A Critique of the Legal Protections afforded to the Matrimonial Home in Ireland: Lessons from British Columbia

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Abstract

This doctoral thesis analyses the legal protection afforded to non-owning spouses in Ireland in relation to the family home through the different stages of a marital relationship – inter vivos, on death and on divorce. Although the property rights of spouses continue to be held on the basis of title and are not automatically modified by marriage, some modifications to the separate property regime have taken place through the intervention of equity and the legislature which mitigate the harshness associated with it, in particular, in relation to the ownership, control and occupation of the family home. This thesis questions whether these interventions are sufficient or whether further protection is needed for non-owning spouses in relation to this important asset. To this end, the thesis considers what lessons may be learned from the law of British Columbia, Canada on this issue.

What emerges is that, in certain circumstances, considerable protection is currently afforded by Irish law to non-owning spouses vis-à-vis the family home. Areas of particular strength include the restrictions against the unilateral disposition of the family home imposed by the Family Home Protection Act 1976 and the provision of the legal right share and the right to appropriate the family home in satisfaction of such a share by the Succession Act 1965. By contrast, the protection afforded by the law in British Columbia at these points in a relationship is much weaker. On the other hand, the British Columbian approach to spousal provision on intestacy appears more likely to secure the family home for the benefit of the non-owning spouse than the Irish approach and British Columbia also confers non-owning spouses with much more substantial protection on marital breakdown than is afforded pursuant to the Irish Family Law Acts. In these latter areas, in particular, the author argues that important lessons can be learned from the experiences of this other jurisdiction to shape the future of Irish law.

On this basis, this thesis presents practical and viable methods of strengthening the protections which currently exist inter vivos and on death, as well as formulating an alternative regime based on a deferred community of property akin to that applied in British Columbia to deal with matrimonial property division on marital breakdown. When combined, the implementation of these proposals for reform in Ireland would ensure much more comprehensive protection for the family home and a system of matrimonial property law which is more theoretically consistent in its application throughout a marital relationship.
Declaration

The substance of this thesis is the original work of the author, and due reference and acknowledgement has been made, where necessary, to the work of others. No part of this thesis has been submitted in candidature for any degree.

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Bibliography
Table of Cases

Canada

Bard v Bird [1993] CanLII 2478 (BC CA)
Barker v Barker [2002] CanLII 345 (BC CA)
Boeckler v Boeckler [1987] CanLII 2599 (BC CA)
Bowman v Bowman [2009] CanLII 1435 (BC SC)
Boyes v Boyes [1997] CanLII 2727 (BC SC)
Brintnell v Grasley [2000] CanLII 1322 (BC SC)
BW L v JB [2006] CanLII 557 (BC SC)
Caple v Dolman [1999] CanLII 5237 (BC SC)
Dale v Dale [2006] CanLII 1683 (BC SC)
Davison v Davison [2006] CanLII 777 (BC SC)
DVK v NKK [2005] CanLII 791 (BCSC)
Elsom v Elsom [1983] CanLII 692 (BC CA)
Fearnside v Fearnside [2008] CanLII 1072 (BC SC)
Hermance v Hermance [2000] CanLII 491 (BC SC)
Karreman v Karreman [2001] CanLII 1327 (BC SC)
Korolew v Korolew (1972) 7 RFL 162
Kowalewski v Kowalewski [1994] CanLII 412 (BCSC)
Lodge v Lodge [1993] CanLII 389 (BC CA)
Machin v Rathborne [2006] CanLII 252 (BC SC)
Macklin v Macklin [1996] CanLII 2999 (BC SC)
Maclean v Maclean [1990] CanLII 878 (BC SC)
MacDougall v Gelin [2008] CanLII 1786 (BC SC)
MacNeill v MacNeill [1997] CanLII 2493 (BC CA)
Manhas v Manhas [2008] CanLII 1175 (BC SC)
McPhee v McPhee [1996] CanLII 3266 (BC CA)
McWatters v Auger [1999] CanLII 6018 (BC SC)
Murdoch v Murdoch [1975] CanLII 193 (SC C)
Newson v Newson [1986] CanLII 166 (BC CA)
NMM v NSM [2004] CanLII 346 (BC SC)
Nolan v Nolan [2005] CanLII 1807 (BC SC)
Nova Scotia (Attorney General) v Walsh [2002] CanLII 83 (SC C)
Ogilvie v Ogilvie [1995] CanLII 2199 (BC CA)
PAJ v RDJ [2007] CanLII 653 (BCSC)
Pegler v Avio [2008] CanLII 128 (BC SC)
Peter v Beblow [1993] CanLII 126 (SC C)
Pettkus v Becker [1980] CanLII 22 (SC C)
PGN v BAN [2005] CanLII 1807 (BC SC)
Pickelein v Gillmore [1997] CanLII 3147 (BC CA)
Porter v Arce [1996] CanLII 8589 (BC SC)
Rathwell v Rathwell [1978] CanLII 3 (SC C)
Rees v Rees [1980] CanLII 573 (BC SC)
Richardson v McGuinness [1996] CanLII 681 (BC SC)
Rishi v Nijjar [2000] CanLII 1607 (BCSC)
Rushchinski v Schmold [2001] CanLII 96 (BC SC)
SBM v NM [2008] CanLII 1786 (BC SC)
Spoklie (Trustee of), [1996] CanLII 1048 (BCSC)
Straarup v Barton [2007] CanLII 37 (BCSC)
Toth v Toth [1995] CanLII 1917 (BC CA)
Tratch v Tratch [1981] CanLII 774 (BC SC)
Tsonis v Tsonis [1985] CanLII 800 (BC SC)
Van Eeuwen v Van Eeuwen [2010] CanLII 1050 (BC SC)
Walker v McDermott [1930] CanLII 1 (SC C), [1931] SCR 94
Wale v Wale [2008] CanLII 1562 (BC SC)
Wall v Eeles [2006] CanLII 115 (BC SC)
Wallace v Wallace [1999] CanLII 5803 (BC SC)
Whittal v Whittal [1987] CanLII 2489 (BC SC)
Wolowidnyk v Wolowidnyk [2008] CanLII 135 (BC CA)
Zaurrini v Zaurrini (1981) CanLII 484 (BC CA)

**England and Wales**
Charman v Charman (No 4) [2007] EWCA Civ 503, [2007] 1 FLR 1246
Cowan v Cowan [2001] EWCA Civ 679
Gissing v Gissing [1971] AC 886
Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 1 FLR 1186
National Provincial Bank Ltd v Ainsworth [1965] UKHL 1, [1965] AC 1175
Ruabon Steamship Company Limited, The v London Assurance [1900] AC 6 (HL)
White v White [2001] 1 AC 596
Wroth v Tyler [1974] Ch 30

