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TRUSTS OF THE FAMILY HOME: SOCIAL CHANGE, JUDICIAL INNOVATION AND LEGISLATIVE REFORM

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This article surveys the development, over the last half-century, of the law in relation to trusts of the family home in Ireland. The focus on disputes over the beneficial ownership of the family home, the most important asset owned by many families, will allow a consideration of the evolution of an aspect of the law of resulting and constructive trusts,¹ set against the background of relevant legislative developments. The most common trigger for disputes over the beneficial ownership of the family home is the breakdown of an intimate relationship, whether a marriage or civil partnership or cohabitation. However, the trigger could also be the death² or bankruptcy³ of one of the parties or a dispute with creditors.⁴ In addition, not all disputes arising on the breakdown of a relationship will involve an issue related to the ownership of the family home, one obvious reason being that many couples live in rented accommodation. There is, therefore, an imperfect match between the area of the law of equity conveniently described as “trusts of the family home” and the issue of the property consequences of relationship breakdown. Nonetheless, the development of this area of the law of equity has clearly been dominated by concerns as to the latter issue.

In fact, a feature of the development of the law that will emerge in this article is that the social phenomenon or “problem” that equity has been seeking to address has changed over the course of the decades. Initially, disputes between married couples were the primary focus of the case law; however, the attention of commentators and law reformers has more recently shifted to those arising in the context of unmarried cohabitation (even if the case law in this context has

¹ The boundary between these forms of non-express trust was blurred by Lord Diplock in *Gissing v Gissing* [1971] A.C. 886 at 905B. However, the doctrine applied by the Irish courts can reasonably be regarded as giving rise to a resulting trust, while the approach in England and Wales is generally regarded as leading to a constructive trust (as is also the case under the different doctrinal approaches of other Commonwealth jurisdictions such as Canada, Australia and New Zealand).

² See, e.g. *EN v RN* [1992] 2 I.R. 115.

³ See, e.g. *Wall v Wall*, unreported, High Court, 10 September 1986 [Hamilton P.].

⁴ *C.D. v W.D.* [1997] IEHC 23.

remained sparse). Many judges and commentators have felt that there is the potential for injustice “upon the termination of a relationship where the parties were economically and emotionally interdependent and relied on the relationship rather than their separate legal entitlements to secure their financial well-being”.⁵

The idea of utilising the law of equity to address this perceived injustice has a strong appeal for some. In the Supreme Court of Canada in *Peter v Beblow*,⁶ McLachlin J.⁷ rejected an argument against judicial intervention which was based on the fact that (then existing Canadian) legislative property adjustment regimes excluded unmarried cohabitants such as the plaintiff in the case, arguing that “it is precisely where an injustice arises without a legal remedy that equity finds a role”.⁸ The contrary view is that, where the legislature has consciously decided not to intervene (or to intervene only to a limited extent), it would be undemocratic for the courts to second-guess this decision.⁹ It will be seen that there is now Irish legislation governing the property rights of married couples upon judicial separation and divorce, as well as parallel legislation covering civil partners, with a more limited regime in place in respect of “qualified” cohabitants. Thus, not only do the equitable rules developed by our courts no longer have as much practical importance as they once did, it is also arguable that further judicial extension of them would not be democratically legitimate. This point is further explored in the Conclusion.

Setting the stage

Our period begins in 1966 and, before beginning to survey the evolution of the law, it is necessary to examine the social and doctrinal position at that date. Although the underlying doctrinal difficulties should not be underestimated, this is an area of the law where it is particularly clear that the development of doctrine can only be understood in the context of societal conditions. It is

⁵ J. Mee, “Property Rights and Personal Relationships: Reflections on Reform” (2004) 24 *Legal Studies* 414 at 426.

⁶ [1993] 1 S.C.R. 980.

⁷ Giving judgment on behalf of herself and La Forest, Sopinka and Iacobucci JJ.

⁸ [1993] 1 S.C.R. 980 at 994.

⁹ See the discussion in John Mee, “*Burns v Burns*: The Villain of the Piece?” in Stephen Gilmore, Jonathan Herring and Rebecca Probert (eds), *Landmark Cases in Family Law* (Oxford: Hart, 2011), pp.187–190.

possible to identify a number of important aspects of the background against which disputes over the ownership of the family home arose. First, the model of family life envisaged by Art.41.2 of Bunreacht na hÉireann (Constitution of Ireland),¹⁰ premised on a male “bread-winner” and a female “stay-at-home mother”, was reflected in social reality (certainly to a greater extent than today).¹¹ Secondly, and associated with the previous factor, was a standard practice of placing ownership of the matrimonial home in the sole name of the husband.¹² This had vital practical importance in cases where the marriage broke down and the separate property entitlements of the parties became crucial. Thirdly, the end of the Second World War saw the beginning of a pattern of inflation in house prices¹³ which meant that there would be a significant “windfall” associated with ownership of the family home, in terms of the excess value of the house when compared to the amount that had been invested in its purchase, taking into account both the initial cash payment and the mortgage repayments.¹⁴ Fourthly, there was no legislative framework allowing for the adjustment of the property entitlements of spouses upon the breakdown of the relationship, thus increasing the impact of the factors that have already been mentioned. Finally, cohabitation outside marriage was far less common than today, both in Ireland and in England and Wales, with same-sex cohabitation being extremely rare due to societal hostility.¹⁵

Turning to the state of development of the case law, at the start of our period there had not yet been any written judgment in a modern Irish “family home”

¹⁰ Referring to a woman’s “life in the home” (Art.41.2.1°) and mothers’ “duties in the home” (Art.41.2.2°).

¹¹ For discussion in the British context, see Colin Creighton, “The rise and decline of the ‘male breadwinner family’ in Britain” (1999) 23 *Cambridge Journal of Economics* 519.

¹² Note the comment of Baroness Hale in *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432, [67], that: “Mortgagees used to insist upon the home being put in the name of the person whom they assumed would be the main breadwinner. Nowadays, they tend to think that it is in their best interests that the home be jointly owned and both parties assume joint and several liability for the mortgage.”

¹³ See generally Katharina Knoll, Moritz Schularick and Thomas Steger, *No Price Like Home: Global House Prices 1870–2012* (Centre for Economic Policy Research, Discussion Paper No 10166, 2015).

¹⁴ Note, e.g. the repeated references by Evershed M.R. in *Rimmer v Rimmer* [1953] 1 Q.B. 53 at 67, 68, 71, 72 to the “windfall” which the court had to divide between the parties.

¹⁵ Statistics on the rise of cohabitation in Ireland are given in the text to fnn.89–95 below. For a perceptive study (written from an English perspective) of the history of cohabitation, emphasising the modern origins of its prevalence, see Rebecca Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600–2010* (Cambridge: Cambridge University Press, 2012).

case, with the first important cases coming in the 1970s. The modern English case law begins much earlier, with *Re Roger's Question* in 1948.¹⁶ That case applied the long-established “purchase money resulting trust”. Under this doctrine, there is a rebuttable presumption that the beneficial ownership of property is held, under a resulting trust, by the person who has provided the purchase price.¹⁷ Where more than one person has contributed, the presumption is that the parties are entitled in the proportions of their contributions.¹⁸ As will be seen in due course, this doctrine has formed the basis of future developments in Irish law, in a more straightforward manner than in England, where a “common intention constructive trust” approach, which has a tangled relationship with the purchase money resulting trust, has come to represent orthodoxy.

