

## **(2007) 12(1) CPLJ 18 Article: Property Disputes Between Co-owning Cohabitees—A Conveyancer's Perspective**

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This article examines the disputes which may arise on the breakdown of a relationship between unmarried cohabitees who co-own the family home. It illustrates how most disagreements are likely to be over how the beneficial ownership is to be shared between the parties and whether the property should be sold or not. The purchase money resulting trust may generate no beneficial interest, or one that is smaller than expected, for the legal co-owner who cares for the house and children. In addition, the primary carer may be forced to leave the home, as an unmarried co-owner who seeks an order for the sale of the property pursuant to the Partition Acts 1868 and 1876 is unlikely to be refused. The remainder of the article examines the techniques and devices which may be used by conveyancing solicitors to prevent future property disputes arising between cohabitees who purchase as co-owners.

In recent years conveyancing solicitors have witnessed a huge increase in the number of unmarried couples purchasing homes together. It is standard practice to advise such clients on the difference between holding the property as joint tenants and as tenants in common. [1] However, conveyancing solicitors have, to date, tended to ignore the possible implications of the purchase money resulting trust where there is a purchase by co-owners. Professor John Mee has commented:

"It is not difficult to construct a scenario in which the assumption by a solicitor that joint ownership at law is sufficient to guarantee equal beneficial ownership could lead to an action for professional negligence." [2]

Although the deed of purchase specifies that they hold the property as joint tenants, if they make unequal contributions to the purchase price, a presumption of a resulting trust shall arise. It is presumed that the co-owner who made the larger contribution must have intended to take a larger beneficial interest in the property. [3] Unless the other co-owner can prove that the extra contribution was intended as a gift or a loan, a resulting trust will give effect to this larger beneficial interest. Usually a mortgage is involved and, as Professor Mee has noted, [4] the approach taken by the Irish courts to mortgage repayments [5] may place an excessive burden of proof on a co-owner who looks after the house and children, [6] freeing up the other co-owner to earn the money to pay the mortgage and other household bills. [7] Each mortgage repayment technically gives rise to a presumed resulting trust generating a beneficial interest proportionate to the increase in the value of the equity of redemption represented by that payment. The primary carer must, therefore, prove that the earning co-owner intended to make a gift of one half of each instalment in order to rebut the presumed resulting trust. [8] The earning co-owner may have intended to share equally in the beneficial ownership when they originally purchased the house. It will, however, be very difficult to prove such an intention in relation to any mortgage repayments which were made after the relationship broke down. In such circumstances, the court could rule that the primary carer is entitled to a half share in the value of the property represented by the equity of redemption at the date the relationship broke down. Any subsequent mortgage repayments will probably be treated by the court as increasing the earner's beneficial share in the property.

### **Disputes over the beneficial ownership**

Although the beneficial ownership of property in the joint names of cohabitees has come under the judicial spotlight in England on a number of occasions [9] most of the Irish case law in this area concerns the beneficial ownership of family homes jointly owned by married couples. [10] A purchase by a married couple may give rise to another presumption, known as "the presumption of advancement." It will be presumed that a larger contribution by a husband to the purchase price of a property, which the husband and wife hold as joint tenants, was intended to be a gift. [11] Therefore, a wife who is a legal joint tenant but has not contributed equally to the purchase price of the property will not face the same difficulties of proof as an unmarried co-

owner. It is well established that the presumption of advancement has no application where the transaction involves unmarried cohabitees. [12] Neither does this presumption apply where the property is purchased in the joint names of a married couple and the larger contribution to the purchase price is made by the wife or on her behalf. In *O'K v O'K* [13] the wife's father had provided the entire purchase price of the couple's first home which was taken in the joint names of the husband and wife. The court was satisfied that the father had intended to make a gift of the beneficial interest to his daughter. This premises was sold and the proceeds were used to purchase a second property which, again, was taken in their joint names. A mortgage was obtained by the parties to make up the shortfall. Barron J. was satisfied that the wife held the entire beneficial interest in the equity of redemption, which represented 75 per cent of the value of this second property. Since the purchase, payments had been made on foot of the mortgage and it was held that these payments generated a beneficial interest on the part of the person who made them. [14] In *B v B* [15] although the family home and a farm had been registered in the joint names of the wife and her husband, the wife claimed to be entitled to the sole beneficial ownership. The wife's mother had previously purchased a house for them which was sold and the proceeds, together with a further £2,500 also provided by the mother, were used to purchase the disputed house. The mother gave evidence that she intended the original house to be the joint property of her daughter and the husband as she did not want her daughter's husband to be dependent on his wife. Finlay P. held that the beneficial interest in both the original home and the disputed property was held by the parties as joint tenants.

In a more recent case, *BM v AM*, [16] Peart J. examined the beneficial ownership of a corporation house purchased under a tenant purchase scheme. The property was purchased in the joint names of the plaintiff's parents as they had previously occupied the premises and could, therefore, avail of a discount. All the corporation loan repayments were made by the defendant, the plaintiff's ex-husband and the loan was discharged by October 1996. The plaintiff left the family home in August 1989 and in 1995 she obtained a divorce in England. In 2001 she instituted proceedings seeking an order for the sale of the premises pursuant to the Partition Acts 1868 and 1876 and a distribution of the proceeds between the parties in such proportion as the court deemed just and proper. The defendant claimed that he was entitled to the entire beneficial interest in the property and that, even if the plaintiff was entitled to a beneficial interest, an order for the sale of the premises under the Partition Acts should be refused. Peart J. noted that the arrangement between the parents, the plaintiff and the defendant was that the tenant purchase would be achieved in the names of the parents in order to avail of the discount but on the basis that the repayments would be made by the defendant. The intention was that the house would be the family home of the plaintiff and the defendant and if the defendant predeceased the plaintiff the property would be owned solely by her. [17] He was satisfied that the parents held the property on resulting trust for the plaintiff and the defendant but there was no resulting trust between the plaintiff and the defendant. [18] He ruled that they were entitled to be registered as joint owners and that the plaintiff was beneficially entitled to a half share in the market value represented by the equity of redemption as at August 1989, when she left the home. Peart J. held that the mortgage repayments made by the defendant after the date his wife left the home operated to generate him an increased beneficial share in the property corresponding with the increase in the value of the equity of redemption represented by those repayments. [19] He referred to the similar approach taken by Finlay P. in *AL v JL* [20] in relation to mortgage repayments made by a husband after his wife had left the home.

