

The other argument favouring a parasitic regime is ideological in this sense: the legislative objectives of a property sharing regime for non-marital couples, at least in New Zealand and Scotland, are the same as the legislative objectives of the regime on divorce. In both jurisdictions, what is sought is

⁹⁵ *Raghunathan v Fairley* 2008 Fam LR 112 (OH) did turn on a judicial finding as to the date of conclusion of cohabitation, and *G v F* 2011 GWD 21-483 (SC) involved a dispute over the date of commencement of cohabitation, but in both cases the dispute was on the facts rather than the law.

protection of the economically vulnerable and “fairness,” albeit that the precise meaning of that word in this context is more clearly defined in New Zealand than in its counterpart in the northern hemisphere. Those objectives are already captured within the existing provision for couples on divorce.

The compromise solution must incorporate a greater degree of nuance than the system currently in place in New Zealand. The “all or nothing” approach set out in s 2D creates a significant gamble for couples who may potentially meet the definition. With relationships seemingly growing more complex as the years pass, it seems only fitting to create space for flexible outcomes.

Finally, the question of equality must be addressed. At base, there is a divergence of principle between New Zealand and Scotland on the subject of relationship parity. New Zealand seeks equivalence between married and de facto couples, in keeping with its obligations under the Bill of Rights Act 1990 and Human Rights Act 1993. Scotland seeks to maintain a distinction between the two relationships in recognition of the uniqueness of marriage. It is suggested that a compromise is possible in a system where only non-marital couples who demonstrate the degree of commitment symbolised by marriage are treated in the same way as married couples. This allows for equality between situations which are truly equal, whilst continuing to differentiate that gold standard of commitment from relationships which do not attain it.

Against the background of these observations, the paper now seeks to explore a possible solution employing the recent Scottish Law Commission recommendation of a percentage-based approach to a cohabitant claim on succession. An outline will be given of the SLC’s proposal, followed by discussion of how such an approach could be modified to meet the aims outlined above.

2. *The Scottish Law Commission proposal*

The Scottish Law Commission recently produced recommendations for reform of the law of succession in Scotland. Its report on *Succession*⁹⁶ gives consideration to the provision in s 29 of the 2006 Act empowering a cohabitant⁹⁷ to make a claim against the intestate estate of their late partner where the relationship is brought to an end by the death.

Prior to the 2006 Act, a surviving cohabitant had no claim on the death of her partner unless provision had been made for her in the will. Section 29 does not set out an automatic entitlement for a cohabitant, but allows her to apply to the court for an award where the couple were cohabiting immediately prior to the deceased’s death.⁹⁸ The court may make an order for a capital sum or a property transfer after having regard to the matters listed in s 29(3), which are:

- (a) the size and nature of the deceased’s net intestate estate;
- (b) any benefit received, or to be received, by the survivor—
 - (i) on, or in consequence of, the deceased’s death; and

96 *Report on Succession*, above n 2.

97 The definition of cohabitant given in s 25 of the 2006 Act, as set out above, applies equally to a claim under s 28 (breakdown) or s 29 (death.)

98 Family Law (Scotland) Act 2006, s 29(1) and (2).

- (ii) from somewhere other than the deceased's net intestate estate;
- (c) the nature and extent of any other rights against, or claims on, the deceased's net intestate estate; and
- (d) any other matter the court considers appropriate.

The court may not make an award to a former cohabitant of a greater sum than a surviving spouse would have received in the same circumstances.⁹⁹

In its report, the SLC criticises the provision for ambiguity as to its objectives. As with s 28, the court is provided with discretion, but with no explanation of the rationale which should underlie the exercise of that discretion. The SLC notes:¹⁰⁰

[T]he court is given no guidance on the purpose of the award: is it to provide for the applicant's future needs or is it to be in recognition of the financial and non-financial contributions that the applicant made for the benefit of the deceased and their family during the relationship? ... [W]hen exercising its discretion, the court is overwhelmed by the number of potentially relevant factors so that in the absence of expressly articulated aims it is very difficult if not impossible to focus on those which are significant in the particular case.