Even in England and Wales, comparatively little exploration of the potential of the law of trusts had, in fact, taken place by 1966. This was largely due to the fact that Lord Denning M.R.’s Court of Appeal was developing special rules to govern matrimonial property disputes.¹⁹ The first attempt along these lines centred on s.17 of the Married Women’s Property Act 1882 (the equivalent of s.12 of the Irish Married Women’s Status Act 1957), which allows the judge “to make such order with respect to the property in dispute... as he thinks fit”. In *Hine v Hine*,²⁰ Lord Denning M.R. suggested that the court’s jurisdiction under s.17 was “entirely discretionary” and entitled the court “to make such order as appears to be fair and just in all the circumstances of the case”.²¹ Dicta of Lord Upjohn in *National Provincial Bank Ltd v Ainsworth*,²² decided just before the start of our period, cast doubt on the validity of the claim for a discretion under s.17. Perhaps partly as a result of this, the Court of Appeal developed an alternative solution, which involved the proposition that “where a couple, by their joint efforts, get a house and furniture, intending it to be a continuing provision for them for their joint lives, it is the prima facie inference from their

¹⁶ [1948] 1 All E.R. 328.

¹⁷ See the classic statement by Eyre CB in *Dyer v Dyer* (1788) 2 Cox Eq. Cas. 92 at 93.

¹⁸ *Wray v Steele* (1814) 2 V & B 388.

¹⁹ See generally James Brady, “Trusts, Law Reform and the Emancipation of Women” (1984) 6 *Dublin University Law Journal* (n.s.) 1.

²⁰ [1962] 1 W.L.R. 1124.

²¹ Fn.20 above, at 1127–1128.

²² [1965] A.C. 1175 at 1235–1236.

conduct that the house and furniture is a ‘family asset’ in which each is entitled to an equal share”.²³

Pettitt and Gissing

In two seminal decisions of the House of Lords, *Pettitt v Pettitt* (decided in 1969)²⁴ and *Gissing v Gissing* (decided in 1970),²⁵ these two doctrines were firmly rejected. In *Pettitt*, the Lords held unanimously that s.17 was purely procedural in nature and conferred no discretion on the court to interfere with existing property rights.²⁶ The “family assets” doctrine was also decisively rejected in *Pettitt*²⁷ and this rejection was reaffirmed in *Gissing v Gissing*.²⁸ Unfortunately, notwithstanding their importance in respect of the development of the law in both England and Ireland, the decisions in *Pettitt* and *Gissing* did not bring doctrinal certainty.²⁹ Given that the factual basis of the claim in each case was weak, the limits of the orthodox resulting trust were not rigorously explored. Furthermore, there were five speeches in each case, thus complicating the position for later judges seeking to interpret the cases.

Two of the Law Lords in *Pettitt* argued unsuccessfully for a radical new approach, which would have had little relationship with the resulting trust. Lord Reid supported an approach whereby, even if there had been no actual agreement between the parties, the court would “ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquisition or improvement of property owned by the other spouse”.³⁰ Thus, Lord Reid was willing to impute an agreement to the parties, thereby creating a fictional contract. Lord Diplock’s proposed solution was

²³ *Gissing v Gissing* [1969] 2 Ch. 85 at 93 (CA) per Lord Denning M.R.

²⁴ [1970] A.C. 777.

²⁵ [1971] A.C. 886.

²⁶ [1970] A.C. 777 at 793D per Lord Reid; 799C–D per Lord Morris; 808D per Lord Hodson; 813C per Lord Upjohn; and 820E per Lord Diplock. Note also the similar view later taken by the Irish High Court in the context of s.12 of the Married Women’s Status Act 1957 in *MB v EB* unreported, 19 February 1980.

²⁷ [1970] A.C. 777 at 795B–C per Lord Reid; 801A–C per Lord Morris; 809G–810G per Lord Hodson; 817A–H per Lord Upjohn.

²⁸ [1971] A.C. 886 at 899–900 per Viscount Dilhorne.

²⁹ On these cases, see John Mee, “*Pettitt v Pettitt* (1970) and *Gissing v Gissing* (1971)” in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Oxford: Hart, 2012).

³⁰ [1970] A.C. 777 at 795.

broadly similar, although it seems that, reflecting a difference from Lord Reid's approach, the fictional common intention on which Lord Diplock focused would have served to create a trust rather than a contract.³¹ The views of Lords Reid and Diplock were rejected by the majority of the House of Lords in *Pettitt*. Lord Morris insisted that the court cannot "devise or invent a legal result".³² The same view was taken by Lord Hodson,³³ and by Lord Upjohn.³⁴

The early Irish case law

The first modern Irish case in the family property area was *C v C*,³⁵ in which a married couple had bought a house in the sole name of the husband. The wife paid the ten per cent deposit and the costs of the purchase. The remainder of the price was borrowed by the husband on mortgage. Afterwards he made most of the repayments. However, on a number of occasions when he was unable to find the cash, the wife borrowed from her family and gave him the money to pay the amount due. Kenny J. held that she was entitled to one half of the beneficial interest in the home. He stated that:

"I think that the correct and most useful approach to these difficult cases is to apply the concept of a trust to the legal relationship which arises when a wife makes payments towards the purchase of a house, or the repayment of the mortgage instalments, when the house is in the sole name of the husband. When this is done, he becomes a trustee for her of a share in the house and the size of the share depends upon the amount of the contributions which she has made towards the purchase or the repayment of the mortgage."³⁶

In many ways, this case set the tone for future Irish case law. Kenny J.'s legal analysis was brief and superficial. He did not expressly refer to the purchase money resulting trust in his judgment but it is clear that this doctrine was the

³¹ See fn.30 at 822C–D. See also, fn.30 at 823G.

³² Fn.30 at 804.

³³ Fn.30 at 810.

³⁴ Fn.30 at 816.

³⁵ [1976] I.R. 254 (High Court). Note also *Heavey v Heavey* (1974) 111 I.L.T.R. 1.