**Ireland**
ABC’s Estate, Re [2003] 2 IR 250
AK v PK [2000] IEHC 24
Allied Irish Banks v Finnegan [1996] 1 ILRM 401
AL v JL (HC, 27 February 1984)
Bank of Ireland v Hanrahan (HC, 10 February 1987)
Barclays Bank (Ireland) Ltd v Carroll (HC, 10 September 1986)
BF v VF [1994] 1 Fam L J 15
BM v AM [2003] IEHC 170
Bracken v Byrne [2005] IEHC 180, [2006] 1 ILRM 91
C v C [2005] IEHC 276
CC v WC [1990] 2 IR 143
CF v JDF [2005] 4 IR 154
Containercare Ireland Ltd v Wycherley [1982] IR 143
CO’R v M O’R [2000] IEHC 66
CP v DP [1983] 3 ILRM 380
D v D [2006] IEHC 100
Denis Kennedy v Breda Kennedy, Estate of (HC 26 January 2007)
Dunne v Hamilton [1982] ILRM 290
ED v FD (HC, 23 October 1980)
Elliot v Stamp [2008] IESC 10
EM v WM [1996] IFLR 155 (CC), [1994] 3 FamLJ 93 (CC)
ES v DS (HC, 12 July 2010)
F v F [1994] 2 ILRM 401
F v F (HC, 11 June 2002)
Fleming, Re [1987] 7 ILRM 638
G v G [2011] IESC 40
GB v AB [2007] IEHC 491
GM v TAM, Re (1972)106 ILTR 82
GNR v KAR (HC, 25 March 1981)
GP v IP (HC, 19 October 1984)
H v H [1978] IR 138
H v O [1978] IR 194
H v S [1979] ILRM 105
Hamilton’s Estate, Re [1984] ILRM 306
Hamilton v Armstrong [1984] ILRM 306
Hamilton v Hamilton [1982] IR 466
HD v ED (HC, January 1994)
Heavey v Heavey (1974) 111 ILTR 1
ICC Bank Plc v Gorman (HC, 10 March 1997)
Irwin v Deasy [2004] IEHC 104; [2006] IEHC 25
JC v CC [1994] 1 FLJ 22
JD v DD [1997] 3 IR 64
JH v WJH (HC, 20 December 1979)
Johnston v Horace [1993] ILRM 594
K v K [2008] IEHC 341
Kavanagh v Delicato (HC, 20 December 1996)
Kyne v Tiernan (HC, 15 July 1980)
L v L [1992] 2 IR 77
L v L [2007] IEHC 438
Linnie v Murphy [2008] IEHC 362
McA v McA (HC, 23 May 2000)
McC v McC [1986] ILRM 1
McGill v S [1979] IR 238
McGrath v Tesco Ireland Ltd (HC, 14 June 1999)
McMahon v O’ Loughlin [2005] IEHC 196
MK v PK [1991] 9 FamLJ 12 (HC)
MPD v MD [1981] 1 ILRM 179
MP v AP [2005] IEHC 326
Murray v Diamond [1982] 2 ILRM 113
MY v MY (HC, December 1995)
N v N [1992] 2 IR 116
N v N (HC, 18 December 2003)
NAD v TD [1985] ILRM 153
National Irish Bank Ltd v Graham [1995] 2 IR 244
NC v KLM (CC, 22 February 2002)
Nestor v Murphy [1979] IR 326
Northern Bank v Henry [1981] IR 1
O’ D v O’ D (High Court, 18 November 1983)
O’ L v O’ L [1996] 2 FamLJ 63
PP v AP [1999] IEHC 60
PS v PS (HC, July 1996)
R v R [1979] ILRM 1
R v R (CC, 18 January 2005)
R v R [2006] 2 ILRM 467
Reynolds v Waters [1982] ILRM 335
RK v MK (HC, 24 October 1978)
S v S [1983] 3 ILRM 387
SB v RB [1996] IFLR 220 (CC), [1997] 3 FamLJ 66
SD v BD [2007] IEHC 492
SO’B v MO’B (HC, December 1980)
Somers v Weir [1979] IR 94
Strong v Holmes [2010] IEHC 70
T v T (CC, March 1995)
Trinity College v Kenny [2010] IEHC 20
Urquhart, Re [1974] IR 197
VS v RS [1992] 2 FamLJ 52 (HC)
XY v YX [2010] IEHC 440
W v W [1981] ILRM 202
WA v MA [2005] 1 IR 1, [2005] 1 ILRM 517

New Zealand

Pasi v Kamana [1986] 1 NZLR 603
## Table of Legislation

### Australia
- Succession Amendment Act 1997 (Queensland)

### Canada
- Court Order Enforcement Act 1996 (RSBC)
- Court Order Interest Act (RSBC)
- Estate Administration Act 1996 (RSBC)
- Execution Act 1969 (RSBC)
- Execution Amendment Act 1978 (RSBC)
- Family Law Act 2011 (RSBC)
- Family Relations Act 1996 (RSBC)
- Land (Spouse Protection) Act 1996 (RSBC)
- Partition of Property Act 1996 (RSBC)
- Probate Recognition Act 1996 (RSBC)
- Succession Law Reform Act 1990 (Ont.)
- Testators’ Family Maintenance Act 1920 (SBC)
- Wills Act 1996 (RSBC)
- Wills, Estate and Succession Act 2009 (RSBC)
- Wills, Estate and Succession Amendment Act 2011 (RSBC)
- Wills Variation Act 1996 (RSBC)

### England and Wales
- Family Law Act 1996
- Inheritance (Provision for Family and Dependents) Act 1975
- Intestate Estate’s Act 1952
- Matrimonial Homes Act 1967

### Ireland
- Bankruptcy Act 1988
Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010
Dower Act 1833
Family Home Protection Act 1976
Family Law (Divorce) Act 1996
Family Law (Maintenance of Spouses and Children) Act 1976
Family Law (Protection of Spouses and Children) Act 1976
Inheritance Act 1833
Intestates’ Estates Act 1890
Intestates’ Estates Act 1954
Judgment Mortgage (Ireland) Acts 1850 and 1858
Judicial Separation and Family Law Reform Act 1989
Land and Conveyancing Law Reform Act 2009
Married Women’s Property Acts 1865, 1870, 1874, 1882, 1884, 1893 and 1907
Matrimonial Home Bill 1993
Partition Acts 1868 and 1876
Registration of Title Act 1964
Statute of Uses (Ireland) 1634
Statute of Wills (Ireland) 1634
Statute of Distributions 1695
Succession Act 1965
Statute of Distributions (Ireland) 1695
Registration of Title Act 1964
Property Services (Regulation) Act 2011

New Zealand
Property Relationship Act 1976

Scotland
Succession (Scotland) Act 1964
Introduction
Central Research Question

Professor Kahn-Freund remarked in 1955:

‘Since in our societies marriage is the basis for the normal family, it follows that marriage must have a profound effect on the property of the spouse ... It is difficult to imagine any system of law which in its regulation of the impact of marriage on property could completely ignore these elementary social facts, ie confine itself to a strict rule of “separation of property” in the sense that marriage has no effect on the property of the spouse at all.’

Yet, in the mid-twentieth century, a separate property approach remained the prevailing matrimonial property regime in many countries across the common law world. Even today in Ireland, it is arguable that marriage still does not have a ‘profound effect’ on property. The property rights of spouses continue to be held on the basis of title and are not automatically modified by marriage. However, some modifications to the separate property regime have taken place through the intervention of equity and the legislature which mitigate the harshness associated with it, in particular, in relation to the ownership, control and occupation of the family home. This thesis seeks to assess whether these interventions are sufficient or whether further protection is needed for the non-owning spouse in relation to this important asset.

The thesis analyses the legal protection afforded to non-owning spouses in relation to the family home through the different stages of a marital relationship – inter vivos, on death and on divorce. The decision to focus exclusively on the family home was an easy one to make. In purely economic terms, it frequently represents the single most valuable asset owned by spouses. However, its value is often more than monetary. Unlike most other assets, it is also a source of comfort, security and protection. As Professor Fox points out, the family home is a ‘powerfully emotive idiom, with considerable cultural kudos and, as such, may be regarded as carrying significant weight in policy debates’. However, despite its importance in the shared lives of a couple, the title to the family home is not always vested in both spouses. Although co-ownership of the family home has undoubtedly increased in recent years with most newly purchased properties vested in both spouses, where it is not co-owned, the consequences may now be viewed as less acceptable. As Professor Cooke observed in relation to England and Wales, this increase in co-ownership ‘may ... mean that the value placed on home ownership in our society is so great, that the risk of having to move is seen as correspondingly tragic, perhaps to a greater extent than it was in the early years of the twentieth century before we became a “property-owning democracy”.

Moreover, the consequences of not possessing a legal interest in the home are often felt most acutely where the non-owning spouse is caring for the dependent children of a marriage which has

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3 See Chapter 1.
broken down. In many cases, custody is awarded to the mother and the spouse who does not hold a legal interest in the home is usually the wife. The vulnerability of such wives and mothers is often exacerbated by their financially inferior position to their husbands. When these factors are combined, it is clear that for such women in particular, the legislative protections vis-à-vis the family home are of the utmost importance.