### Disputes over the sale of the property

Disputes between co-owners are frequently triggered where only one of the parties wishes to sell the property. A co-owner who desires a sale and is entitled to less than a 50 per cent share in the property will seek an order for sale pursuant to s.3 of the *Partition Act 1868*. Section 3 provides that, in a partition suit, the court may make an order for a sale of the premises and the division of the proceeds if, by reason of the nature of the property, the number of the parties interested, the absence or disability of some of those parties or any other circumstance, a sale would be more beneficial for the parties. An order for sale will usually be forthcoming where the co-owned property is residential as a partition would generally be impractical. [21] A co-owner entitled to a 50 per cent share or more in the ownership of the property will proceed under s.4 of the 1868 Act which provides that the court must order a sale of the property and a division of the proceeds unless there is good reason not to. It is difficult to find examples of cases where the

courts refused to order a sale under s.4. [22] In *Re Whitwell's Estate* [23] Monroe J. commented that the courts had “frequently decided what is not good reason to the contrary but [had] never yet ... in any reported case decided what is.” A co-owner will not prevent a sale just because he or she is unlikely to acquire a reasonably priced equivalent home in the same area. [24] Also, the courts have refused to regard the fact that the property was the family home in which children were being brought up as a good reason for not ordering a sale, unless legislation such as the *Family Home Protection Act 1976* applies. [25] A married co-owner may benefit from the protection of the *Family Home Protection Act 1976* where an action is brought pursuant to the Partition Acts. [26] In *O'D v O'D* [27] the husband, who was entitled to a half share in the matrimonial home, sought an order for sale under s.4 of the 1868 Act. Murphy J. refused an order for sale and held that such actions must fail unless the court is of the opinion that it would be reasonable to dispense with the respondent's consent under the *Family Home Protection Act 1976*. [28] Therefore, a married co-owner who continues to care for their children in the family home may not be forced to leave the home in such circumstances. It should be mentioned that in *BM v AM* [29] Peart J. took an unusual approach to the plaintiff's application for an order for sale under the Partition Acts. Peart J. decided that the application should be decided pursuant to s.4, although the plaintiff's beneficial interest in the property must necessarily have been less than 50 per cent given that the mortgage repayments made after August 1989 increased the defendant's beneficial interest. Peart J. was satisfied that the defendant had established that there was a good reason why the court should not order the sale of the premises. He also noted that even if s.3 was the appropriate section, the court, in the exercise of its discretion, ought not to direct a sale of the premises given the circumstances. [30] In reaching his decision, Peart J. noted that if a sale was ordered and a division of the proceeds made, the defendant, bearing in mind the current property market and his age, would effectively be left without a home. He also referred to the fact that the premises had been the family home prior to the separation of the parties. Peart J.'s decision clearly breaks with the traditional approach to grant an order for sale regardless of such circumstances. Although the plaintiff had obtained an English divorce, Peart J. also refused an order for sale on the basis that it would not have been reasonable to dispense with the defendant's consent under s.4 of the 1976 Act. [31] It is submitted that the defendant should not have been afforded the protection of the *Family Home Protection Act 1976* in this case as he had ceased to be a “spouse”. [32] The *Family Home Protection Act 1976* does not apply to unmarried co-owners and, if one of them seeks an order for the sale of the family home pursuant to the Partition Acts, the established jurisprudence indicates that he or she is likely to be successful. [33]

## Reform

The Partition Acts 1868 and 1876 will be repealed by the enactment of the Land and Conveyancing Law Reform Bill 2006 and s.29 of the Bill confers a new power on the court to make orders for partition, sale and distribution of the proceeds, accounting adjustments or such other order as appears to the court to be just and equitable in the circumstances of the case [34] on the application of any person with an estate or interest in land which is co-owned either at law or in equity. It is impossible to predict how the courts will exercise this jurisdiction as the legislation fails to set out any factors which should be taken into account by the courts in reaching its decision. It remains to be seen, for example, whether the court will take into account that an order for sale would deprive an unmarried co-owner and their children of their family home. [35] Presumably, it was anticipated that the majority of disputes between cohabiting co-owners would be decided in the future under a new scheme of legal protection which would extend to unmarried cohabitants certain ancillary reliefs currently only available to married couples.

The Law Reform Commission in its recent *Report on the Rights and Duties of Cohabitants* [36] recommended the introduction of legislation which would allow “qualified cohabitants,” [37] who can establish economic dependency arising from the ending of the relationship, access to property adjustment orders. [38] Section 13(2) of the draft Cohabitants Bill 2006, set out in the Law Reform Commission Report, states that a property adjustment order may provide for the transfer of property from one cohabitant to another, the settlement of the property of either cohabitant in favour of the other, the variation of a cohabitant agreement [39] or other settlement for the benefit of either of the cohabitants or the extinguishment or reduction of the interest of either of the cohabitants under any such agreement. [40] Section 12(4) directs the court to make