³⁶ [1976] I.R. 254 at 258

basis upon which a trust arose in favour of the claimant in the case. It emerges from the passage quoted above that Kenny J. felt that it was appropriate to treat contributions to the repayment of mortgage instalments as contributions for the purposes of that doctrine. Although the issue did not arise on the facts of the case, Kenny J. clearly equated direct payment of mortgage instalments by the claimant with “paying the expenses of the household so that he has the money which makes it possible for him to pay the mortgage instalments”.³⁷

The main controversy in subsequent Irish cases, over the next decade or so, was as to whether such so-called “indirect contributions” could indeed be treated as “contributions” which would trigger a resulting trust. There had been conflicting decisions in the English and Northern Ireland courts on this point. Lord Denning had favoured treating indirect contributions as sufficient in a series of cases,³⁸ while a Northern Irish case (supported by the weight of opinion in the House of Lords in *Gissing*) took the view that such contributions could not form the basis of a successful claim unless there was evidence of “an agreement or arrangement” to that effect between the parties.³⁹ A similar conflict arose in the Irish courts.⁴⁰ Ultimately, the controversy was resolved by the Supreme Court decision of *McC v McC*,⁴¹ where Henchy J. commented that “when the wife's contribution has been indirect (such as by contributing, by means of her earnings, to a general family fund) the courts will, in the absence of any express or implied agreement to the contrary, infer a trust in favour of the wife, on the

³⁷ [1976] I.R. 254 at 257.

³⁸ *Falconer v Falconer* [1970] 1 W.L.R. 1333; *Davis v Vale* [1971] 1 W.L.R. 1022; *Hargrave v Newton* [1971] 1 W.L.R. 1611; *Hazell v Hazell* [1972] 1 W.L.R. 301; *Cooke v Head* [1972] 1 W.L.R. 518.

³⁹ *McFarlane v McFarlane* [1972] N.I. 59.

⁴⁰ Making no requirement of an agreement or arrangement: *M. v M.* (1978) 114 I.L.T.R. 46; *L. v L.*, unreported, High Court, [Finlay P.], 21 December 1979; *R. v R.* [1979] I.L.R.M. 1; *Power v Conroy* [1980] I.L.R.M. 31; *W. v W.* [1981] I.L.R.M. 202; *F.G. v P.G.* [1982] I.L.R.M. 155; *H.D. v J.D.*, unreported, High Court, [Finlay P.], 31 July 1981; *O’K. v O’K.*, unreported, High Court, [Barron J.], 16 November 1982. Supporting such a requirement: *McGill v S.* [1979] I.R. 283; (perhaps) *M.B. v E.B.*, unreported, High Court, [Barrington J.], 19 December 1980; *M.G. v R.D.*, unreported, High Court, [Keane J.], 28 April 1981; *S.B. v B.D.*, unreported, High Court, [Murphy J.], 19 March 1982. Note also, *B. v B.*, unreported, High Court, [MacKenzie J.], 22 April 1986. For more detailed treatment of the cases discussed in this note, see Brady, fn.19 above.

⁴¹ [1986] I.L.R.M. 1.

ground that she has to that extent relieved the husband of the financial burden he incurred in purchasing the house”.⁴²

Claims based on other contributions did not fare as well. In *R.K. v M.K.*,⁴³ it was held by Finlay P. that a resulting trust could not be founded upon work in the home and in the rearing of children. In *W. v W.*⁴⁴ and *N.A.D. v T.D.*,⁴⁵ it was held that contributions to the making of improvements to the property could not be regarded as contributions for the purposes of a resulting trust.⁴⁶ However, in contrast, the cases appeared to lean in favour of the proposition that unpaid work in the legal owner’s business could generate a resulting trust.⁴⁷

B.L. v M.L. and E.N. v R.N.

Almost exactly in the middle of our period, on 5 December 1991, the Irish Supreme Court decided two cases, *B.L. v M.L.*⁴⁸ and *E.N. v R.N.*,⁴⁹ which have remained, up to the present day, the most authoritative statements of the Irish position.⁵⁰ The judgments do not provide a detailed or rigorous legal analysis of the Irish approach in this area. However, there have been comparatively few cases, and very little theoretical development, after these decisions. The decision in *BL v ML* is the better known of the two cases because it required the Supreme Court to consider a radical doctrine whereby the Irish Constitution was regarded as forming the basis for a successful claim by a wife who had worked without pay in the family home. However, *E.N. v R.N.* is also of significance because in that case the Supreme Court gave its approval to a curious doctrine, concerning the

⁴² Fn.41 at 2. For the preferred Irish method of calculating the share of a claimant who contributed, directly or indirectly, to the repayment of a mortgage, see *K v K* (1978) 114 I.L.T.R. 50; *R v R* [1979] I.L.R.M. 1; *L. v L.*, unreported, High Court, [Keane J.], 21 December 1979; *G.N.R. v K.A.R.*, unreported, High Court, [Carroll J.], 25 March, 1981. See also, *B.M. v A.M.* [2003] IEHC 170.

⁴³ Unreported, High Court, [Finlay P.], 24 October 1978.

⁴⁴ [1981] I.L.R.M. 202.

⁴⁵ [1985] I.L.R.M. 153. Some earlier cases appeared to favour a more generous approach: see *M. v M.* (1978) 114 I.L.T.R. 46; *E.R. v M.R.*, unreported, High Court, [Carroll J.], 26 January 1981; *G.N.R. v K.A.R.*, unreported, High Court, [Carroll J.], 25 March 1981.

⁴⁶ This view was reiterated by McGuinness J. in the Supreme Court case of *C.F. v J.D.F.* [2005] 4 I.R. 154 at 166. Contrast the questionable approach of Edwards J. in *Sheehy v Talbot* [2008] IEHC 207. See also fn.70 below and accompanying text.

⁴⁷ See *R.K. v M.K.*, unreported, High Court, [Finlay P.], 24 October 1978, p.9 of the transcript; *C.R. v D.R.* unreported, High Court, [Lynch J.], 5 April 1984, p.15 of the transcript.

⁴⁸ [1992] 2 I.R. 77.

⁴⁹ [1992] 2 I.R. 116.

⁵⁰ For detailed analysis, see John Mee, “Trusts of the Family Home: Boiling Oil from the Ivory Tower” (1992) 14 D.U.L.J. (n.s.) 19.

effect of repaying a mortgage unrelated to the acquisition of the family home, that had been advanced in the earlier High Court case of *W. v W.*⁵¹

Turning first to *B.L. v M.L.*, the case concerned a claim by a wife to a share in the beneficial interest in the family home and farm which was held in the sole name of her husband. Shortly after the marriage, the house had been purchased without the assistance of a mortgage. Three-quarters of the price derived from a gift that the husband had received from his father and the remaining quarter was paid to the vendor over a period of five years out of farm profits. The wife's claim was based on the fact that she had, during 19 years of marriage, devoted herself to life as a "full-time wife and mother". In the High Court, Barr J. accepted that the claim would fail under the law of trusts because the claimant had made "no contribution in money or money's worth, directly or indirectly" to the acquisition of the disputed property.⁵² However, Barr J. found a basis, "not previously considered by the courts",⁵³ on which to award the claimant a one-half share in the family home (but not in the farm). He relied on Art.41.2 of the Irish Constitution, which states that "the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved"⁵⁴ and that the "State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home".⁵⁵ Barr J. reasoned that because the claimant's constitutionally approved "role as full-time wife and mother precludes her from contributing, directly or indirectly, in money or money's worth from independent employment or avocation towards the acquisition by the husband of the family home and contents, her work as home-maker and in caring for the family should be taken into account in calculating her contribution towards that acquisition".⁵⁶ According to Barr J., the value of this contribution should be assessed by the court "in the light of its nature, quality and duration".⁵⁷

⁵¹ [1981] I.L.R.M. 202.