Critiquing the effectiveness of the various protections available to a spouse whose name does not appear on the title to the family home, this thesis questions how the Irish approach may be strengthened to ensure the most effective protection of the family home for non-owning spouses. To this end, the thesis considers what lessons may be learned from the law of British Columbia, Canada on this issue. Drawing from the British Columbian approach in certain respects, viable proposals for reform are then presented.

How This Thesis Contributes to Knowledge

A comprehensive critique of this nature is particularly timely in Ireland. In light of the current economic turmoil, inter vivos protection against unilateral dispositions of the family home has assumed greater importance. Spouses may seek to sell the family home to generate cash for a business venture or (re)mortgage the home to release credit. Unsecured creditors may seek to register a judgment mortgage against the family home to secure repayment of outstanding debts. In such an environment, any weakness in the inter vivos protection afforded to non-owning spouses is amplified. Following the trend of much of Western Europe, Ireland now possesses an ageing population. Therefore, the need to ensure that the entitlements of surviving spouses and the special protection afforded to the family home on death are adequate assumes greater significance.

Moreover, judicial separation and divorce have become a common occurrence around the country. Although the Family Law Act 1995 and the Family Law (Divorce) Act 1996 place considerable discretion in the hands of the judiciary to effect an equitable redistribution of property including the family home, recent statistics show that recourse to this discretion is the exception rather than the rule. Instead, most divorcing couples reach a settlement. Whether, and to what extent, the legislation facilitates fair settlements must be questioned. In particular, the implications of providing discretionary rights to spouses as opposed to fixed shares in family property must be scrutinised. The need to undertake such research is particularly important as the harmonisation of European family law is now on the agenda of the European Commission and may, sooner or later, require

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5 In 2011, 44.5% of married men worked for 40 or more hours per week, while merely 14.7% of married women did likewise. In contrast, 25.1% of married women worked for 20-29 hours per week compared with just 5.5% of married men. See Central Statistics Office, Women and Men in Ireland 2011 (Stationery Office 2012) 21. This report is discussed in more detail at 22, 186-187.

6 Although, this thesis does proceed on the basis that the non-owning spouse is a woman, the proposals made apply equally to men and are not gender specific.


8 Professor Barlow noted, ‘Those EU nationals who live and thus often own property in a member state other than their own are ... presented with difficulties arising out of a conflict of laws, particularly at the point of divorce. This has put harmonisation of family law within Europe on the agenda of the European Commission.’
Ireland to consider a more communitarian approach to matrimonial property division. In 2006, the Commission produced the Green Paper, ‘On Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition’ and the ‘unstoppable Europeanisation of Irish family law’ has been noted.

To date, the protections afforded to the non-owning spouse in relation to the family home have not been subject of a comprehensive statutory review, either specifically or as part of a broader analysis of matrimonial property law. However, certain relevant proposals for reform were made by the Law Reform Commission in its Consultation Paper on Judgment Mortgages which was published in 2004. These proposals, which would have improved the position of non-owning spouses where a judgment mortgage was registered against the family home, seem to have been put on the back-burner indefinitely, indicating a general disengagement with the issue by the Government. Even within Irish academia, a clear lack of engagement with this specific issue is evident and, on a more general level, the ‘youthful nature of family law as an academic discipline in Ireland’ has been noted. As Professor Dewar explained, ‘Family law is a legal subject that is under-conceptualised and fails to provide a coherent intellectual challenge. It has low status among academics as well as among practitioners who too easily regard it as an interesting supplement to property law’.

The lack of academic engagement in Ireland with the topic of family property and, in particular, the family home, is especially pronounced in relation to the provisions applicable to a subsisting marital relationship and on death. Although some commentary was generated in the lead up to the failed Matrimonial Home Bill 1993, in the intervening years such analysis has all but vanished. Moreover,

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9 See 8 below for definition of the term ‘communitarian’. Elizabeth Cooke, Anne Barlow and Thérèse Callus, Community of Property: A regime for England and Wales? (Nuffield Foundation 2006) observed at 41 that in the longer term there may be European pressure to introduce a form of community property. They note at 10, ‘English law and English courts may well be obliged to embrace the very idea of community regime, at least for those nationals who marry a national of another member state.’ This may equally be the case in Ireland where, like England and Wales, an equitable redistribution regime applies on marital breakdown. Currently, ‘proper provision’ is a prerequisite to an order for judicial separation and divorce under the Irish Family Law Acts 1995 and 1996. However, in light of European reforming efforts to date such as Council Regulation (EC) 2201/2003 [2003] OJ L338/1, also known as Brussels IIb, Buckley concludes: ‘Although all is not lost – Irish law has not yet been supplanted by pan-European family measures, nor is this likely to happen in the foreseeable future – it is clear that the “proper” provision standard is no longer the bastion of family security that it was initially assumed and intended to be.’ See Lucy-Ann Buckley, ‘European Family Law: The Beginning of the End for “Proper Provision”?’ (2012) 15(2) IJFL 31.


12 While the Report of the Commission on the Status of Women (Stationary Office 1972) and the Report of the Second Commission on the Status of Women (Stationary Office 1993) were commissioned by the Government, they were not published as part of a statutory review process. Although the terms of reference of the first report did not specifically mention the family home, the terms of reference of the second report did, at 6, include a provision ‘to pay special attention to the needs of women in the home’.

13 (LRC CP30–2004).

14 Carol Coulter, Family Law in Practice: A Study of Cases in the Circuit Court (Clarus Press 2009) 12.

while a number of texts discuss the provisions of the Succession Act 1965 in considerable detail,\textsuperscript{16} comprehensive analysis and proposals for reform of the law relating to the family home on death are glaringly absent.\textsuperscript{17}

It seems that the high point of discussion relating to ancillary relief on marital breakdown in Ireland came prior to the introduction of the Family Law Acts 1995 and 1996.\textsuperscript{18} Since then, there has been ‘little by way of analysis of the law itself or comment on how it is working in practice’.\textsuperscript{19} It is clear that in comparison to other jurisdictions, discussion about ‘the state, the family and the law in Ireland ... has scarcely begun’.\textsuperscript{20} Notwithstanding this general trend, however, two Irish academics have contributed to a discussion in relation to matrimonial property division on marital breakdown.

Buckley published an analysis of matrimonial property division in ‘Irish Matrimonial Property Division in Practice: A Case Study’ in 2007.\textsuperscript{21} Nevertheless, two factors render this study of limited value in the Ireland of 2012. First, the data on which the findings were based was from 2002. While the Family Law (Divorce) Act 1996 was in its infancy at that time, it has now been in place for sixteen years. Second, Buckley’s study was quite limited in its scope and much more comprehensive data is now available. For example, in 2009, Coulter published the results of a valuable empirical research exercise in Family Law in Practice: A Study of Cases in the Circuit Court\textsuperscript{22} and the associated Family Law Matters series 2007-2009\textsuperscript{23} adds further to the empirical data available in this area. Important statistics concerning the number of divorces and judicial separations, in addition to statistics on the frequency of ancillary orders made, including those specifically related to the family home, are now also provided by the Courts Service website for 2008-2011.\textsuperscript{24} Drawing on this information, this thesis makes a more informed assessment of the practical impact of the legislation than was open to Buckley. Crowley has also recently published articles which discuss Irish matrimonial property law. However, Crowley’s research may also be distinguished from this thesis. First, unlike the research conducted here, which critiques the protections available to the family home throughout all the phases of a marital relationship, Crowley’s study focused exclusively on financial provision and property distribution following marital breakdown. Second, although she also engaged in a

\begin{flushright}
\textsuperscript{17} Shatter does make some recommendations for reform where the Succession Act 1965 and the Family Law Acts 1995 and 1996 intersect, see Alan J. Shatter, Shatter’s Family Law (4th edn Butterworths 1997) and discussed at 212 below. Limited measures for reform are also set out in Spierin (n 16). However, none of the texts tackled the weaknesses highlighted in Chapter 2 in relation to the current fractional share system applied under the Succession Act.
\textsuperscript{18} There are many factors which may have contributed to this omission. These are discussed in Chapter 5. However, some empirical research has recently taken place, see below text at n 21.
\textsuperscript{19} Coulter (n 14) 15. One important exception she notes, however, is Frank Martin, ‘Judicial Discretion in Family Law’ (1998) 16 ILT 168 which ‘contains all too rare critical analysis of the emerging jurisprudence on divorce in Ireland, situated within the context of international debate on the issues’.
\textsuperscript{20} Coulter (n 14) 10.
\textsuperscript{22} Coulter (n 14).
\textsuperscript{24} See www.courts.ie.
\end{flushright}
comparative analysis of ancillary relief on marital breakdown, Crowley specifically focused on Scotland and California. This thesis, by contrast, considers the regime applied in British Columbia, Canada.