In order to deal with this central difficulty as well as various other concerns,¹⁰¹ the SLC recommended repeal of s 29¹⁰² and replacement with an entirely new statutory scheme for cohabitants on intestacy. Understanding the recommendations requires a brief explanation of the position of a surviving spouse on the intestacy of her late husband in Scotland. A widow has a statutory claim to a group of entitlements referred to as "prior rights"¹⁰³ (a house, furniture and a sum of money) the financial limits of which are fixed by statute, together with a common law claim known as "legal rights" to a fixed share in any remaining moveable estate.¹⁰⁴ She will also inherit the residue if the deceased is not survived by issue, parents or siblings.¹⁰⁵ There is no scope for judicial discretion in respect of the surviving spouse's claim.¹⁰⁶ For practitioners, it is simply a matter of applying the rules set out above to the estate in question: a calculation, rather than an evaluation or a negotiation.

The SLC did not believe that the rights held by surviving spouses should be replicated for cohabitants. Instead:¹⁰⁷

99 Family Law (Scotland) Act 2006, s 29(4).

100 *Report on Succession*, above n 2, at [4.3] and [4.4].

101 See generally *Report on Succession*, above n 2, at [4.3]–[4.9].

102 *Report on Succession*, above n 2, at recommendation 37.

103 Succession (Scotland) Act 1964, ss 8 and 9.

104 Scots law of succession has maintained a distinction between heritage (broadly, land and buildings) and moveable property (all other belongings, including intangible assets such as money in a bank account) since time immemorial.

105 Succession (Scotland) Act 1964, s 2.

106 The position for a surviving partner in New Zealand is somewhat more complicated, the partner having the choice between an entitlement under the rules of intestacy set out in s 77 of the Administration Act 1969 or a claim on relationship property under Part 8 of the Property (Relationships) Act 1976.

107 *Report on Succession*, above n 2, at [4.10].

... a cohabitant's rights of succession should reflect the quality of the relationship which the couple had. Put another way, unlike a spouse or a civil partner, a cohabitant has to "earn" her right to a share of an intestate estate...To that extent the distinction between marriage and civil partnership and cohabitation should be maintained. This means that as with section 29 proceedings, an element of judicial discretion will be involved.

However, the scheme it recommends *does* make use of the non-discretionary entitlement of a surviving spouse as the basis for an award to a cohabitant. Essentially, where a cohabitant dies intestate, it should be established what entitlement a widow would have had in respect of the estate. The surviving cohabitant should then receive a percentage of that entitlement. The appropriate percentage should be determined on the basis of the "share" the cohabitant has "earned" during her relationship with the deceased.

The SLC suggests a two stage process. First, it should be established whether the applicant was cohabiting with the deceased immediately prior to death. This should be ascertained by reference to a non-exhaustive list of factors including whether they were members of the same household, the stability of their relationship, whether they were engaged in a sexual relationship, whether they had raised children together and whether the parties appeared to others to be in an established relationship.¹⁰⁸ That hurdle having been overcome, it would then be determined to what extent the applicant should be treated as a spouse for the purpose of the rules of succession, expressed as a percentage. Only three matters are relevant to this determination: the length of the period of cohabitation; the interdependence (financial or otherwise) between the applicant and the deceased; and the contributions (financial or otherwise) of the applicant to their shared life.¹⁰⁹ The SLC considers that where a couple had been together for many years, raised a family and so on, the applicant would achieve 100 per cent.¹¹⁰ At the other extreme, a young couple who had been together only five years, had no children and maintained separate finances might achieve only 25 per cent.¹¹¹

3. A modified scheme for relationship breakdown

It is submitted that the general thrust of the regime proposed by the SLC dovetails neatly with the aims outlined above for a compromise solution in respect of breakdown of non-marital relationships. In the first place, the SLC scheme builds upon existing legal provision for married couples. Secondly, the use of percentages allows for a nuanced approach to the treatment of non-marital couples, avoiding the "all or nothing" position of the current law in New Zealand. Thirdly, the range of outcomes possible allows for equality in treatment of functionally equivalent relationships only. The overall framework is well suited for the needs of both legal systems.