⁵² [1992] 2 I.R. 77 at 97.

⁵³ [1992] 2 I.R. 77 at 97.

⁵⁴ Art.41.2.1°.

⁵⁵ Art.41.2.2°.

⁵⁶ [1992] 2 I.R. 77 at 98-99.

⁵⁷ Fn.56 at 100. On Barr J.'s doctrine, see James Brady, "Constructive Trusts, Constitutional Rhetoric and the Non-Ownning Spouse" (1991) 42 N.I.L.Q. 1 at 9-13.

The merits of this doctrine are open to question, given that it could be suggested that, due to its foundation in the outdated rhetoric of Art.41.2, it “represented the formal adoption by the Irish judiciary of the sort of gender stereotyping from which originally flowed their inequitable treatment of work in the home”.⁵⁸ The parameters of the doctrine were not worked through by Barr J. but it seemed as if the new doctrine was not directly aligned to the existing law of trusts. He stated that he drew “no distinction between the purchase of the family home entirely or substantially by the husband out of his independent assets and the more usual case where the home is acquired by him subject to a mortgage repayable over a term of years”.⁵⁹ If, however, the availability of a remedy were not confined to a claimant whose work in the home occurred while a mortgage was being repaid, this would—unacceptably—place a female claimant who worked outside the home in an inferior position in this respect.⁶⁰

On appeal, the Supreme Court was unanimous in its rejection of Barr J.’s approach. Finlay C.J. stated that:

“[T]o identify this right in the circumstances set out in this case is not to develop any known principle of the common law, but is rather to identify a brand new right and to secure it to the plaintiff. Unless that is something clearly and unambiguously warranted by the Constitution ..., it must constitute legislation and be a usurpation by the courts of the function of the legislature.”⁶¹

The Supreme Court was also satisfied that a contribution based on work in the home could not be accommodated within the law of trusts⁶² (and this was reiterated in *E.N. v R.N.*).⁶³

In *E.N. v R.N.*, the dispute arose upon the death, apparently insolvent, of the husband, who had provided in cash all the money required for the purchase of the family home in his sole name. At the time of the purchase, the husband took

⁵⁸ Mee, “Trusts of the Family Home”, fn.50 above, at 34.

⁵⁹ [1992] 2 I.R. 77 at 99.

⁶⁰ Mee, “Trusts of the Family Home”, fn.50 above, at 35.

⁶¹ [1992] 2 I.R. 77 at 107.

⁶² Fn.61 at 107–108 per Finlay C.J.; 111 per McCarthy J.; 115 per Egan J.

⁶³ [1992] 2 I.R. 116 at 122, per Finlay C.J.

out a mortgage to secure a loan to cover the renovation of the house and the conversion of part of it into nine apartments. Upon the marriage, the claimant had given up her career as a nurse “so as to be a full-time wife”.⁶⁴ Insofar as it was based on her work in the home and in rearing the three children of the marriage, her claim was unsuccessful. However, over the course of the marriage, the claimant had also managed the nine apartments, “making the lettings in them, dealing with complaints, collecting the rents and providing for and organising the[ir] maintenance”.⁶⁵ According to Finlay C.J. (with whom the other four Supreme Court judges concurred), “[s]uch activities are different from and not to be identified with the activities of a wife and mother in the home”.⁶⁶ Thus, the Supreme Court was willing to accept a claim to a resulting trust based on unpaid work in the legal owner’s business. The Supreme Court did not articulate the precise reasons for distinguishing between an unpaid contribution in the form of work in the family home and an unpaid contribution in the form of work in the legal owner’s business. It appears that the former was regarded as a contribution “in money’s worth”, which could appropriately be taken into account, while the latter did not fall into that category.⁶⁷ In fact, however, the claimant who works without pay in the legal owner’s business no more makes a “monied” contribution to a family pool or fund than does a claimant who works without pay in the home.⁶⁸ In each case, the argument for the claimant seems to come down to the point that the claimant’s endeavours have made it easier, in practical economic terms, for the legal owner to pay off a mortgage on the

⁶⁴ Fn.63 at 119.

⁶⁵ Fn.63 at 119. She had also worked a nurse for four years, after the children had grown up, and her financial contribution from her earnings was taken into account in accordance with the standard Irish approach.

⁶⁶ Fn.63 at 122.

⁶⁷ The idea of a contribution in “money’s worth” was mentioned by Barr J. in *B.L. v M.L.* [1992] 2 I.R. 77 at 96, 97, 99 and by Finlay C.J. in *E.N. v R.N.* [1992] 2 I.R. 115 at 122.

⁶⁸ In the Supreme Court in *B.L. v M.L.*, Finlay C.J. referred to the need for a “monied contribution”: [1992] 2 I.R. 77 at 108. Where the claimant has contributed money into a “family fund” or “family pool”, it can be argued that the parties regard themselves as having a joint budget and treat all family expenses as common, so that it is only a matter of convenience as to whose money goes towards the mortgage repayments and whose goes towards other family expenses. This makes it possible to see a person who has contributed money to the family fund as having made what is, in effect, a *direct* contribution to the repayment of the mortgage. See Mee, “Trusts of the Family Home”, fn.50 above at 36–37.

disputed property. If this is the test, it is not easy to see why work in the home and in child-rearing is not regarded as a contribution in “money’s worth”.⁶⁹

The other significant aspect of *EN v RN* was its treatment of contributions to the repayment of a mortgage that does not represent the purchase price of the disputed property. The wife’s contributions in the case had been made at the time when various mortgages over the house, unrelated to the cost of its initial purchase, were being repaid. Finlay C.J. held that direct contributions to the making of improvements could not form the basis of a resulting trust.⁷⁰ However, he felt that the position was different where the contribution was not directly towards the improvements but rather was towards the repayment of mortgages over the disputed property that had been taken out (inter alia) in order to finance the improvements. Finlay C.J. referred to his earlier decision in *W v W*,⁷¹ where the following passage appeared:

“I assume that the fundamental principle underlying this rule of law is that the redemption of any form of charge or mortgage on property in truth consists of the acquisition by the owner or mortgagor of an estate in the property with which he parted at the time of the creating of the mortgage or charge and that there can be no distinction in principle between a contribution made to the acquisition of that interest and a contribution made to the acquisition of an interest in property by an original purchase.”⁷²

In *EN v RN*, Finlay C.J. quoted this passage and confirmed that he “would adhere to that view”.⁷³ The effect of his approach is that the purchase money resulting trust doctrine is applied to the “purchase” of the equity of redemption from the lender, rather than to the purchase of the property from the original

⁶⁹ See further, fn.50 at 36–40.