Indeed, in undertaking a comprehensive and in-depth critique of the protections afforded to the family home by the British Columbian legal system, this thesis makes an important contribution to international literature on matrimonial property. This thesis discusses what lessons we in Ireland may learn from the experience of the province in this respect. On the basis that certain aspects of the British Columbian regime represent an improvement on the Irish approach, it develops detailed proposals for reform of the Irish law.

Methodology

A doctrinal and comparative analysis

The thesis adopts a doctrinal approach, undertaking a thorough investigation of the legal protection afforded to non-owning spouses in relation to the family home both in Ireland and British Columbia. Although the ‘uses and misuses of comparative law’ considered by Kahn-Freund in the early 1970s are still of relevance today, and ‘any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection’, comparative law nonetheless provides a useful method of assessing the options open to legislatures around the world. It is considered:

‘As each country works out its own solution, it has first of all to recognise and to analyse its own economic, social, political and ideological situation. In that process it will be helped by foreign experiences. Such experiences will also indicate the schemes of technical implementation, their limited number and their relative merits.’

The decision to study the specific protections afforded to the family home in British Columbia was based on a number of factors. First, the need for practical law reform lies at the heart of this thesis. Thus, drawing from a jurisdiction such as British Columbia which, like Ireland, is founded on the English common law tradition is most appropriate in light of the shared legal threads which are present in both jurisdictions. As Cretney notes, ‘practical law reform will rarely be avowedly

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25 Otto Kahn-Freund, ‘Uses and Misuses of Comparative Law’ (1974) 37 Mod L Rev 1, 27. See also Jacques-Michel Grossen, ‘Comparative Developments in the Law of Matrimonial Regimes’ (1985) 60 Tul L Rev 1199. In the Foreword to Professor Binchy’s A Casebook on Irish Family Law (Professional Books 1984) v, Walsh J noted: ‘While it might be claimed that the problems of family life are broadly similar throughout the western world yet any such statement must be qualified by the realization that family life is so closely bound up by the socio-cultural life of a people that the problems arising do not lend themselves easily to a uniform solution … Legislators and judges alike must resist the temptation to embrace unquestioningly the solutions adopted in other countries, whose socio-cultural life is significantly different, simply because they have been so adopted elsewhere. One must also avoid the tendency … to borrow measures and ideas from other countries at the point where they are already being discarded in those countries where they have been tried and found wanting.’ While Walsh J’s warning has merit, this thesis does not ‘embrace unquestioningly’ the alternative solutions adopted in British Columbia. Rather, detailed consideration is made of the approach applied in the Canadian province and recommendations for change are proposed where appropriate.

26 However, the author is reluctant to define this research as ‘comparative’ since such a description arguably requires greater analysis of the socio-legal and, perhaps, socio-political environments in both jurisdictions than is provided here.

27 Kahn-Freund, ‘Uses and Misuses of Comparative Law’ (n 24) 191.
revolutionary in purpose.' Second, despite certain commonalities, the approach of the legislature and the judiciary in British Columbia to the protection of the family home diverges from their Irish counterparts through each phase of a marital relationship. Consequently, the protection of the family home is achieved through differing means in both jurisdictions thereby lending the study the variation in approach required to make an effective comparative analysis. Third, unlike Ireland, British Columbia benefits from a well-oiled statutory review regime. In particular, the current statutory review of matrimonial property law which is taking place in the province rendered British Columbia a logical choice for comparison. A number of recent reports recommending reforms to this area of law on death and divorce were available which proved to be an invaluable source in assessing the effectiveness of the law in British Columbia and the suitability of certain measures for Ireland. For example, in 2006, the British Columbia Law Institute published a report entitled *Wills, Estates and Succession: A Modern Legal Framework.* This led to the introduction of the Wills, Estates and Succession Act 2009 which, although enacted, has not yet been fully commenced. In 1989, the Law Reform Commission of British Columbia published a report entitled *Property Rights on Marriage Breakdown.* A more recent review of the family property regime was undertaken by the Ministry of the Attorney General resulting in the publication of the *White Paper on Family Relations Act Reform* in 2010. This prompted the reforms introduced by the Family Law Act 2011 which, again, is enacted though not yet commenced. Most recently, in March 2012, the British Columbia Law Institute produced a *Report on the Partition of Property* proposing reform of the law governing applications for sale by mortgagees and judgment creditors.

Reliance on a case study

The technique of using a hypothetical set of facts framed as a case study to which the law may be applied is availed of throughout this thesis. This approach has been employed very effectively in various academic studies in the family property field. From Mary Ann Glendon’s, ‘Matrimonial Property: A Comparative Study of Law and Social Change’ which was published in 1974, to Alan Newman’s paper from 2000, ‘Incorporating the Partnership Theory of Marriage into Elective Share Law’ and Elizabeth Cooke, Anne Barlow and Thérèse Callus’s 2006 report, ‘Community of Property: A Regime for England and Wales?’, the application of a case study has proved a timeless aid in the analysis of matrimonial property law. It allows for a clear impact assessment to be made and demonstrates the practical effects of the law for those directly affected. It also highlights the strengths and weaknesses of any proposal for reform.

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35 Cooke, Barlow and Callus, Community of Property: A regime for England and Wales? (n 9).
**Terminology**

At various stages throughout this thesis, references are made to ‘communitarianism’ or ‘a communitarian approach’. In the interests of clarity, it is necessary to define what is meant by these terms. The terms are used to denote a philosophical position whereby a more community-oriented approach is favoured over the promotion of excessive individualism. As defined by the Oxford English Dictionary, communitarianism is ‘an ideology which emphasizes the responsibility of the individual to the community and the social importance of the family unit’.  

**Thesis Structure**

Chapter 1 examines the restrictions placed on unilateral dispositions of family homes in the sole name of one spouse. It begins by outlining the historical background to the introduction of the Family Home Protection Act 1976, before outlining the main provisions of that Act. The chapter then illustrates how this Act continues to play an important role in the Ireland of 2012. The relevant Irish and British Columbian legislative provisions are applied to a case study to demonstrate the strengths and weaknesses of both approaches. In Ireland, the automatic veto afforded to the non-owning spouse by the Family Home Protection Act 1976 ensures that the protection afforded by the law against unilateral dispositions is quite robust. By contrast, the Land (Spouse Protection) Act 1996 which applies in British Columbia confers considerably less protection, by making registration of the spouse’s occupation a pre-condition to the benefits conferred by the Act. However, the doctrine of unjust enrichment which applies in the province may provide some equitable relief and considers a wider range of contributions than the purchase money resulting trust applied in Ireland. Nevertheless, weaknesses in the unjust enrichment approach to family property disputes are also apparent. In general, therefore, the Irish approach appears to be vastly superior and the reforms of the law proposed are not prompted by the British Columbian approach. The primary shortcoming of the Irish legislation which emerges is in relation to judgment mortgages. In considering how best to remedy this weakness, the thesis considers reform of the purchase money resulting trust, the possible reintroduction of the Matrimonial Home Bill 1993, the implementation of proposals made by the Law Reform Commission in 2004 and sensible proposals for reform made by Shatter.