such an order only where it considers it just and equitable to do so and s.12(5) requires the court to consider a list of factors before making this decision. These factors include the needs, obligations and responsibilities which the applicant has or is likely to have in the foreseeable future, the contributions and sacrifices which the applicant made or is likely to make in the foreseeable future to the welfare of the respondent and any child of the relationship [41] and the effect on the earning capacity of the applicant of the responsibilities assumed during the period he or she lived with the respondent. [42] Therefore, a co-owning cohabitee who can establish that she is economically dependent and satisfy the other qualifying criteria [43] could apply for a court order directing her co-owning partner to transfer his interest in the property to her. Alternatively, the court could settle the property on her for life followed by a fee simple remainder in favour of the children of the relationship. The past and future contributions and sacrifices made by such a co-owner through her role as the primary carer may be taken into consideration by the court in deciding whether to make such an order. This is an improvement on the Law Reform Commission's Consultation Paper [44] proposals in relation to property adjustment orders which focused on the past contributions by one cohabitee to the property, financial resources or welfare of the other party or to the welfare of the family. [45] It is submitted, however, that a property adjustment order in relation to the family home in favour of one of the parties will not always be fair or appropriate. An outright transfer of an interest or even the creation of a life estate is quite a radical solution to adopt to deal with the consequences of a relationship breakdown and the court may be reluctant to make such an order, even in circumstances of economic dependence. The inclusion of a provision empowering the courts to make an order conferring on one qualified cohabitant the right to occupy the family home for life, or such other period as the court may specify, to the exclusion of the other, [46] would provide the courts with a less drastic option which would leave intact existing proprietary interests. The Law Reform Commission referred to the English position where a non-owning cohabitee may apply for an order under s.36 of the *Family Law Act 1996* permitting the cohabitee to occupy the home to the exclusion of the other but rejected the introduction of such a remedy as it could cause "serious practical difficulties for conveyancers and the courts." [47] It is submitted that the courts may find it easier to make an order conferring an exclusive right of residence on a qualified cohabitant than a property adjustment order. As regards the conveyancing difficulties, the introduction of legislation allowing qualified cohabitants to apply for property adjustment orders will require a purchaser's solicitors to raise a requisition as to whether such an order has been made or applied for in relation to the property [48] and to confirm that the disposition is not for the purposes of defeating a claim for relief. [49] It will also be necessary to include such information in the family home declaration made by the vendor. [50] Whether an order conferring an exclusive right of occupation on a qualified cohabitant has been made, applied for or threatened in relation to the property could be established in a similar manner. It is submitted that any residual concerns over the discoverability of an order conferring an exclusive right of occupation could be alleviated by a provision requiring the registrar or the court clerk to lodge a certified copy of the order in the Land Registry for registration pursuant to s.69(1)(h) of the *Registration of Title Act 1964* or in the Registry of Deeds as appropriate. Section 14(4) of the *Family Law (Divorce) Act 1996* imposes such a requirement where a property adjustment order is made on the grant of a judicial separation or divorce and it is submitted that a similar provision should be included in any future legislative scheme which permits the adjustment of ownership or the regulation of the occupation of the property of qualified cohabitants. The courts should also be permitted to make an order for the sale of the family home and the division of the proceeds between the qualified cohabitants. [51] In dividing the proceeds between co-owners in such circumstances, the court would be permitted to consider the past and future contributions and sacrifices of the primary carer and her accommodation needs if she is to continue to fulfil this role. In contrast, where the order for sale is granted pursuant to s.29 of the Land and Conveyancing Law Reform Bill 2006, the division of the sale proceeds between the co-owners must presumably reflect their respective beneficial interests. The position of the co-owner of the family home who is also a qualified cohabitant would be improved by the current Law Reform Commission proposals in relation to property adjustment orders but it is submitted that the courts may need additional flexibility and should be afforded access to the full range of family home orders. This additional flexibility is even more necessary where the qualified cohabitant is not a co-owner of the family home at law or in equity.

### Conveyancing measures for the avoidance of co-ownership disputes

One of the main disputes which may arise between co-owners is in relation to how the beneficial

ownership of the family home or the proceeds of sale are to be shared between them. The beneficial ownership of the property is established by ascertaining the intention of the parties or identifying their contributions to the purchase price. The extent to which conveyancers can reduce or eliminate uncertainty over the issues of intention or contributions, thereby preventing disputes between co-owners over the beneficial ownership, shall now be examined. The article concludes by examining how the execution of a co-ownership agreement can prevent other disputes arising in relation to the property, in particular disputes over whether the property should be sold.

### 1. A conveyance to uses

It could be argued that the inclusion of the phrase “unto and to the use of the co-owners as joint tenants” in the *habendum* of the deed [52] demonstrates an intention that the co-owners are intended to take the “use” or beneficial interest in the property as joint tenants in addition to the legal interest. This argument, however, fails to take into account the reason why the conveyance to uses was originally employed in this context. It was devised by conveyancers in the aftermath of the introduction of the Statute of Uses 1535 [53] to prevent the legal interest reverting to the grantor in the context of a voluntary conveyance. [54] A voluntary conveyance gave rise to a resulting use in favour of the grantor which, when executed by the Statute of Uses, would render the conveyance completely ineffective. The use of the phrase avoided the presumption of a resulting use and ensured that the legal interest was vested in the grantee. The cautious nature of conveyancers led to the practice of including the phrase in deeds even where the conveyance was for consideration. [55] In the aftermath of the Statute of Uses, the resulting trust developed by analogy with the resulting use and, as was the case with the express trust, it was forced to operate as a use upon a use. [56] It is clear that including the phrase “unto and to the use of” the purchasers in a deed does not prevent the creation of an express trust. Similarly, the phrase will not prevent a purchase money resulting trust arising if the appropriate conditions are met. As Professor Scott notes:

“(I)t is well settled that where one person pays the purchase price for land and takes title in the name of another, a resulting trust arises even though the instrument of transfer contains a recital of consideration paid by the grantee and even though the conveyance is expressly declared to be to the use of the grantee.” [57]

### 2. Explaining the implications of a joint tenancy

As has already been mentioned, it is standard practice for conveyancing solicitors to discuss the implications of the different types of co-ownership with clients who wish to purchase property together. If they purchase as joint tenants it means that legally they are entitled to an equal share in the property and if one of them dies the share of the deceased joint tenant will pass to the survivor who becomes the sole owner of the property. The clients may be satisfied that this arrangement reflects their wishes in relation to the property and, in the event of a breakdown in the relationship, the parties may be content to rely on their legal rights. However, if the larger contributor claims a larger beneficial interest, it will be necessary to provide evidence of that party’s original intention to share equally in the ownership of the property in order to rebut the presumption of a resulting trust. [58] A written attendance by their solicitor recording their intentions in this regard or a letter of explanation sent to the clients may be available. It is submitted that the existence of a legal joint tenancy cannot, on its own, be regarded as sufficient evidence of the parties’ intention to create a beneficial joint tenancy. As Professor John Mee notes:

“... this suggestion [59] that the existence of a joint tenancy at law is sufficient evidence to rebut the presumption of a resulting trust is unsupportable. It contradicts the whole essence of the doctrine of resulting trusts and is tantamount to the proposition that X cannot establish a resulting trust over property in Y’s name simply because the property *is* in Y’s name.” [60]

However, if the decision is to put the property in joint names is made because the main contributor understands that a joint tenancy will enable the other co-owner to share equally in the ownership and to acquire sole ownership on his death, this does indicate an intention in relation to the beneficial ownership of the property. [61]

Such evidence will probably be sufficient to rebut the presumption of a resulting trust if an outright purchase was involved or if the mortgage was redeemed before any difficulties in the relationship arose. However, if the property was purchased with the aid of a mortgage, the possibility of a resulting trust being triggered in relation to mortgage repayments made subsequent to the breakdown in the relationship, due to a change in the contributor's intention, can only be eliminated by the existence of a declaration of trust.