⁷⁰ [1992] 2 I.R. 115 at 122, citing *W. v W* [1981] I.L.R.M. 202. Such contributions can, of course, form part of a claim in the law of proprietary estoppel, even if this point was expressed somewhat obscurely in *W v W* and in the later case of *N.A.D. v T.D.* [1985] I.L.R.M. 153. On proprietary estoppel, see Hilary Biehler, *Equity and the Law of Trusts in Ireland*, 6th edn (Dublin: Thomson Round Hall, 2016), Ch.18.

⁷¹ [1981] I.L.R.M. 202.

⁷² Fn.71 at 204–205 per Finlay P. (as he then was).

⁷³ [1992] 2 I.R. 115 at 123.

vendor. This means that contributions towards the redemption of any mortgage or charge over property, irrespective of what the money borrowed was used for, can generate a resulting trust for the contributor. Thus in *E.N.*, the claimant who helped to repay various mortgage loans, taken over a period of years for different purposes, was held to be entitled to a one-half share in the beneficial interest in the disputed premises, despite the fact that the initial purchase price had been entirely paid in cash by the legal owner.

Finlay C.J.'s approach is based on the idea that in creating a mortgage a borrower is "parting with an estate" in the property and that, as the loan is repaid, he is buying back that estate. In *B.L. v M.L.*,⁷⁴ Finlay C.J. had referred in passing to "the acquisition of the equity of redemption by ... the clearing off of a mortgage".⁷⁵ Unfortunately this is not an accurate conceptualisation of the process. Consider an example where X mortgages his house (then worth €200,000) to secure a loan of €100,000. If, the day after the mortgage, the value of his house were to double, the bank could not claim one-half of the enhanced value of the land. X would still merely owe it €100,000. What the lender possesses is not a proportion of the ownership but merely a security interest for a fixed sum of money. Correspondingly, as the mortgagor gradually repays the mortgage, he is not increasing his proportionate interest in the property; he is merely reducing the extent of the debt charged upon the property. Thus, the approach taken by Finlay C.J. in *E.N. v R.N.* is inconsistent with the essential nature of the mortgagor/mortgagee relationship. In addition, serious anomalies are created by the fact that Finlay C.J.'s trust is triggered simply by the repayment of a secured loan. It appears entirely arbitrary that, as was expressly held in *E.N. v R.N.*,⁷⁶ a share will be gained by a claimant who pays off a mortgage which was raised to finance improvements to a defendant's property, while a claimant who pays for the same improvements in cash will be awarded nothing. It seems clear that the approach under discussion is based on a misunderstanding and is contrary to principle.⁷⁷ Unfortunately, it has not been

⁷⁴ [1992] 2 I.R. 77.

⁷⁵ Fn.74 at 107.

⁷⁶ [1992] 2 I.R. 116 at 122-123.

⁷⁷ For a more detailed critique, see Mee, fn.50 above at 28-33.

questioned in the subsequent case law and, despite its illogicality, it remains the law in Ireland.

Legislative developments in relation to married couples

One reason for the comparative paucity of case law after the two Supreme Court decisions just discussed⁷⁸ is that the advent of legislative reform drastically reduced the significance of the law of trusts in the context of marital breakdown. The Judicial Separation Act 1989 provided courts with a wide-ranging discretion to adjust the property entitlements of spouses upon the breakdown of their relationship. The legislative regime went well beyond the pre-existing law of trusts and explicitly addressed the issues surrounding unpaid work in the home, requiring the courts *inter alia* to take account of any contribution “by looking after the home or caring for the family” and of “the effect on the earning capacity of each spouse of the marital responsibilities assumed by each during the period when they lived together and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of [that spouse] having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family”.⁷⁹ A similar discretionary regime now applies in relation to married couples who divorce⁸⁰ and civil partners who dissolve their civil partnership.⁸¹ The far-reaching nature of this legislation is illustrated by the comment of Murray J. in *D.T. v C.T.*⁸² that “in ensuring that proper provision is made for the spouses of a marriage before a decree of divorce, the courts should, in principle, attribute the same value to the

⁷⁸ Subsequent cases, for the most part adding comparatively little to what went before, include *C.D. v W.D.* [1997] IEHC 23; *Malone v MacQuaid* [1998] IEHC 86; *B.M. v A.M.* [2003] IEHC 170; *Hickey v O'Dwyer* [2006] 2 I.L.R.M. 81; *M.C. v B.S.* [2008] IEHC 463; *Sheehy v Talbot* [2008] IEHC 207; *DPP v B.* [2009] IEHC 196.

⁷⁹ See Judicial Separation Act s.20(2)(f) and (g) respectively. These provisions have since been re-enacted in s.16(2)(f) and (g) of the Family Law Act 1995 (with the addition of the words indicated in square brackets in the text).

⁸⁰ Family Law (Divorce) Act 1996 Pt III (see, in particular, s.20(2)(f) and (g)).

⁸¹ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 Pt 12 (see, in particular, s.129(1)(f) and (g), referring to contributions in relation to “looking after the shared home” but with no reference to “caring for the family”). Civil partnership was available only to same-sex couples and, in the wake of the Marriage Act 2015 which made marriage available to same-sex couples as well as opposite-sex couples, it is no longer possible to enter a new civil partnership in Ireland.

⁸² [2002] 3 I.R. 334.

contribution of a spouse who works primarily in the home as it does to that of a spouse who works primarily outside the home as the principal earner”.⁸³

Because of the time at which the litigation was commenced in the case, the provisions of the Judicial Separation Act were not applicable to the claim in *BL v ML*. Notwithstanding the existence of the adjustive regime under the Judicial Separation Act 1989, the decision in *B.L. v M.L.* triggered a “strong and often panicky response”⁸⁴ from the public. There was “an instant clamour for emergency legislation from the Opposition parties”⁸⁵ and, on the day of the decision, the Government announced plans for new legislation to ensure equal ownership of the matrimonial home.⁸⁶ The Matrimonial Homes Bill was eventually passed in 1993 and provided that all matrimonial homes would automatically be held under a joint tenancy. The Bill was to have retrospective as well as prospective application, so that an existing family home in the sole name of one spouse would be converted into joint ownership. President Mary Robinson referred the Bill to the Supreme Court under Art.26 of the Constitution and it was found to represent an unconstitutional interference with the decision-making authority of the family (protected by Art.41.1.2°), given its impact on past decisions made by married couples in relation to the manner in which the family home would be held.⁸⁷ The decision of the legislators to make the scheme in the Bill retrospective in its operation thus (predictably) proved fatal in constitutional terms. After the Supreme Court’s decision, no attempt was made to reintroduce a modified version of the Bill and the idea of statutory joint ownership of the family home seems unlikely to resurface.⁸⁸

Cohabitation and further legislative reform

The legislation that has just been discussed is not relevant to those who have not formalised their relationship by marrying (or, while this was possible, entering a civil partnership). A striking change in Irish society over our period was the

⁸³ Fn.82 at 407. Note also fn.82 at 381–382 per Denham J.