Chapter 2 discusses the provisions of the Succession Act 1965 dealing with the property entitlements of surviving spouses and the right to appropriate the family home. It begins by outlining the historical development of succession law in Ireland and then seeks to identify the overriding social policy objectives of the protections afforded to surviving spouses by the Succession Act 1965. The relevant provisions of Ireland’s 1965 Act and British Columbia’s Wills, Estates and Succession Act 2009 are then applied to the case study. Although both jurisdictions are based on the same English, common law, tradition, British Columbia nevertheless offers certain interesting and sometimes significant differences in approach to both testate and intestate family provision. First, intestate provision in Ireland is based on a fractional share of the estate. By contrast, British Columbia applies a regime based on a fixed monetary sum, known as a preferential share, and a fraction of the remainder. Second, a system of forced heirship applies in Ireland to prevent the disinherention of a

37 Although the Wills, Estate and Succession Act 2009 is enacted, it has not yet commenced.
surviving spouse. On the other hand, in British Columbia, a surviving spouse has no fixed right to a portion of the testate estate of the deceased. They can, however, make an application for ‘proper maintenance or support’ where the will does not make ‘adequate provision’ for them. The chapter concludes that the provisions of the Irish legislation relating to the property entitlements of surviving spouses should be reviewed to assess their effectiveness in securing the protection of the family home following the death of the owner spouse.

Chapter 3 commences with an evaluation of the relative merits of providing fixed or discretionary rights in the property of a deceased spouse. Although it is acknowledged that greater protection is afforded by fixed rights, the chapter highlights a serious weakness in the Irish regime. A fractional share system is highly dependent on the size of the overall estate. Where the estate is small, and protection is arguably most required, the provision is correspondingly limited. Alternatively, the provision of a fixed monetary sum, akin to the preferential share in British Columbia, ensures a minimum level of support, irrespective of the size of the estate. On this basis, a comprehensive proposal for reform of the rules of intestacy is presented to act as an alternative to the current fractional share system in Ireland. As the focus of the thesis is the protection of non-owning spouses in the family home, the proposal suggests a preferential share of €180,000, a figure in line with the average house price in Ireland. This preferential share, it is proposed, would be offset by the value of any interest in the home held by the surviving spouse on the death of the deceased. Thus, the effect of the proposal would, in most cases, be limited to those most in need of protection, namely non-owning spouses.\textsuperscript{38} Moreover, the weaknesses of a fractional share system are even more pronounced in case of a testate death. Drawing on the author’s published article entitled ‘Spousal Disinheritance Protections under Irish Law: A Proposal for Reform’,\textsuperscript{39} a strong argument is made for the extended application of the preferential share to situations where a will exists. The chapter then turns to an analysis of the difficulties which have arisen in relation to the appropriation of a family home on agricultural land. Again, a novel solution, involving the provision of a right of residence, is presented.

Chapter 4 turns to the issue of matrimonial property division following marital breakdown. The chapter commences with a detailed synopsis of the historical development of marital breakdown legislation in Ireland. It then applies Ireland’s Family Law Acts 1995 and 1996 and British Columbia’s Family Relations Act 1996 to the facts of the case study which illustrates two sharply contrasting approaches to the division of family assets. Ireland operates a system based on equitable redistribution which places considerable discretion in the hands of the judiciary to ensure ‘proper provision’ for spouses. To ascertain how this discretion is utilised in relation to the family home, reference is made to case law as well as recent empirical research and statistics which cast light on the actual application of the legislation in practice. In British Columbia, on the other hand, a deferred community of property regime operates. Both spouses are entitled to an equal share of family assets as defined by the legislation. However, where such equal sharing would be ‘unfair’, an application may be made to the court for a reapportionment. The writer concludes that the discretionary approach to ancillary relief applied in Ireland leaves non-owning spouses quite vulnerable while the

\textsuperscript{38} In certain circumstances, however, it would be relevant to co-owners and spouses who own no family home.

predictability inherent in the British Columbian approach provides significant protection for such spouses.

Chapter 5 opens with a critique of the law governing matrimonial property division following marital breakdown in Ireland and British Columbia. It notes that, overall, the greater levels of certainty inherent in the Family Relations Act 1996 are much more attractive than the lack of foreseeability which is the hallmark of the Irish Family Law Acts 1995 and 1996. A comprehensive proposal for reform of the Irish law is developed which incorporates certain aspects of the law as currently applied in British Columbia, in addition to elements of the Family Law Act 2011 due to be introduced in the province in Spring 2013. This proposal introduces a presumption of equal sharing of family assets and quasi-family assets. It also outlines the circumstances in which a re-apportionment of such assets would be acceptable. The chapter then assesses the likelihood of reform. In this regard, it considers how deeply the current system based on equitable redistribution is embedded in Ireland and whether any constitutional impediments lie in the way of reform.

**Conclusion**

What emerges from this thesis is that the level of legal protection afforded to non-owning spouses in relation to the family home varies considerably through the different stages of a marital relationship in both Ireland and British Columbia. Deep protection is afforded to non-owning spouses in Ireland where a spouse attempts to dispose of the home to a third party while the marriage subsists or by will. By contrast, the protection afforded by the law in British Columbia at these points in a relationship is much weaker. On the other hand, the British Columbian approach to spousal provision on intestacy appears more likely to secure the family home for the benefit of the non-owning spouse than the Irish approach and British Columbia also confers non-owning spouses with much more substantial protection on marital breakdown than is afforded pursuant to the Irish Family Law Acts. In these latter areas, in particular, the author argues that important lessons can be learned from the experiences of this other jurisdiction to shape the future of Irish law.
Chapter One
Restrictions on Unilateral Dispositions of the Family Home

1.1 Introduction

The need to prevent unilateral dispositions of the family home where it is in the sole legal ownership of one spouse is an issue which has generated considerable debate down through the years. Indeed, as the esteemed Professor Wylie explains:

‘One of the most intractable problems to confront the legal system in recent decades is how far a spouse who has no legal title to the matrimonial home should have protection against dispositions by the legal owner (the other spouse) which may jeopardise the “non-owning” spouse’s right of occupation’.¹

Yet, despite the difficulties involved in balancing the competing interests, legislatures across the globe have, with varying degrees of effectiveness, sought to deal with this predicament through the implementation of a regulatory framework. After all, as de Londras notes ‘There is, the law recognizes, something special about homes: something that might even be said to “trump” the sheer market orientation of efficiency and alienability.’²

Considering the value of such legislation which allows a non-owning spouse to veto unilateral dispositions of the family home, Conway and Girard explain:

‘The policy basis of such rights is clearly to encourage consultation between spouses before any major change is made to their living arrangements. These rights also recognize the uniquely personal nature of the matrimonial home: no other asset of the spouses is treated in this fashion.’³

In Ireland, the Family Home Protection Act 1976 imposes restrictions on such dispositions. Although Wylie notes the 1976 Act was ‘one of the most controversial pieces of legislation to have been introduced into the Republic’,⁴ over the years it appears to have gained broad acceptance. It is now an integral aspect of Irish matrimonial property law and an important feature of Irish conveyancing practice.⁵

This chapter commences with a brief discussion of the historical background of matrimonial property rights in Ireland while a marriage subsists – from the doctrine of coverture, to the introduction of the

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⁴ ‘An Irish Perspective on Protecting a Non-owning Spouse in the Home’ (n 1) 144. See also William Duncan and Paula Scully, Marriage Breakdown in Ireland (Butterworths 1990) chapter 12; Alan J. Shatter, Shatter’s Family Law (4th edn Butterworths 1997) chapter 15.
⁵ Nuala Casey and others (eds), Law Society of Ireland Manual: Conveyancing vol 2 (3rd edn OUP 2006) 107 noted the 1976 Act has ‘impacted greatly’ on practitioners.
Family Home Protection Act 1976, and concluding with the failed Matrimonial Home Bill 1993. The chapter then examines whether legislation such as the Family Home Protection Act 1976 holds any relevance today in light of the socio-legal changes which have arisen since its introduction. On the basis that it does continue to have an important role to play, the chapter then applies the Family Home Protection Act 1976 and the British Columbian equivalent, the Land (Spouse Protection) Act 1996, to a case study. In light of the potential protection afforded by the equitable remedies available in both jurisdictions as well as the relationship between these equitable remedies and the legislation just mentioned, the purchase money resulting trust in Ireland and the doctrine of unjust enrichment in British Columbia are also considered. The chapter critiques the protection afforded by the respective regimes and discusses how the Irish approach may be strengthened to ensure the most effective protection of the family home while a marriage subsists.