Modification of the scheme is, however, required for it to make sense beyond the succession context. The fundamental question to be addressed

¹⁰⁸ *Report on Succession*, above n 2, at [4.11]–[4.13] and recommendation 38.

¹⁰⁹ *Report on Succession*, above n 2, at [4.1.4] and recommendation 39.

¹¹⁰ *Report on Succession*, above n 2, at [4.15].

¹¹¹ *Report on Succession*, above n 2, at [4.16].

concerns the assessment of the appropriate percentage. In the SLC proposal, this assessment is framed in restitutionary language: what percentage share of a spousal award has an applicant “earned”? It may be that a strictly restitutionary approach was not envisaged by the SLC given that the factors relevant to the assessment extend beyond a simple matter of contributions. In any event, it is suggested that it would be undesirable to base a modified scheme on restitutionary ideas. In part, this is because – as the recent jurisprudential interpretations of the Scottish legislation have demonstrated – such an approach cannot meet the objectives sought from legal regulation here, in particular in terms of protection of economically vulnerable parties emerging from non-marital relationships. Furthermore, a restitutionary model is not consonant with the existing property sharing regimes on which the compromise solution seeks to build.

In both New Zealand and Scotland, the claim to property on divorce is based not on an assessment of contributions but on the basis of the legal status of marriage itself. Jo Miles describes this as an entitlement approach to economic remedies on relationship breakdown.¹¹²

The nature of the relationship is such that, simply because of its existence and the parties’ many and various, often unique and indefinable contributions to it, the parties ought to be entitled to share certain of each other’s property on relationship breakdown. No attempt is made to relate those contributions to the acquisition of economically valuable assets. Nor may any attempt be made to quantify the value of the parties’ contributions to the relationship; they may simply be accepted as being of equal value. This approach may accordingly avoid the difficult, some might say impossible and invidious, tasks posed by a property law inspired approach of trying to ascribe economic value to contributions not readily susceptible to that kind of measurement, and trying to compare the relative worth and value of essentially incommensurable contributions in order to determine the size of each party’s share.

As identified in the preceding passage, there are many cogent reasons for adopting this approach. In both New Zealand and Scotland this model has played a part in promoting the economic equality of women particularly. It is worth noting that the regimes in both jurisdictions do not rest purely on entitlement; both make some provision for consideration of the overall economic consequences of the relationship, through the remedies for economic imbalance set out in s 15 of the PRA in New Zealand, and through the consideration of economic advantage and disadvantage to the parties demanded by s 9(1)(b) of the 1985 Act in Scotland. However, these factors do not come into play until after the parties have been admitted to the regime. They can alter the presumed equal division of property that is the starting point of the regimes, but they cannot prevent the regimes operating in the first place.

If entitlement is the appropriate basis for access to the property sharing system, however, and this entitlement is predicated on the formal status of marriage, how can this operate for non-marital couples? By definition, they do not meet the formal test. There is an awkward paradox here. Functionalist analyses are often employed as a justification for equal treatment in this area of law. Marriages and non-marital relationships often function in the same way,

¹¹² Miles, above n 37, at 274.

and accordingly the same problems often arise when they break down. It is appropriate, then, for the law to provide them with the same solutions. However, the functioning of a marriage is nowadays virtually an extra-legal concern. In the Scottish context, Jane Mair comments:¹¹³

The modern law tells us how to create and terminate a marriage but it tells us little of what happens, or is expected to happen, in between. Modern marriage, according to Scots family legislation, is a relationship largely open to personal interpretation.

Such an observation is equally applicable to the situation in New Zealand. Very few legal obligations remain between spouses while they are married, and divorce is available on a “no fault” basis in both jurisdictions. The conduct of the parties, beyond the requirement to live apart for the proscribed period, need not be relevant to obtaining a divorce and can be used to influence the eventual division of property in limited circumstances and only where sufficient to overcome the starting presumption of equal sharing.