⁸⁴ “Family law experts say rights of wives ensured by 1989 Act”, *Irish Times*, 6 December 1991.

⁸⁵ “Bill will protect wives’ property rights”, *Irish Times*, 6 December 1991.

⁸⁶ Fn.85. There had, in fact, already been a commitment in the Fianna Fail/Progressive Democrats Programme for Government to introduce the relevant legislation.

⁸⁷ *In Re Matrimonial Homes Bill 1993* [1994] 1 I.R. 305.

⁸⁸ Note the lack of enthusiasm evident in the discussion in Law Reform Commission *Consultation Paper on Rights and Duties of Cohabitees* (LRC CP 32-2004) pp.50–51.

increase in the level of cohabitation outside marriage. The 1996 Census, the first to provide data on this issue, revealed 31,300 cohabiting couples.⁸⁹ This had risen to 77,600 couples in the 2002 Census,⁹⁰ to 121,800 in the 2006 Census,⁹¹ and to 143,600 in the 2011 Census, the most recent for which results are available.⁹² The increase in the prevalence of cohabitation has coincided with an increase in societal acceptance of this form of relationship. In the Supreme Court case of *WO'R v EH*,⁹³ Murphy J. commented that

“[L]ong term relationships having many of the characteristics of a family based on marriage have become commonplace. Relationships which would have been the cause of grave embarrassment a generation ago are now widely accepted.”⁹⁴

The Census figures indicate that in 2011 there were 4,042 same-sex couples living together, 2,321 male couples and 1,721 female.⁹⁵ For much of our period, such couples were unable to formalise their relationship in the eyes of the law, so that cohabitation was the only option for them. However, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 allowed same-sex couples to enter into a civil partnership, triggering many but not all of the rights and duties associated with marriage. The Thirty-Fourth Amendment of the Irish Constitution,⁹⁶ and the Marriage Act 2015, then opened marriage to same-sex couples.

After two early High Court cases, *McGill v S*⁹⁷ and *Power v Conroy*,⁹⁸ there have been remarkably few written judgments concerning disputes between

⁸⁹ Central Statistics Office, *Census 1996—Principal Demographic Results* (Dublin: Stationery Office, 1997), Table 17.

⁹⁰ Central Statistics Office, *Census 2006 Principal Demographic Results* (Stationery Office, 2007), p.21.

⁹¹ Central Statistics Office, *Census 2006 Principal Demographic Results* (Stationery Office, 2007), p.21.

⁹² Central Statistics Office *This is Ireland—Highlights from Census 2011, Part 1* (Stationery Office, 2012), p.27.

⁹³ [1996] 2 I.R. 248.

⁹⁴ Fn.93 at 286.

⁹⁵ Central Statistics Office, *This is Ireland—Highlights from Census 2011, Part 1* (Stationery Office, 2012), p.27.

⁹⁶ Approved by referendum on 22 May 2015.

⁹⁷ [1979] I.R. 283.

unmarried couples as to the ownership of the family home. One example is *Sheehy v Talbot*;⁹⁹ another is *MC v BS*.¹⁰⁰ The latter, however, was a case arising in the aftermath of an order for nullity, where Herbert J. insisted that the parties “were not and never intended to be co-habitees”. There have also been a handful of other written judgments involving disputes between cohabitants that do not fall into the mainstream of “trusts of the family home” cases.¹⁰¹ Newspaper reports do refer to family home disputes between cohabitants arising at Circuit Court level.¹⁰² However, there has never been a cause célèbre in Ireland such as the English case of *Burns v Burns* (frequently seen as a representing a paradigmatically unfair outcome).¹⁰³

In view of the dearth of cases coming before the higher courts in Ireland, it is perhaps surprising that legislative reform has taken place in this jurisdiction but not in England and Wales,¹⁰⁴ where there has been a stream of family home cases involving cohabitants, from cases in the 1970s such as *Hazell v Hazell*¹⁰⁵ and *Cooke v Head*¹⁰⁶ up to the latest leading cases of *Stack v Dowden*¹⁰⁷ and *Jones v Kernott*.¹⁰⁸ The Irish legislative scheme is contained in Part 15 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.¹⁰⁹ It applies to “qualified cohabitants”, that is, those who satisfy the definition of a “cohabitant”¹¹⁰ and who have been living together for at least two years, in the case where they are the parents of one or more dependent children, and for at

⁹⁸ [1980] I.L.R.M. 31.

⁹⁹ [2008] IEHC 207.

¹⁰⁰ [2008] IEHC 463.

¹⁰¹ See *Re J.R.* [1993] I.L.R.M. 657; *Ennis v Butterly* [1996] 1 I.R. 426; *A.F. v S.F.* [2007] IEHC 196; *Stanley v Kieran* [2011] IESC 19.

¹⁰² See e.g. “Woman Claims Half-Interest in House”, *Irish Times*, 14 March 2003, p.4; “Dispute over House” *Irish Times*, 9 February 2004, p.4.

¹⁰³ [1984] Ch. 317. See Rebecca Probert, “Trusts and the Modern Woman—Establishing an Interest in the Family Home” [2001] *Child and Family Law Quarterly* 275; John Mee, “*Burns v Burns*: The Villain of the Piece?” in S. Gilmore, J. Herring and R. Probert (eds), *Landmark Cases in Family Law* (Oxford: Hart Publishing, 2011).

¹⁰⁴ See Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307). The Government decided against the implementation of these proposals: written statement by Parliamentary Under-Secretary of State, Ministry of Justice (Jonathan Djanogly), House of Lords, 6 September 2011.

¹⁰⁵ [1972] 1 W.L.R. 301.

¹⁰⁶ [1972] 1 W.L.R. 518.

¹⁰⁷ [2007] 2 A.C. 432.

¹⁰⁸ [2012] 1 A.C. 776.

¹⁰⁹ For detailed discussion of the genesis and content of these provisions, see John Mee, “Cohabitation Law Reform in Ireland” (2011) 23 *Child and Family Law Quarterly* 323.

¹¹⁰ See s.172(1)–(4).

least five years in other cases.¹¹¹ The scheme is applicable to both same-sex and opposite-sex cohabitants.¹¹² Upon the termination of a cohabiting relationship, if the claimant can establish “that he or she is financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship”,¹¹³ the court can make an order in favour of the claimant if, having considered a list of factors, it concludes that it would be “just and equitable” to do so.¹¹⁴ The available orders include property adjustment orders,¹¹⁵ maintenance orders,¹¹⁶ and pension adjustment orders.¹¹⁷ There are also provisions governing claims upon the death of a qualified cohabitant¹¹⁸ and the enforceability of “cohabitant agreements”.¹¹⁹ The requirement that the claimant demonstrate “financial dependency” seems to represent a serious limitation upon the scheme and, since the scheme has yet to be tested in higher courts,¹²⁰ it remains to be seen whether it will provide a remedy in many cases.