### 3. Setting out the contributions in the deed

An alternative approach to dealing with the beneficial ownership of the property is to allow the presumptions which arise due to the contributions to the purchase price [62] to do all the work. Difficulties in proving the extent of the contributions made by the parties can be reduced by recording the contributions of both parties in the deed. This is the approach taken in Laffoy's *Irish Conveyancing Precedents* . [63] If the deed provides that the purchasers hold the property as joint tenants and that they paid the purchase price in equal shares or out of monies belonging to them on joint account, [64] a presumption of a beneficial joint tenancy will arise. If the deed provides that the purchasers take as tenants in common in shares proportionate to their contributions to the purchase price, an introductory recital setting out those contributions will remove any potential for doubt over the extent of the contributions, allowing the beneficial ownership to reflect the stated legal position. Setting out the contributions in this way, in effect, permits the express creation of a resulting trust.

There are, however, a number of limitations inherent in such an approach. The first problem is that it is not designed to confer a gratuitous benefit on one of the co-owners where, for example, one co-owner contributes the entire purchase price but wishes a joint tenancy to govern the beneficial interest. In such circumstances, it may be advisable for the parties to execute a declaration of trust. [65] The second difficulty is that Laffoy's precedents are designed to cater for an outright purchase of a property, where all the contributions are made at the same time. Most joint purchases involve on-going contributions under a mortgage where it will only be possible to calculate the contributions made by both parties on the redemption of the mortgage.

### 4. Declaration of trust (fixed shares)

If there are ongoing mortgage instalments, the case law [66] demonstrates the danger that the court could find that there was a change in the intention of the person discharging the mortgage on the breakdown of the relationship, triggering a resulting trust in his or her favour in relation to any subsequent mortgage repayments. A solicitor who wishes to avoid any uncertainty in this regard should ascertain if the clients wish to share the property equally regardless of how future mortgage repayments are discharged. If this is the intention, the safest course of action is to have the co-owners execute a declaration of trust. [67] A declaration by the co-owners that they "hold the property [68] on trust for themselves as beneficial joint tenants (regardless of their actual contributions, both past and future, to the purchase price)" [69] can be incorporated into the deed of purchase in the case of unregistered land [70] although a separate document must be drafted where the property is registered in the Land Registry. [71] It is clearly established that the existence of an express declaration of trust conclusively defines the co-owners' beneficial interests unless the court would be justified in making an order for rectification because of the existence of fraud or a mistake. [72] The disadvantage of expressly declaring the shares of the parties is that they cannot currently be altered by the court even where the circumstances of the parties and their respective contributions have changed dramatically since the declaration was executed. [73] It should be explained to the parties that, once such a declaration of trust has been executed, an alteration in the beneficial ownership will only be possible if both of them execute a variation of the declaration of trust. [74]

### 5. Declaration of trust (floating shares)

Where a mortgage is involved and the parties wish their beneficial interests in the property to be linked to their actual contributions to the purchase price, both past and future, one option would be to set up a floating trust. [75] In one sense, this may seem unnecessary, as where evidence of unequal contributions can be produced, a presumption of a resulting trust will arise achieving the same result. A declaration of a floating trust would, however, eradicate the possibility of a court ruling that there was an intention to hold the beneficial interest as joint tenants. Also, such a declaration offers the parties more freedom than the resulting trust in relation to the types of contributions which will generate a beneficial interest. For example, contributions by the parties to repairs or improvements of the property could be taken into account in ascertaining the beneficial interests of the parties. [76] The precedent declarations of trust setting out floating shares included by Wood, Lush and Bishop in *Cohabitation Law, Practice and Precedents* do not incorporate contributions to other outgoings affecting the property in the calculation of each party's floating share. Nevertheless, the authors refer to the injustice that might occur if one co-owner pays the mortgage (which will affect his or her beneficial interest) and the other co-owner pays the other outgoings (which do not affect the beneficial ownership) as one of the disadvantages of floating shares. [77] It is submitted that provided the relevant outgoings are clearly identified, [78] there is no reason why they could not be included in the list of contributions which would generate an interest. Such an approach would, of course, increase the amount of book-keeping required. Another advantage of the creation of a floating trust is that the parties will be aware of the requirement to keep track of their contributions. Nevertheless, it seems unlikely that most couples would opt for such a labour intensive arrangement, which requires them to keep accounts, receipts and statements. Such an arrangement, also, does little to foster a relationship based on mutual dependence. [79]

## 6. Co-ownership agreement

The execution of an express declaration of trust will prevent any disputes arising over the beneficial ownership of the property. It will not, however, provide solutions to the other disagreements which can arise in a co-ownership relationship. For this reason, cohabitees should be encouraged by their solicitors to execute a co-ownership agreement. [80] Such agreements expressly set out the parties' future obligations in relation to the property and the consequences of non-compliance with these obligations. It should also set out the procedure to be followed if only one of the co-owners wishes to sell the property. Where both an express declaration of trust and a co-ownership agreement are being executed it would seem sensible to follow the English precedents which incorporate the declaration of the beneficial shares into the co-ownership agreement. [81]