Barlow and Smithson highlight this mismatch in their recent research into the practices of cohabitants in England and Wales, noting:¹¹⁴

In law, marriage is considered to be the ultimate commitment because it is one that is declared so publicly and so provable. This is the key distinction that is made between functionally similar marriages and cohabiting families – a distinction which justifies a quite different treatment of the adjustment from intact to separated families [in English law.] Yet it is the initial public commitment to the institution of marriage, rather than to the relationship, that is rewarded within our redistribution of assets on divorce. This is regardless, in most cases, of any fault attributable to the parties’ conduct during the marriage which might have led to the breakdown.

The distinction that is made between commitment to the institution of marriage and commitment to the relationship is respectfully submitted to be misconceived here. The purpose of marriage is that it operates as a shorthand signifying commitment to the relationship, or at least signifying that the property consequences of the breakdown of the relationship should be governed by law formulated on an assumption of commitment. The reality of the marriage may be that little evidence of commitment exists: parties may have been unfaithful; there may have been abuse; their lives might simply have drifted apart and their attentions become focused elsewhere. However, that reality is not relevant, since the commitment is evidenced through the marriage itself.

Accordingly, it is submitted that commitment is the core value underlying the entitlement of married couples to property division on divorce. Marriage signifies a full commitment on the part of both parties to the relationship. The marriage is conceived of as a joint endeavour, from which both parties are naturally entitled to share equally at the end. Non-marital couples do not have the benefit of this formal representation of their commitment. For them to benefit from the same entitlement as their married counterparts, then, it is necessary for them to demonstrate commitment through their actions.

113 J Mair “A modern marriage?” (2006) 10 Edin LR 333 at 340.

114 A Barlow and J Smithson “Legal assumptions, cohabitants’ talk and the rocky road to reform” (2010) 22 CFLQ 328.

It is this demonstration of commitment, as assessed against the “gold standard” represented by marriage, which must provide the basis for assigning a percentage to non-marital relationships under the proposed compromise regime. The question is not what percentage share an applicant has earned, but what percentage commitment to the relationship the couple have demonstrated. What evidence exists of a partnership conducted as the joint endeavour presupposed by the rules of relationship property division? The assessment could be conducted on the basis of the factors which are already relied upon in both jurisdictions: the duration of the relationship; whether the parties share a residence; whether the parties are in a sexual relationship; whether there are children of the family; the financial arrangements between the parties. As at present, listed factors must be indicative rather than exhaustive, and the circumstances of the case looked at it the round. A minimum standard of commitment must be evidenced before any percentage can be applied – a couple who are merely dating will be assessed at zero per cent of marriage standard commitment. Conversely a couple who have lived together for many years and raised children together will be assessed at 100 per cent.

Once the percentage commitment figure has been ascertained, this should be applied against the award the applicant *would* have received had the parties been married. Under divorce law in both jurisdictions, this award represents the value to be transferred from the respondent to the applicant in order that both parties leave the relationship with an equal share of the relationship property (or such other share of the property as might be appropriate in the individual case.) So, if the sole relationship asset was a house worth \$100,000 held in the respondent’s name, a married applicant would be entitled to \$50,000, leaving the couple with half the relationship property each. If the respondent held legal title to \$75,000 of the relationship assets and the married applicant \$25,000, she would be entitled to an award of \$25,000, again leaving parties with half the property each.

Under the modified scheme, the value of the award on divorce would be ascertained based on existing law, then multiplied by the percentage commitment figure. So, in the example of the sole asset of a house worth \$100,000 held in the respondent’s name, a non-marital applicant in a 50 per cent relationship would receive \$25,000. In a 20 per cent relationship, she would receive \$10,000.

4. *Evaluating the modified scheme*

The value of the modified scheme can be tested through its application to some of the “hard cases” outlined above. Does it produce results which avoid the pitfalls in the existing regimes?