Conclusion

It is now possible, by way of conclusion, to offer some general observations prompted by the foregoing review of the development of this area of Irish law over the last half-century. The first point to note is that, although relatively unsophisticated in theoretical terms, the Irish approach is not without its virtues. The Irish courts have simply modified the ancient purchase money resulting trust so that a wider range of conduct on the part of the claimant can now be regarded as representing a contribution to the purchase price. While it has been pointed out above that some aspects of the modified Irish doctrine can be criticised as socially unjust or doctrinally misguided, the Irish approach does

¹¹¹ See s.172(5). Where one or both of the parties is married to a third party, then that person must have lived apart from his or her spouse for at least four of the previous five years: s.172(6).

¹¹² See s.172(1).

¹¹³ See s.173(2).

¹¹⁴ The factors are listed in s.173(3).

¹¹⁵ Section 174.

¹¹⁶ Section 175.

¹¹⁷ Section 187.

¹¹⁸ Section 194.

¹¹⁹ Section 202.

¹²⁰ Note, however, in the succession context, the decision of Baker J. in *DC v DR* [2015] IEHC 309. Note also the Circuit Court decision of *M.O'S. v E.C.*, referred to in Justin Spain “Live With Me” (2015) 109(10) G.L.S.I. 26 and discussed in Mark Tighe, “Judge Awards Woman 10% of Former Partner’s €26 million fortune”, *Sunday Times*, 25 April 2015.

appear to have had the important advantage of being relatively certain. Albeit without the benefit of empirical evidence as to the extent of relevant litigation in the Circuit Court, it can be suggested that the limited number of written judgments in the High Court after *B.L. v M.L.* and *E.N. v R.N.* may be a reasonably reliable indicator that there has not been a strong sense of uncertainty at Circuit Court level as to the state of the law. Uncertainty as to the possibility of a remedy in the current context can lead to emotionally-charged and expensive litigation that makes it impossible for the parties (and, in some cases, their children) to move on from the ending of a relationship.

In this respect, the Irish experience contrasts favourably with the “never-ending story” represented by the English common intention trust, which has generated a high volume of case law which shows no signs of diminishing.¹²¹ Given the mass of case law and commentary generated by the uncertain and confusing English approach,¹²² and the absence of an explicit statement to this effect in the Irish case law, it is important to stress that the English common intention approach is not consistent with the more straightforward approach taken by the Irish courts and settled by the Supreme Court in *B.L. v M.L.* and *E.N. v R.N.* This means that our courts must be very wary of arguments based on English case law¹²³ unless the point in question can specifically be related to the Irish “extended resulting trust” approach. It should be noted that the Supreme Court of Canada has recently held that the common intention trust does not form part of Canadian law.¹²⁴ In light of the shortcomings of the English doctrine, our courts would be well advised to take the same approach.¹²⁵

¹²¹ Martin Dixon, “The never-ending story—co-ownership after *Stack v Dowden*” [2007] Conv. 456. See also Mee, “*Burns v Burns*”, fn.9 above at 194–197.

¹²² See generally Mee, *The Property Rights of Cohabitees* (Oxford: Hart, 1999), Ch.5; Jamie Glister and James Lee (eds), *Hanbury & Martin: Modern Equity* (London: Sweet & Maxwell, 2015), Ch.13;

¹²³ See e.g. the argument, involving a reference to *Lloyds Bank v Rosset* [1991] 1 A.C. 107, briefly made (and not accepted by the court) in *Goodbody Stockbrokers v Allied Irish Banks* [2013] IEHC 155, [10].

¹²⁴ *Kerr v Baranow* [2011] 1 S.C.R. 269, [21]–[29] per Cromwell J. Note also Mark Bennett “*Harvey v Beveridge: Common Intention Constructive Trusts in New Zealand*” (2015) 46 *Victoria University of Wellington Law Review* 959 at 964 arguing that “New Zealand courts should do the same”.

¹²⁵ Note also Lord Denning M.R.’s proposal of a “constructive trust of a new model” to be imposed whenever “justice and equity” required it. In England and Wales, this doctrine has been “consigned to history”: Glister and Lee, *Hanbury & Martin*, fn.122 above, p.262. Surprisingly, however, some Irish High Court cases show support for Lord Denning’s discredited doctrine: see Biehler, *Equity and the Law of Trusts in Ireland*, fn.70 above, pp.281–288. Nonetheless, it is

A second observation relates to the change that has occurred, over the last 50 years, in the background against which disputes over the family home occur. At the start of our period, the practice of putting the matrimonial home into the sole name of the husband, combined with the absence of legislation allowing for the adjustment of the property rights of spouses upon marital breakdown, created very clear potential for injustice (of a gendered nature, given that women were normally the ones who suffered). As a result, the idea became entrenched that it would be appropriate to increase the rights of claimants to the greatest extent possible, with developments in equity being necessary to address the unfairness to vulnerable members of society. After legislation transformed the position in the matrimonial context, the focus of concern switched to the position of cohabitants, who fell outside the legislative framework. However, in Ireland, there has now been legislative intervention in relation to cohabiting couples as well as married couples, and there is no longer a social practice of unthinkingly putting a home into the sole name of the male partner to a relationship, whether a marriage or cohabiting relationship. It is arguable, therefore, that much of the justification for further equitable development in this area has now disappeared.

This means that there is a strong argument that it would not be democratically legitimate for our courts to take any of the radical approaches favoured in Canada, Australia and New Zealand, which involved developing a wide-ranging judicial discretion to adjust property entitlements on the termination of an intimate cohabitation. In Canada, the new doctrine has been justified on the basis of the law of unjust enrichment;¹²⁶ in Australia, the focus has been on “unconscionability” and on the analogy with a joint venture which terminates prematurely;¹²⁷ while, in New Zealand, the emphasis has been on the “reasonable expectations of the parties”.¹²⁸ In each case, however, the new

difficult to see the “new model” constructive trust as being consistent in principle with, or as likely in practice to displace, the rules confirmed by the Supreme Court in *B.L. v M.L.* and *E.N. v R.N.* as applicable to family home disputes.

¹²⁶ Leading cases include *Petkus v Becker* [1980] 2 S.C.R. 834; *Peter v Beblow* [1993] 1 S.C.R. 980; *Kerr v Baranow* [2011] 1 S.C.R. 269.

¹²⁷ Leading cases include *Muschinski v Dodds* (1985) 160 C.L.R. 583; *Baumgartner v Baumgartner* (1987) 164 C.L.R. 137.

¹²⁸ Leading cases include *Gillies v Keogh* [1989] 2 N.Z.L.R. 327; *Lankow v Rose* [1995] 1 N.Z.L.R. 277.

doctrine appears to be difficult to justify on a principled basis, so that—rather than representing the incremental development of existing principles—the doctrines appear to represent a quasi-legislative response by the courts of these jurisdictions to the problem of property disputes between unmarried cohabitants.¹²⁹ Given that the Irish legislature has intervened to regulate property disputes between both married and unmarried couples, it is hard to see the justification for judicial law-making. Admittedly, as has been pointed out above, the Irish cohabitation scheme may turn out to be relatively limited in its scope. However, it currently represents society's view of the appropriate extent of the remedies upon the termination of a cohabiting relationship. In future, it may be appropriate to look to amending legislation, rather than judicial development of the law of equity, to achieve any expansion in the scope of the relevant jurisdiction.