Irish conveyancers are likely to adopt the format of Laffoy's precedent co-ownership agreement. [82] This precedent recites the contributions which have been made by both parties to the purchase price, including the incidental costs of the purchase, and their intention in relation to the future outgoings and expenses. The agreement then sets out an obligation to pay a certain fraction of the mortgage instalments, the costs of repairing, maintaining and insuring the property and other outgoings affecting the property including water, gas, electricity, cable television etc. [83] A failure to comply with these financial obligations could lead to the other co-owner acquiring a right to buy out the defaulting co-owner's interest in the property. Clause 2(b) provides that if, for a period of 28 days, a co-owner remains in default of his obligations under the agreement and owes [€500] or more, the other co-owner may serve a payment notice on the defaulting co-owner. If all outstanding sums due are not paid in full within 28 days, the co-owner who served the notice may elect to treat the default as a fundamental breach of the agreement. Once a notice of his or her election has been served on the defaulting co-owner, the defaulting co-owner shall be deemed to have agreed to sell his or her interest in the property to the other co-owner. [84] A contract for sale comes into effect incorporating the Law Society of Ireland *General Conditions of Sale* and the special conditions of sale regarding title which applied when the couple originally purchased the property. [85] In a number of other situations, one of the co-owners will acquire a right to buy out the other co-owner's interest in the property. Clause 3 provides that if a co-owner dies, the surviving co-owner may serve a notice on the personal representatives of the deceased co-owner requiring them to sell the deceased's

interest in the property to him or her. Of course, such a clause will not be necessary if the beneficial interest is held by the co-owners as joint tenants due to the operation of the right of survivorship. Clause 4 confers on each co-owner a right to buy out the interest of the other co-owner if he or she is convicted of a criminal offence (other than a minor offence or an offence under the Road Traffic Acts). If a co-owner wishes to realise his or her share of the property, cl.5 confers a right of pre-emption on the other co-owner. [86] If the other co-owner does not exercise this right of pre-emption within the requisite period of time, the party who wishes to sell can insist on the sale of the interests of both co-owners or, alternatively, he or she can opt to buy out the other co-owner’s interest. [87]

Where a contract for the sale of the interest of a co-owner comes into effect pursuant to cls 2, 3, 4 or 5, it is provided that the purchase price shall be the selling co-owner’s “due and fair share of the Open Market Value.” [88] His or her “due and fair share” is to be ascertained “by taking into account the percentage share of the selling co-owner in the property and making an allowance for any mortgage of the property and any apportionment of outgoings or arrears of contributions which either party was liable for on foot of the terms of the agreement.” [89] This clause permits his or her beneficial interest to be determined by an express declaration of trust, if one has been executed, but it also allows an accounting adjustment to be made for any arrears owing under terms of the agreement. [90] If no declaration of trust has been executed a resulting trust will arise generating a beneficial interest in accordance with his or her contributions. Difficulties in proving the extent of such contributions are reduced by the recitals of past contributions and the parties’ intention in relation to future outgoings.

A right of pre-emption will be invaluable in the event that the parties cannot agree to sell the property. Where a party chooses to exercise a right of pre-emption, the jurisdiction of the court to order a partition or sale of the property pursuant to the Partition Acts 1868 and 1876 is ousted. [91] Where such a right does not exist, as has already been mentioned, an unmarried co-owner who wishes to sell the property will be able to force a sale by bringing an action pursuant to the Partition Acts. However, the existence of a right of pre-emption will be of little use to a co-owner who has insufficient funds to exercise it. This may seem particularly harsh if such a co-owner has sacrificed his or her earning capacity to act as the primary carer of their children. Co-owners who have decided to enter into a co-ownership agreement may wish to consider including a clause which postpones a sale of the property, unless they agree otherwise, until the first of the following events occurs:

1. the youngest child attains the age of 18 or completes his or her full-time secondary education whichever is later; or
2. the primary carer who lives in the property with the youngest child remarries or cohabits. [92]

It is well established that the jurisdiction of the court under the Partition Acts is ousted by an agreement between the co-owners not to sell or divide their land for a specific period of time or until a certain event occurs. [93] In the absence of such a clause, an estoppel-based argument may currently represent a co-owner’s only chance of persuading the court to refuse an order for sale. In *Lucas v McNaughton* [94] the defendant opposed the plaintiff’s application for partition or sale of the property on the basis that the plaintiff had encouraged an assumption that he would provide for the defendant and her two children by joining in the purchase of the dwelling house. The court dismissed the application stating that since a contract was a valid defence to an application for partition, promissory estoppel might also be a basis for refusing relief.

The Law Reform Commission’s Report recommends that cohabitees should be encouraged to make co-ownership and cohabitant agreements to regulate their property and financial affairs during and at the end of a relationship. [95] The draft Cohabitants Bill 2006 clarifies that a cohabitant agreement, [96] entered into after a commencement order is made in relation to s.4 and which is in writing and signed by both cohabitants after each received legal advice independently of the other, may preclude applications for property adjustment orders or other applications for redress under Pt 4 of the draft Bill. However, in exceptional circumstances and if the enforcement of the cohabitant agreement would cause serious injustice, the court may set aside such an agreement, or, on the application



of a qualified and economically dependent cohabitant, make a property adjustment order which varies the agreement or extinguishes or reduces the interest of either party under the agreement. [97] After the draft Cohabitants Bill 2006 is implemented, if unmarried co-owners wish to reduce the power of the court to interfere with the arrangements made in their co-ownership agreement (including the declaration in relation to the beneficial ownership which will usually be included in the agreement or incorporated by reference), their solicitor will have to ensure that the requirement for independent legal advice is adhered to. In the meantime, it seems slightly contradictory to encourage cohabiting co-owners to enter into agreements which will have no status in the context of an application for a property adjustment order once the draft Cohabitants Bill 2006 is implemented. Perhaps s.12(5) of the draft Bill, which lists the factors which the court shall have regard to in deciding whether to make a property adjustment order, could be amended to include the terms of any cohabitant agreement which was entered into before a commencement order was made in relation s.4.

## Conclusion

Although the law in this area is quite complex, conveyancing solicitors can help unmarried couples purchasing property to avoid future disputes by eliciting certain information from them at the beginning of the transaction. It should be established whether the purchasers wish to have the same interest in the property and whether the right of survivorship suits their purposes. It should also be ascertained whether they will be contributing equally to the purchase price. If unequal contributions have been made, or seem possible in the future, and the co-owners wish to hold as joint tenants, a declaration of trust should be executed whereby the co-owners declare that they hold the property on trust for themselves as beneficial joint tenants (regardless of their actual contributions, both past and future, to the purchase price). [98] Parties who wish to take as tenants in common in equal or unequal shares can allow their contributions to raise a presumption of a resulting trust in proportion to their contributions or, alternatively, they can execute a declaration of trust providing for fixed or floating shares in the property. Clients should, however, be warned that once a declaration of trust is executed, the beneficial ownership of the property can currently only be altered by the execution of a deed of variation. The execution of a co-ownership agreement setting out the financial obligations of the parties in relation to the property, the consequences of failing to comply with these obligations and a right of pre-emption in certain circumstances should also be strongly encouraged. In the future, it may become necessary for the parties to such agreements to receive independent legal advice. Although not required at the moment, in some circumstances it may be prudent to arrange for independent legal advice to avoid future allegations of undue influence.