In New Zealand, the outcomes for the comparison cases of *Benseman v Ball*¹¹⁵ and *Scragg v Scott*¹¹⁶ would clearly be less drastic. Under the modified scheme, the similarities between these cases would be likely to have more impact than the differences. Both couples had been together for some years, and both had a sexual relationship. Although there had been brief periods of

115 *Benseman v Ball* [2007] NZFLR 127 (HC).

116 *Scragg v Scott* [2006] NZFLR 1076 (HC).

shared residence, for the majority of each relationship the partners had lived in different places. Both cases involved a degree of financial interdependence, perhaps more marked in *Scragg* where the claimant was effectively dependent on the respondent. Both cases involved legal documents indicating a mental state contrary to the idea of a shared life on the part of the respondent – the will in *Benseman* and the contracting out agreement in *Scragg*. The overall picture in both cases suggests something less than the gold standard ideal of marriage, and in both cases an assessment around 50 per cent would seem appropriate.

In Scotland, the criticisms levelled against cases decided on the restitutionary approach – a failure to meet the legislative objective of protecting the economically vulnerable, and a reduction of the new statutory scheme down to the pre-existing enrichment law principles – would be addressed. In *Selkirk v Chisholm*,¹¹⁷ commitment to the relationship was evidenced through cohabitation in a sexual relationship for nine years during which the applicant undertook the homemaking role and the respondent was responsible for household bills. The separation in their financial affairs would be relevant to the assessment, and perhaps an overall figure of 60 per cent commitment would be appropriate.

It is accepted that the modified regime will have some difficulties of its own. The discretion required to assess commitment will compromise the certainty of outcomes where the scheme is applied. Such uncertainty is inevitable if the scheme is to be sufficiently flexible to deal with the variety of non-marital relationships which exist and, it is submitted, the balance struck between certainty and flexibility here is appropriate, avoiding the dramatic consequences of the current New Zealand system without replicating the debilitating ambiguity in the Scottish provision. Jurisprudence on the existing law demonstrates that absolute predictability is unlikely to emerge, but over time caselaw should allow a “ball park” percentage figure to be estimated with confidence, allowing litigation (or settlement) to proceed on a surer footing than is currently possible in either jurisdiction.

Equality concerns may also be brought up in connection with the compromise scheme, although it is submitted that these can be adequately addressed. The prohibition on discrimination on the basis of marital status in New Zealand would not, it is argued, be violated by the percentage approach, since it allows for a difference in treatment only where relationships are not equivalent. Such discrimination is justified since the situations are not like for like. Conversely, the sanctity of marriage sought to be preserved by Scots law would also be undisturbed, since again only relationships functionally equivalent to marriage would receive the same treatment as a marriage. The differentiation allowed by the scheme between different types of non-marital relationship promotes equality in the true sense.

E. Final thoughts

Such are the similarities between New Zealand and Scotland in terms of size, society and legal regulation of personal relationships that it is something of a surprise to find that their approaches to non-marital partnerships have been so

117 *Selkirk v Chisholm* 2011 Fam LR 56 (SC).

divergent. Although there may be a temptation to view the grass as always greener on the other side of any legislative fence, comparative analysis of the two jurisdictions in this area of the law suggests, inevitably, that any regime has both advantages and drawbacks. At present, it would be difficult to conclude other than that the New Zealand regime is in better health, with a clear basis in principle and a relative degree of satisfaction amongst critics as to its operation. A legislative scheme for non-marital couples entirely separate from existing relationship property law may be entirely possible, but the profound ambiguity in the current provision in Scotland suggests that considerable thought must be given to the drafting and underlying principle of such a scheme or the law is unlikely to function to the satisfaction of those affected by it.

As the range of relationship and family forms acceptable within modern society proliferates, increasingly creative solutions to legal regulation in this area are required to negotiate the struggle between certainty and flexibility that animates the normal chaos of family law.¹¹⁸ The modified scheme outlined in this paper aims to unite the certainty of existing law and practice with a flexibility expressed in a familiar percentage form in recognition of the variability of non-marital partnerships.

As a compromise, this regime may have something to offer on both sides of the world.

118 J Dewar "The Normal Chaos of Family Law" (1998) 61 MLR 467.