1.2 The Family Home Protection Act 1976

1.2.1 The historical background

To place the Family Home Protection Act 1976 in context, it is necessary to consider the law governing inter vivos matrimonial property transactions prior to its introduction. Historically, the common law doctrine of coverture, by virtue of which a woman renounced her legal personality upon marriage, applied in Ireland. This doctrine was described succinctly by Blackstone in his 1756 Commentaries on the Law of England:

‘By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover, she performs everything.’

Thus, upon marriage, a wife’s property was transferred to her husband who alone was capable of administering it. In effect, all personal property held by the wife was vested absolutely in her husband. While a wife did not forfeit the ownership of her real estate, she no longer possessed the authority to manage the property or receive the rents or profits derived therefrom.

Since the mid-Nineteenth century, major developments in matrimonial property law have greatly altered the position of the traditionally dependent wife. The introduction of formal equality by the Married Women’s Property Acts represented a particularly important milestone by affording

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6 For further discussion of the doctrine of coverture and the historical differences between single women and married women, see John D. Johnston Jnr, ‘Sex and Property: The Common Law Tradition, the Law School Curriculum and Developments towards Equality’ (1972) 47 NYUL Rev 1033, especially 1045-46.
8 As Senator Gallagher colourfully put it, ‘if Cupid’s arrow did not hit the man’s heart her bank balance certainly did’. See Seanad Deb 27 October 1993, vol 137, col 1539.
9 Moreover, married women were legally incapable of contracting, of suing or of being sued in their own name. Married women were allowed to conduct business separately from their husbands but only with his consent. However, equity adopted a more lenient approach developing the concept of a wife’s ‘separate property’. From the Eighteenth century onwards, Wylie explains, ‘It became established in equity that property conveyed to trustees or the wife’s husband for her “separate use” could be dealt with by her as if she were unmarried.’ See John C. W. Wylie, Irish Land Law (4th edn Tottel 2010) para 25.11. For more on the incapacity of married women in general, see paras 25.09-25.16.
married women the capacity to own and control their own property.\textsuperscript{10} Introducing a separate property regime, this legislation ensured each spouse’s property claims were no longer based on rights and obligations arising from the marital relationship but were instead founded in title.

Unfortunately, although in theory this development would appear to have improved the position of married women, in reality it was a double-edged sword. In order to benefit from the new, separate property regime, a woman would have to acquire title to property. However, very few married women were actually in a position to generate a property portfolio. They were, in the vast majority of cases, financially inferior to their husbands. Moreover, the prevailing social convention in most of the common law world, including Ireland, was for property to be acquired in the sole name of the husband. In more modern times, this was then often exacerbated by bank policy. If a mortgage was obtained to finance the purchase of property, banks usually insisted that the property was put in the name of the principal earner, almost invariably the husband. The position of non-owning wives vis-à-vis the family home was, therefore, precarious.

In the mid-1970s, Senator Robinson noted, ‘Probably the source of greatest hardship in our family law has been the helplessness and the dependence of the wife who could not prevent the matrimonial home from being sold over her head.’\textsuperscript{11} To counteract this injustice, in 1972 the Commission on the Status of Women proposed the introduction of a system whereby a spouse’s ability to unilaterally dispose of the matrimonial home was severely restricted.\textsuperscript{12} This proposal, with its firm constitutional foundation,\textsuperscript{13} subsequently formed the basis of the Family Home Protection Act 1976. It is interesting to note that the Commission also considered the introduction of,

\begin{quote}
‘a system of co-ownership of the matrimonial home under which the home would be legally regarded as being jointly owned by the husband and wife, by virtue of the marriage bond, except where an agreement to the contrary had been entered into by the spouses.’\textsuperscript{14}
\end{quote}

The Commission concluded that the former proposal to restrict the unilateral disposition of the family home would be ‘the easier to introduce and to operate and would be less likely to lead to injustices in individual cases’.\textsuperscript{15} Nevertheless, it recommended that the latter proposal regarding co-ownership of the family home ‘should be further investigated and if it should prove to be a workable one, consideration should be given to its introduction as an alternative to the foregoing

\begin{itemize}
\item \textsuperscript{10} Married Women’s Property Acts 1865, 1870, 1874, 1882, 1884, 1893 and 1907.
\item \textsuperscript{11} Seanad Deb 1 July 1976, vol 84, col 923.
\item \textsuperscript{12} Report of the Commission on the Status of Women (Stationary Office 1972) 175. The Commission considered ‘two acceptable alternative courses’ open to the legislature to protect non-owning spouses vis-à-vis the family home. The first recommendation was adopted in the Family Home Protection Act 1976 discussed here. For the second recommendation, see below.
\item \textsuperscript{13} Fox explains, ‘The policy which informed the Irish provisions was clearly motivated by the special status attached by the Act to marriage and the family under the Irish Constitution’. See Lorna Fox, ‘Creditors and the Family Home: Three Perspectives on Family Property Policy’ (2002) 5(2) IJFL 3, 7. Article 41.1.1° of the Irish Constitution states the State ‘recognises the Family as the natural primary and fundamental unit group of Society’ and Article 41.1.2° provides that the State ‘guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and State’. For analysis, see G. White and G. Hogan (eds), J M Kelly: The Irish Constitution (4th edn Butterworths 2002).
\item \textsuperscript{14} Report of the Commission on the Status of Women (1972) (n 12) 176.
\item \textsuperscript{15} ibid.
\end{itemize}
Consequently, upon the introduction of the Family Home Protection Bill, Senator Robinson described it ‘as an interim measure on the road to a proper and just system of co-ownership of the matrimonial home’. The need for a default regime of co-ownership of the family home was subsequently reiterated in 1993 by the Report of the Second Commission on the Status of Women. This prompted the publication of the Matrimonial Home Bill 1993 which vested the beneficial ownership of the matrimonial home in the joint names of the married couple. However, this Bill was never enacted as the Supreme Court deemed it to be unconstitutional.

1.2.2 Provisions of the Act

The Family Home Protection Act 1976 constitutes a ‘remedial social statute’ and the courts have vowed to interpret it ‘as widely and liberally as can fairly be done’ to ensure the effectiveness of its measures. The main thrust of protection afforded by the Family Home Protection Act 1976 arises under section 3. Section 3 requires, subject to certain exceptions, the written consent of the non-owning spouse for the conveyance of any interest in the family home. Unlike the approach adopted in England and Wales pursuant to sections 30 and 31 of the Family Law Act 1996, the Irish legislation does not specifically create any ‘occupation rights’ in the family home. Wives will,

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16 ibid.
17 Seanad Deb (n 11) col 923.
18 [Stationary Office 1993).
21 Almost identical restrictions on unilateral dispositions of the family home were extended to Civil Partners by s 28 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Surprisingly, the 1976 Act is not referred to in either the text of the 2010 Act or in the Explanatory Memorandum. Professor Mee suggests that the reason why the legislature did not merely amend the 1976 Act to extend its provisions to civil partnerships may be related to its desire ‘to extirpate all reference in the relevant provisions to “dependent children” of the relationship’. See John Mee, ‘Succession and the Civil Partnership Bill 2009’ (2009) 14(4) CPLJ 86. See also Sinead Curtis, ‘The Family Home, Property Adjustment Orders and the Civil Partnership Bill 2009’ (2010) 15(2) CPLJ 33. Note that the Law Reform Commission, Consultation Paper on the Rights and Duties of Cohabitees (LRC CP32–2004) expressed the view at 54 that the Family Home Protection Act 1976 should not be extended to unmarried cohabitants in light of the conveyancing difficulties it would create. It noted that the extension of the provisions to qualified cohabitants would ‘create a nightmare for conveyancers’ especially since the presumptive scheme suggested in the paper meant that only the court could determine whether the parties were qualified cohabitants or not. As the paper stated, ‘how is the purchaser supposed to know if the seller is a qualified cohabitee, if the latter does not know himself?’
22 ‘Family home’ is defined in s 2(1) as ‘primarily a dwelling in which a married couple ordinarily resided. The expression comprises, in addition, a dwelling in which a spouse whose protection is in issue ordinarily resides or, if that spouse has left the other spouse, ordinarily resided before so leaving.’ Sub-s 2(2) states: ‘In sub-s (1), “dwelling” means any building or part of a building occupied as a separate dwelling and includes any garden or other land usually occupied with the dwelling, being land that is subsidiary and ancillary to it, is required for amenity or convenience and is not being used or developed primarily for commercial purposes, and includes a structure that is not permanently attached to the ground and a vehicle, or vessel, whether mobile or not, occupied as a separate dwelling.’ Regarding the term ‘ordinarily resided’ see National Irish Bank v Graham [1995] 2 IR 244 where it was held the Act does not apply to a house which is merely intended to be occupied as a family home. See also Linnie v Murphy [2008] IEHC 362.
however, be protected by their common law right to reside in the family home which belongs to her husband.\textsuperscript{23}