[1] [See *Wylie and Woods Irish Conveyancing Law* (3rd ed., Tottel, West Sussex, 2005), para.18.91.]

[2] [See "Joint Ownership of the Family Home" *Gazette*, March 1992, p.59 at 62.]

[3] [This point has been made by Professor Mee on a number of occasions, see Mee, "Joint Ownership of the Family Home" *Gazette*, March 1992, p.59; Mee, *The Property Rights of Cohabitees* (Hart Publishing, Oxford, 1999), pp.45-46; Mee, "The End of the Affair: The Equitable Rights of Cohabitees" (2001) 6 C.P.L.J. 43 at 45.]

[4] [See *The Property Rights of Cohabitees*, *ibid.*, p.74.]

[5] [Mortgage repayments are treated as direct contributions to the purchase price. See *W v W* [1981] I.L.R.M. 202 per *Finlay P.* at 204-205 "... the redemption of any form of charge or mortgage on the 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 ..."]

[6] [Such domestic contributions are not considered to be sufficient to generate a beneficial

interest under the purchase money resulting trust, see *BL v ML* [1992] 2 I.R. 77 .]

[7] [Paying the household expenses, while the mortgage is being repaid, will increase the beneficial share of the primary earner as such payments are treated as indirect contributions to the purchase price, see *McC v McC* [1986] I.L.R.M. 1 .]

[8] [As we shall see, if the co-owners were married, the primary carer would benefit from the presumption of advancement in such circumstances.]

[9] [See *Walker v Hall* [1984] 5 F.L.R. 126 ; *Young v Young* [1984] F.L.R. 375 ; *Turton v Turton* [1988] 1 Ch. 542 ; *Springette v Defoe* [1992] 2 F.L.R. 388 ; *Huntingford v Hobbs* [1993] 1 F.L.R. 736 ; *Stack v Dowden* [2005] E.W.C.A. Civ. 857 ; *Norton v Hudson* [2005] E.W.H.C. 2934 (Q.B.) . See also Woods, "Property Disputes Between Co-owning Cohabitees - Ireland and England Compared" (2006) 35(4) C.L.W.R. 297.]

[10] [It may be that many of the cases involving unmarried co-owners are settled before they reach the courtroom.]

[11] [It should be noted that the presumption may be rebutted by evidence that a gift was not intended thereby triggering the operation of a resulting trust, see *RF v MF* [1995] 2 I.L.R.M. 572 .]

[12] [ *Caverley v Green* (1984) 86 A.L.R. 483 ; *Lowson v Coombes* [1999] Ch. 373 .]

[13] [Unreported, High Court, November 16, 1982.]

[14] [*ibid.*, pp.4—5 of transcript.]

[15] [Unreported, High Court, July 25, 1978.]

[16] [Unreported, High Court, April 3, 2003.]

[17] [*ibid.*, pp.16-17 of transcript.]

[18] [*ibid.*, pp. 18-19 of transcript.]

[19] [*ibid.*, p.24 of transcript. For a more detailed discussion of this decision, see Woods, "Property Disputes Between Co-owning Cohabitees - Ireland and England Compared" (2006) 35(4) C.L.W.R. 297 at 311-315.]

[20] [Unreported, High Court, February 27, 1984.]

[21] [See *Conway, Co-ownership of Land, Partition Actions and Remedies* (Butterworths, Dublin, 2001) chap.5 for a discussion of the factors which the court considers in deciding whether to order a sale.]

[22] [See also *Conway, ibid.*, para.5.41.]

[23] [(1887)19 L.R. Ir.45 at 47.]

[24] [ *Richardson v McGuinness*, unreported, British Columbia Supreme Court, December 12, 1996.]

[25] [See *Smith v Smith (No.2)* [1962] Qd. 132 ; *Peck v Peck* [1965] S.A. Sr. 293 ; *Bourke v*

Bourke [1983] 2 N.Z.F.L.R. 55 .]

[26] [Nowadays, disputes between spouses over the family home will generally be resolved in the context of judicial separation or divorce proceedings by ancillary orders made pursuant to the Family Law Act 1995 or the Family Law (Divorce) Act 1996 . See Conway, *Co-ownership of Land, Partition Actions and Remedies*, op cit., para.10.18 et seq. ]

[27] [Unreported, High Court, November 18, 1983.]

[28] [The court's jurisdiction under the Partition Acts 1868 and 1876 may also be ousted where, following a judicial separation or a divorce, a property adjustment order is made which regulates the use and occupation of the family home or the circumstances in which the spouses may dispose of the property. See Conway, *Co-ownership of Land, Partition Actions and Remedies*, op cit., para.10.19.]

[29] [Above n.16.]

[30] [*ibid.*, pp.20-21 of transcript.]

[31] [Above n.16, pp.23-24 of transcript.]

[32] [Assuming that the English divorce was recognised in Irish Law. See Shatter's *Family Law* (4th ed., Butterworths, Dublin, 1997), para.10.38.]

[33] [Although the writer could not locate any Irish case dealing specifically with this issue, it is also the opinion of Conway in *Co-ownership of Land, Partition Actions and Remedies* op cit., para.10.45. The cases cited in n.25, above, would lend support to such a point of view.]

[34] [Note that the court is also empowered to make an order dispensing with consent to severance of a joint tenancy where such consent is unreasonably withheld. Section 28 of the Bill prohibits the unilateral severance of a joint tenancy by a joint tenant without the prior consent in writing of the other joint tenant(s).]

[35] [Note that such factors can be taken into account by the English courts exercising their jurisdiction pursuant to the Trusts of Land and Appointment of Trustees Act 1996 . See Woods, "Property Disputes Between Co-owning Cohabitees - Ireland and England Compared" (2006) 35(4) C.L.W.R. 297 at 323-325.]