It is true that the remedies under the legislative schemes governing both the matrimonial and cohabitation situations do not have one key characteristic of a resulting or constructive trust imposed by the courts, that is they are not retrospective in nature and therefore do not have the same potential to allow a claimant to defeat the rights of the defendant's creditors. This, however, seems appropriate. If the parties to an intimate relationship have chosen to arrange the ownership of their property in a certain way, whether for their convenience or because they did not envisage that their separate property rights would be of significance, why should creditors not be able to rely on that arrangement? An expansive equitable jurisdiction to declare, with retrospective effect, the rights of the parties to be other than they appear to the outside world has the potential to lead to injustice to creditors.

Thirdly, it is necessary to comment on the challenge to the current law presented by cases involving joint ownership at law. The current equitable rules were originally developed, as has been mentioned, on the basis of an assumption that it would not be fair to allow the defendant (generally a husband) to insist that the legal ownership of the property should dictate the beneficial ownership,

¹²⁹ See generally the detailed analysis of the responses of the three jurisdictions under discussion in Mee, *The Property Rights of Cohabitees*, fn.122 above, Ch.7 (Canada); ch.8 (Australia); ch.9 (New Zealand).

in a context where the legal ownership tended, on the basis of a sexist social practice, to have been put into his sole name. This tendency to second-guess the legal ownership leads to problems in the modern context. In particular, where the legal ownership of the home been taken in joint tenancy by the parties to an intimate relationship, it seems reasonable to start from the assumption that their intention was to hold as beneficial joint tenants, with no trust being implied to qualify the joint tenancy at law. However, the purchase money resulting trust doctrine treats legal ownership as irrelevant and the beneficial interest is presumed to belong to the person who has supplied the purchase money. Therefore, if the parties have put the home into joint names at law, with one partner having supplied more than half of the purchase money, there is a presumption of resulting trust in favour of that partner. If the parties are married, and the person making the larger contribution is the husband, then the presumption of advancement could displace the presumption of resulting trust. However, that presumption has been widely criticised due to the fact that it applies in favour of wives but not husbands, so that its current status in the context of spouses is unclear and, furthermore, it has no application in the context of cohabitants.¹³⁰ Therefore, there is a danger that the resulting trust analysis could generate undesirable results by overriding the parties' choice of joint ownership (particularly in a situation where one party has cared for the children of the relationship while the other worked outside the home and so was in a position to make all or most of the financial contributions to the purchase of the home).¹³¹

The English courts have insisted that, at least in the "domestic" context, "cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual".¹³² Thus, in joint names cases in England, there is a "presumption (or

¹³⁰ On the presumption of advancement, see generally Biehler, *Equity and the Law of Trusts in Ireland*, fn.70 above, pp.179–184; 189–197.

¹³¹ The problem could be avoided if the parties made an express declaration of the beneficial interests in the property (see John Mee, "Joint Ownership of the Family Home" (1992) 86 *Gaz ILSI* 59) or entered into a co-ownership agreement that made clear their intentions in relation to the beneficial ownership in the property.

¹³² *Stack v Dowden* [2007] 2 A.C. 432, [69] per Baroness Hale.

assumption) of a beneficial joint tenancy”¹³³ rather than a presumption of resulting trust. There has been a broadly similar development in Australia.¹³⁴ It remains to be seen how the Irish courts will deal with the challenge of applying the purchase money resulting trust doctrine to joint names cases, a context which highlights the danger that the intervention of equity may make things worse rather than better.¹³⁵

Finally, it is possible to identify a wider challenge which is hinted at by the difficulty that arises in joint names cases. This is the fact that the Irish approach is founded on the purchase money resulting trust, an ancient doctrine which assumes that the parties did not intend to give any real weight to the legal ownership of the property being acquired.¹³⁶ If, in the present day, one were devising a doctrine to protect the position of a person who had supplied the purchase price for property, it is likely that it would take a rather different form. A rational modern doctrine would, it is submitted, require the claimant to show a genuine understanding between the parties that the beneficial ownership would differ from the legal ownership. The purchase money resulting trust’s focus on the unilateral intention of each contributor would be replaced by a focus on what had been agreed between the parties. The trigger for equitable intervention would then be the fact that the legal owner was acting inconsistently with the agreement on the basis of which he or she had been allowed to obtain the legal ownership of the property.

This putative modern doctrine, of course, has some resemblance to the common intention constructive trust doctrine, the drawbacks of which have already been highlighted. It may be, however, that the problems with the English

¹³³ *Jones v Kernott* [2012] 1 A.C. 776, [17] per Lord Walker and Lady Hale.

¹³⁴ *Trustees of the Property of Cummins v Cummins* (2006) 227 C.L.R. 278; Lisa Sarvas, “Trusts, Third Parties and the Family Home: Six Years since *Cummins* and Confusion Still Reigns” (2012) 36 *Melbourne University Law Review* 216. Compare the remarks of Lord Upjohn in *Pettitt* [1970] A.C. 777 at 814–815.

¹³⁵ An attempt was made to rely on the *Stack v Dowden* approach to this point in *Stanley v Kieran* [2011] IESC 19 but the Supreme Court declined to consider the point since it had not been raised in the High Court ([21], [25] per Denham J.). Note also, *DPP v B* [2009] IEHC 196, [51] per Feeney J. Also relevant is the early case of *Containercare (Ireland) Ltd v Wycherley* [1982] I.R. 143, where Carroll J. regarded the presumption of resulting trust as having been rebutted by the fact that the parties had put the property into joint names (contrary to resulting trust orthodoxy which insists that the legal ownership is irrelevant to the operation of the doctrine).

¹³⁶ On the historical background to the presumption in favour of a transferor or a person who pays for property to be purchased in someone else’s name, see John Mee, “Presumed Resulting Trusts, Intention and Declaration” (2014) 73 *Cambridge Law Journal* 86 at 96–97.

doctrine have arisen because it has not properly been disentangled from the older purchase money resulting trust, leading to a problematic emphasis on artificially inferring common intention from conduct (often leading to the finding of a common intention where it is highly improbable that one really existed). A doctrine which focused on the existence of genuine agreement between the parties would arguably be the most defensible doctrinal option. It would provide a remedy in comparatively few cases, given the fact that couples in an intimate relationship do not tend to attribute great importance to, or make actual agreements about, their separate property rights, but that arguably would not be a problem given the existence of the legislative frameworks that have been discussed in this article. A paradigm shift of this nature may be some years away but, ultimately, it could end up as the key subject matter of a review of the next 50 years of the development of the law in relation to trusts of the family home.

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