The array of inter vivos transactions directly affected by the 1976 Act is quite wide-ranging. A conveyance under section 3 includes a mortgage, lease, assent transfer, disclaimer, release and any other disposition of property otherwise than by will or by \textit{donatio mortis causa}. The definition of ‘conveyance’ also includes an enforceable agreement, whether conditional or unconditional, to make any such conveyance. As a result, in \textit{Kyne v Tiernan} the court held that if consent is given to the contract for sale, further consent to the execution of the deed of conveyance giving effect to that contract is not required.\textsuperscript{24} In practice, however, consent is generally obtained at both stages of the process. This ensures certainty with regard to future dealings in the event that the consent provided to the contract is not retained with the title deeds. Frequently the requisite consent is endorsed on the deed of a conveyance or transfer.\textsuperscript{25}

With regard to the consent required of the non-owning spouse, three specific criteria must be met: (a) it must be made prior to the conveyance;\textsuperscript{26} (b) it must be in writing; and (c) it must be valid. To be valid, the consent must be ‘free’ and ‘fully informed’.\textsuperscript{27} This was established in the Supreme Court decision of \textit{Bank of Ireland v Smyth}.\textsuperscript{28} While the Supreme Court accepted that the Bank of Ireland was not bound to fully explain the charge to the respondent or advise her to obtain independent legal advice, it added:

‘the reason why [these steps ought to have been taken by the Bank Manager] was to protect the Bank’s own interest since if Mrs Smyth had consented to the charge after it had been fully explained to her and after she had received independent advice it is unlikely that her consent could have been challenged. So it is correct that the Bank ought to have done these things, but not because they owed Mrs Smyth any duty to do so. The reason was to ensure that they got a good title to the land which was the subject of the charge.’\textsuperscript{29}

With regard to the importance of independent advice, it was held in \textit{ICC Bank Plc v Gorman}:

‘There is no requirement in law that a spouse who is giving a consent for the purposes of section 3 of the 1976 Act must have the benefit of independent legal advice in the sense of advice from a legal practitioner who is not acting for the mortgagor spouse or the mortgagee. What is required is that the consent should be a “fully informed consent” .... a solicitor witnessed the giving of the consent by Nicola Gorman and attested her signature. In

\textsuperscript{23} See \textit{Heavey v Heavey} (1974) 111 ILTR 1. See also \textit{National Provincial Bank Ltd v Ainsworth} [1965] UKHL 1, [1965] AC 1175 and Shatter (n 4) 723-724. It is assumed, on the basis of the constitutional guarantee of equality that such protection would also be afforded to a husband where the family home is owned by the wife.
\textsuperscript{24} (HC, 15 July 1980). See also \textit{Nestor v Murphy} [1979] IR 326.
\textsuperscript{26} See \textit{Bank of Ireland v Hanrahan} (HC, 10 February 1987). Consent provided after the conveyance, will not have retrospective effect and will not validate the conveyance.
\textsuperscript{28} ibid.
the circumstances, in the absence of evidence to the contrary, in my view, the Court is entitled to assume that Nicola Gorman gave her consent voluntarily and on the basis of adequate knowledge of what she was doing.'

In addition, where a lending institution advances an initial sum which is secured on the family home with an arrangement that the borrower may obtain further loans not exceeding a specified limit, each further advance involves a fresh ‘conveyance’ within the meaning of section 3(1) of the 1976 Act. Consequently, a new consent by the non-owning spouse is required in each such case. To overcome the difficulties posed by this requirement and to facilitate the disposal of the family home post-separation, section 54(1)(b) of the Family Law Act 1995 inserts section 3(9) into the Family Home Protection Act 1976. Pursuant to section 3(9), a general written consent to any future conveyance of the family home will be considered a valid consent within the meaning of the Act. Where such blanket consent is provided, the court will be particularly vigilant in ensuring the consent is free and fully informed. Furthermore, the burden of proof lies on the person seeking to rely on the consent.

Generally, in the absence of prior, valid, written consent as required by the Family Home Protection Act, a conveyance involving any disposition of an interest in the family home by the owning spouse will be declared void. However, it is clear the protection afforded under the Act is personal and a conveyance contrary to section 3 is only void at the instigation of a non-owning spouse. Hamilton P, President of the High Court, considered the operation of section 3 in *Barclays Bank (Ireland) Ltd v Carroll*. He held that as the primary purpose of the section was to protect the right of residence of non-owning spouse, an offending conveyance could only be declared void at their instigation.

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31 This point was made by Barron J in the High Court case of *Bank of Ireland v Purcell* (n 20) and subsequently upheld by the Supreme Court.

32 S 3(9) provides: ‘If, whether before or after the passing of the Family Law Act 1995, a spouse gives a general consent in writing to any future conveyance of any interest in a dwelling that is or was the family home of that spouse and the deed for any such conveyance is executed after the date of that consent, the consent shall be deemed, for the purposes of sub-s (1) to be a prior consent in writing of the spouse of that conveyance.’


34 S 3(4) of the Family Home Protection Act 1976. Professor Mee notes the decision in *Bank of Ireland v Smyth* had ‘serious implications for practitioners’. See John Mee, ‘The Family Home Protection Act: The Practical Implications of Bank of Ireland v Smyth: Part I’ (1996) 14 ILT 188. However, it was held in *ICC Bank Plc v Gorman* (n 30) per Laffoy J that where the validity of the mortgage is not challenged by the non-owning spouse, and their consent is endorsed on a mortgage deed, the court will be entitled in the absence of any evidence to the contrary, to make the assumption that the consent was free and fully informed.

35 As a result, the purchaser or mortgagee receives no title at all.

36 (HC, 10 September 1986).

37 ibid. Moreover, s 3(8) of the Family Home Protection Act 1976 as inserted by s 54(1)(b) of the Family Law Act 1995 provides that a conveyance shall be considered not to be and never to have been void for failure to get the requisite prior consent unless: it was declared void by a Court in proceedings brought before the passing of the Family Law Act 1995; or on or after the date it was declared void by a Court in proceedings brought within six years from the date of the conveyance; or the parties to the conveyance, or their successors-in-title, state
Nevertheless, the protection conferred by section 3 is not absolute. Instead, certain specified exceptions exist to the sanction of voidness and some limited caveats on the need for consent are set out in sections 3 and 4. 38 ‘Far and away the most important exemption’ is imposed by section 3(3)(a) 39 which provides that a conveyance to a purchaser for full value is not void, notwithstanding the absence of valid consent. A ‘purchaser’ is defined as a ‘person who in good faith acquires an estate or interest in property’. 40 It has been held that this reference to ‘good faith’ incorporates the doctrine of notice. 41 Thus, to benefit from this exemption, a purchaser must not have actual, constructive or imputed notice that property is a family home at the time of the conveyance. 42

The duties of a purchaser’s solicitor were summarised succinctly by Henchy J in *Somers v Weir*:

‘He must ascertain if the property, because of its present and past use, is a family home within the meaning of the Act of 1976. If it is, he must find out if it is a sale by a spouse and if so whether the conveyance should be preceded by the consent in writing of the other spouse so as to prevent its being rendered void under Section 3. If that other spouse omits or refuses to consent the purchaser should require the vendor to apply to the court for an order under Section 4 of the Act dispensing with the consent.’ 43

In practice, to ensure a purchaser is not fixed with constructive notice, the Law Society Conveyancing Committee recommends that his solicitor should raise pre-contractual inquiries or requisitions. This usually involves sending a standardised list of requisitions on title published by the Law Society to the vendor’s solicitor. Requisition 24 of the *Objections and Requisitions on Title (2001 Edition)* asks:

‘1. Is the property or any part thereof the Vendor’s “family home” as defined in either the 1976 Act or 1995 Act or the 1996 Act?’