[36] [LRC 82(2006).]

[37] [A "qualified cohabitant" is defined in s.3 of the draft Cohabitants Bill 2006 as someone who has been living with his or her partner for a minimum of three years or two years if there is a child of the relationship.]

[38] [*ibid.* ., paras.6.30-6.32.]

[39] [For a discussion of the role of cohabitant agreements in the Law Reform Commission's proposals, see the text accompanying nn.95-97 below.]

[40] [Section 13(2) provides that a property adjustment order may provide for a number of these matters and such orders may also be made for the benefit of any dependent child of the relationship. Presumably, any future legislative scheme would also include a provision, similar to s.14(5) of the Family Law Divorce Act 1996 , permitting the court to order someone other than the respondent to execute any deed which is necessary to give effect to the property adjustment order.]

[41] [Including any contributions made to the income, earning capacity and financial resources of the respondent and any sacrifice made by looking after the home or caring for the respondent and any child of the relationship.]

[42] [Including the degree to which the future earning capacity of the applicant was impaired by reason of having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the respondent and any child of the relationship.]

[43] [See above n.37.]

[44] [Consultation Paper on the Rights and Duties of Cohabitees LRC CP 32 (2004).]

[45] [*ibid.*, paras 3.86-88. For discussion of these proposals see Fox, "Property Rights of Cohabitees: The Limits of Legislative Reform" [2005] 1 I.J.F.L. 2; Mee, "A Critique of the Law Reform Commission's Consultation Paper on the Rights and Duties of Cohabitees" (2004) xxxix Ir. Jur. 74.]

[46] [Such an order is available to a spouse who obtains a decree of judicial separation or divorce. See s.10(1)(a) of the Family Law Act 1995 and s.15(1)(a) of Family Law (Divorce) Act 1996 .]

[47] [*op. cit.*, para.6.10-11. Note that the Law Reform Commission pointed out that the English remedy does not bind third parties and the right of occupation tends to be granted for a short period. It would seem this remedy is not specifically designed to cater for relationship breakdown.]

[48] [For a discussion of the requisitions on title dealing with the Judicial Separation and Family Law Reform Act 1989 , the Family Law Act 1995 and the Family Law (Divorce) Act 1996 , see Woods and Wylie, *Irish Conveyancing Law*, *op. cit.*, para.16.61.]

[49] [Section 37 of the Family Law (Divorce) Act 1996 empowers the court to set aside a disposition by a spouse entered into with the intention of defeating a claim for relief unless the purchaser was a bona fide purchaser for value without notice of the intention on the part of the spouse to defeat the claim for relief. Anti-avoidance provisions are not included in the draft Cohabitants Bill 2006 but presumably they would be included in any future legislative scheme.]

[50] [See Woods and Wylie, *Irish Conveyancing Law*, *op. cit.*, paras 16.51-56.]

[51] [Such an order is available to a spouse who obtains a decree of judicial separation or divorce. See s.10(1)(a) of the Family Law Act 1995 and s.15(1)(a) of Family Law (Divorce) Act 1996 .]

[52] [See Wylie and Woods, *Irish Conveyancing Law*, *op. cit.*, para.18.84 et seq. ]

[53] [Equivalent legislation, the Statute of Uses (Ireland) Act 1634 , was enacted in Ireland.]

[54] [See Lyall, *Land Law in Ireland* (2nd ed., Round Hall Sweet & Maxwell, Dublin, 2000), p.108.]

[55] [Wylie and Woods, *Irish Conveyancing Law*, *op. cit.*, para.18.86.]

[56] [See Mee, "A Stake Through The Heart of the Statute of Uses: A Response to Professor Pearce" (1996) 47 N.I.L.Q. 367 at 373-375.]

[57] [Scott and Fratcher, *The Law of Trusts* (4th ed., Boston, 1989), para.405.]

[58] [In *JC v JHC*, unreported, High Court, August 4, 1982, Keane J. was particularly impressed by the evidence that the husband's object in having the property conveyed into their joint names was to ensure that if he died before his wife, she would be the sole beneficiary of his estate. He concluded that the property was held on a joint beneficial tenancy.]

[59] [See *Containercare (Ireland) Ltd v Wycherly* [1982] I.R. 143 at 151.]

[60] [“Joint Ownership of the Family Home” *Gazette* March 1992, p.59 at 60.]

[61] [Professor Mee notes that: “In such cases it is not the existence of the joint tenancy, but the evidence as to the reason for its creation which would serve to rebut the presumption of resulting trust,” see “Joint Ownership of the Family Home”, *ibid.* ]

[62] [See Lyall, *Land Law in Ireland*, *op. cit.*, pp.431-432.]

[63] [(Butterworths, Dublin, 1992), pp.E427-E450.]

[64] [See *CC v CS*, unreported, High Court, July 1982. See also Wood, Lush and Bishop, *Cohabitation Law, Practice and Precedents* (3rd ed., Family Law, Bristol, 2005), p.61.]

[65] [It is important to bear in mind, however, that any element of a gift could give rise to a Capital Acquisitions Tax liability unless the exemption set out in s.86 of the Capital Acquisitions Tax Consolidation Act 2003 applies. Note the recent Law Reform Commission recommendation that qualified cohabitants be placed in Group threshold (1) for the purposes of Capital Acquisitions Tax, *op. cit.*, at para.3.30-31.]

[66] [In particular, *BM v AM*, above n.16, and *AL v JL*, above n.20.]

[67] [See Wood, Lush and Bishop, *Cohabitation Law, Practice and Precedents*, *op. cit.*, pp.71-76 for precedent clauses setting out fixed beneficial shares.]

[68] [The declaration of trust should also deal with the beneficial interests of the parties in the net proceeds of sale and set out how the liability to redeem the mortgage and to discharge the incidental expenses of the sale is to be apportioned between the parties. If the apportionment of these expenses is not expressly set out, a declaration that the net proceeds are to be divided in a certain way assumes that the amount required to redeem the mortgage and the incidental costs of the sale have been deducted in the same proportions. See Wood, Lush and Bishop *Cohabitation Law, Practice and Precedents*, *op. cit.*, pp.18-19.]

[69] [The statement in the brackets is probably unnecessary but its inclusion would eliminate any doubt over whether the express declaration is intended to govern future mortgage repayments. Professor Mee has noted that a theoretical argument could be made that an express declaration in the conveyance reveals the intention as to the equitable ownership at the time of the purchase whereas in Ireland the intention of the parties at the time of a subsequent contribution may instead be determinative. See “Joint Ownership of the Family Home”, *Gazette*, March 1992, p.63, n.19; *The Property Rights of Cohabitees*, *op. cit.*, p.73-74.]

[70] [See Wylie and Woods, *Irish Conveyancing Law*, *op. cit.*, para.18.90.]

[71] [In accordance with the “curtain principle,” trusts must to be kept off the register. See s.92(1) of the Registration of Title Act 1964 . The trustees are the registered owners although they may enter an inhibition on the register to protect the interests of any beneficiaries under a trust. This would seem unnecessary where the beneficiaries are also the registered owners.]

[72] [ *Goodman v Gallant* [1986] Fam. 106 .]

[73] [See the argument of the Irish Law Reform Commission to this effect in its Consultation Paper on the Rights and Duties of Cohabitees, *op. cit.*, para.3.33. See also Wood, Lush and Bishop, *Cohabitation Law, Practice and Precedents*, *op. cit.*, pp.15—16 for a list of the advantages and disadvantages of expressing fixed beneficial shares in the property at the time of the purchase.]

[74] [Wood, Lush and Bishop, *Cohabitation Law, Practice and Precedents*, *op. cit.*, pp.126-127 for a precedent Variation of a Declaration of Trust.]

[75] [See Wood, Lush and Bishop, *Cohabitation Law, Practice and Precedents*, *op. cit.*, pp.76-85 for precedent clauses setting out floating beneficial shares. Two methods of calculating the floating shares are provided in this book. One method simply adds each co-owner's contributions and apportions the net proceeds of sale *pro rata*. The second method, which has been described as more equitable, involves the application of formulae which are designed to take into account the extent to which any change in the value of the property is attributable to a co-owner's lump-sum contributions and to his or her mortgage-related contributions.]

[76] [See Wood, Lush and Bishop, *Cohabitation Law, Practice and Precedents*, *op. cit.*, pp.76-85.]

[77] [*ibid.*, p.18. ]

[78] [Electricity, gas, telephone, cable TV, etc.]

[79] [Wood, Lush and Bishop, *Cohabitation Law, Practice and Precedents*, *op. cit.*, pp.16-18 for the advantages and disadvantages of floating shares.]

[80] [See the Law Reform Commission recommendation in this regard in its Report on the Rights and Duties of Cohabitees, *op. cit.*, para.3.22-23.]

[81] [See Wood, Lush and Bishop in *Cohabitation Law, Practice and Precedents*, *op. cit.* ]

[82] [*Irish Conveyancing Precedents*, *op. cit.*, pp.E471 C-J. Note that this precedent was reproduced with the permission of the Law Society of Ireland. It deals with many of the issues which could arise in the course of the co-ownership relationship. Other contingencies can be provided for, if necessary, but it should be borne in mind that a simpler document will be more easily understood by the clients.]

[83] [See cl.1 of the agreement.]

[84] [See cl.2(c).]

[85] [The General Conditions regarding Planning and Building Regulations shall be deemed to be deleted. See cl.5(c).]

[86] [Clause 5(a).]

[87] [Clause 5(f).]

[88] [See cl.5(b) for a definition of the "open market value."]

[89] [Clause 5(a).]

[90] [Where an action is brought pursuant to the Partition Acts 1868 and 1876, the court may order an accounting adjustment to be made between the co-owners where one party has been paying more than his share of the expenses. See *Conway Co-ownership of Land Partition Actions and Remedies*, *op. cit.*, chap.11.]

[91] [See *Peck v Cardwell* (1839) 2 Beav. 137 ; *Fletcher v Ashburner* (1779) 1 Bro. C.C491 . cf. *Nullagine Investments Pty Ltd v Western Australian Club* (1993) 177 C.L.R. 635 (see, however, *Conway's comment in Co-ownership of Land Partition Actions and Remedies*, *op. cit.*, at para.4.50, that the reasoning of the dissenting judges is to be preferred).]

[92] [Wood, Lush and Bishop in *Cohabitation Law, Practice and Precedents*, *op. cit.*, at p.71 refer to such clauses creating deferred trusts for sale as "Mesher" and "Martin" Type Trusts after *Mesher v Mesher* [1980] 1 All E.R. 126 and *Martin v Martin* [1978] Fam. 12 in which orders postponing the sale of the family home were made in similar terms by the court in the context of matrimonial proceedings.]

[93] [See *Re Permanent Trustee Nominees (Canberra) Ltd* [1989] 1 Qd. R. 314 (per Connolly J. at 321). See *Conway, Co-ownership of Land Partition Actions and Remedies*, *op. cit.*, para.4.15. Such clauses are frequently included in separation agreements between spouses, see *Conway*, para.10.21.]

[94] [(1990) 14 Fam L.R. 347. See *Conway, Co-ownership of Land Partition Actions and Remedies* *op. cit.*, para.4.55-56.]

[95] [See n.80 above.]

[96] [Section 4(2) of the draft *Cohabitants Bill 2006* defines a cohabitant agreement as "an agreement between two cohabitants which makes provision for financial matters (and only such matters) during the relationship or on its ending (whether by death or otherwise)." It should perhaps be clarified that cohabitant agreements include co-ownership agreements which make provision for property matters. The Law Reform Commission noted that there has never been any doubt over the enforceability of co-ownership agreements (see *op.cit.*, para.3.22, n.26). It should, however, be made clear that such agreements may also prevent an application under Pt 4 of the draft Bill for redress, provided the necessary formalities are complied with.]

[97] [See ss.4(7) and 13(2)(c) and (d) of the draft *Cohabitants Bill 2006*.]

[98] [As was mentioned earlier, if an outright purchase is involved, equal contributions to the purchase price, raise a presumption of a beneficial joint tenancy. Setting out the fact that the parties contributed equally in the recitals to the deed will avoid difficulties of proof arising at a later date.]