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38 S 3 provides the Act does not apply to a conveyance pursuant to a contract executed prior to the coming into effect of the Act, a conveyance pursuant to a contract made prior to marriage or where the purported conveyance is to the other spouse. Moreover, it does not apply to a conveyance by a third party.


40 S 3(6) of the Family Home Protection Act 1976.

41 See *Somers v Weir* (1976) IR 94.

42 S 86(1) of the Land and Conveyancing Law Reform Act 2009 states: ‘A purchaser is not affected prejudicially by notice of any fact, instrument, matter or thing unless (a) it is within the purchaser’s own knowledge or would have come to the purchaser’s knowledge if such inquiries and inspections had been made as ought reasonably to have been made by the purchaser, or (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of the purchaser’s counsel, as such, or solicitor or other agent, as such, or would have come to the knowledge of the solicitor or other agent if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or agent.’

43 (n 41) at 111. See also *H v S* (1979) ILRM 105 at 108 (per McWilliam J).
2. If the answer to 24.1 is in the affirmative, furnish the prior written consent of the Vendor's spouse and verify the marriage by statutory declaration.

It has been observed,

‘given the “official” approval of the forms, it would be unwise practice to depart from them. In each case the form specifies the facts or grounds verifying the declaration in question and the courts seem to accept that the purchaser’s solicitor should not seek to go behind the declaration unless there is a good reason to do so’.

Although in *Reynolds v Waters* the High Court held that purchasers are entitled to rely on statutory declarations that the property in question is or is not a family home within the meaning of the Act, where there is something to suggest fallibility or where reference is made to supporting documents further enquiries must be made.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’.

In *Somers v Weir*, the plaintiff accepted a conveyance of what her solicitor knew to be a family home without obtaining the prior consent in writing of the vendor’s wife as required under section 3. Instead, the plaintiff accepted a statutory declaration by the vendor that his wife had not relied on the house as her family home and that she had disclaimed any interest in the property in a separation agreement. Neither the plaintiff nor his solicitor insisted on viewing the separation agreement which in reality made no reference to the property. Consequently, the plaintiff was held by the court to have constructive notice of the requirement for section 3 consent due to the inadequacy of the inquiries made. In the Supreme Court, Henchy J held:

‘In this case, the enquiries and inspections which ought reasonably to have been made as a matter of common prudence were not made. Instead, a statement which was unwarranted by any document and which falsely swept aside the defendants rights was presented to her husband for execution as a statutory declaration and, on the basis of that statutory declaration, the sale by him went through behind his wife’s back. It was a transaction of the precise kind that section 3 of the Act of 1976 was designed to make void.’

Moreover, to ensure fairness between spouses, a spouse cannot arbitrarily refuse to give his or her consent. Section 4 of the 1976 Act states that the court may dispense with the consent of the non-owning spouse where it is unreasonable for the spouse to withhold consent having regard to all the circumstances. In the Supreme Court decision of *Hamilton v Hamilton*, Costello J, dissenting, set

45 Wylie and Woods, *Irish Conveyancing Law* (n 25) para 16.52. Regarding pre-contract enquiries or requisitions see also questions 1.5–1.12 of the *Pre-Contract Questionnaire for Property Sale* produced by the Law Society of Ireland and the Dublin Solicitors Bar Association as reproduced in Appendix 1 of *Irish Conveyancing Law*.
47 *Somers v Weir* (n 41) at 107.
48 ibid.
49 ibid.
50 S 4(2) Family Home Protection Act 1976. Note the court may also dispense with consent where the non-owning spouse has deserted and continues to desert the other spouse. In this regard, pursuant to s4(3)
out the circumstances to be considered by a court in exercising its discretion under section 4. He noted that the court will apply an objective test of reasonableness. As a result, 'the court is free to have regard to circumstances which the non-disposing spouse may have ignored and to take into account, discount or ignore, as it considers proper, circumstances which may have motivated the decision of the disposing spouse'. He added:

‘The court is not just weighing up the financial advantages and disadvantages of a sale of property; it is adjudicating on a situation in which strong emotions may have been aroused which are very relevant to its deliberation. All the human factors in the case must be considered, and due weight given to the feelings of attachment for the family home and the concern which a spouse may have for the emotional welfare of his or her children should the family home be sold. Due weight must also be given to ... the needs and resources of the spouses and their dependent children and any offer of alternative accommodation that may have been made.’

If the couple have separated, the ability of the husband to finance two households will also be relevant. In R v R the court did not dispense with the wife’s consent as her refusal was deemed to be reasonable. The applicant husband sought to mortgage the family home to repay outstanding debts and make a fresh start with his new partner. His wife refused to consent to this conveyance arguing that, on the basis of her husband’s salary, he would not be in a position to meet the mortgage repayments while also supporting two households. However, a different conclusion was reached in SO’B v MO’B. Here, again, a husband sought to sell the family home and applied to the court under section 4 to dispense with his estranged wife’s consent. He stated his willingness to provide his wife with as much as half the proceeds of the sale in order to provide her with alternative accommodation. O’Hanlon J held that as both parties were responsible for the breakdown of the relationship, they both had to suffer the consequences of trying to maintain two households on the available resources. As a result, he held her refusal to provide consent was indeed unreasonable and granted the order dispensing with her consent.

Finally, section 5 of the Family Home Protection Act 1976 empowers the court to transfer the family home to the non-owning spouse where the spouse who holds title to the home is engaging in

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51 [1982] IR 466. The case was ultimately decided on the basis of the deemed prospective nature of the legislation in the absence of a provision providing for the retroactivity of the Act. As a result, the majority held that the contract in question was not subject to the provisions of the 1976 Act.
52 Ibid at 498.
53 Ibid at 499. Costello J also noted: ‘Some considerable time may elapse between the initial refusal and the court’s adjudication under s 4, and circumstances may have changed during that period. So there may be cases in which the court could conclude that the initial refusal was a reasonable one but that, in the light of changed circumstances (for example, a death in the family, a financial windfall, the unexpected availability of a new and more suitable home), it was no longer reasonable for the spouse to withhold consent. An order under s 4 should then be made. But if the initial refusal was an unreasonable one, it does not follow that, if circumstances change (for example, the value of the family home increasing greatly between the date of the initial refusal and the date of hearing), the court would be entitled to hold that notwithstanding the initial unreasonableness a dispensing order should not be made.’
55 (HC, December 1980).
conduct which may lead to the loss of the home. Before the court may make such an order, however, there must be evidence of an intention to deprive the applicant spouse of their residence in the family home.\textsuperscript{56}

Taking on board these key elements of the legislation, let us now consider whether the Family Home Protection Act 1976 is still relevant in the Ireland of 2012?

1.3 Is the Family Home Protection Act 1976 Relevant in the Ireland of 2012?\textsuperscript{57}

It has been noted ‘family property policies adopted in particular jurisdictions are usually indicative of social attitudes towards both property issues and family relationships at the time of enactment.’\textsuperscript{58} While the \textit{Report of the Commission on the Status of Women 1972} which prompted the enactment of the Family Home Protection Act 1976 provided a faithful narrative of the position of women in the early 1970s, the report now merely represents a historical document offering a window into another age. Describing the prevailing social habits of the period, the report explained, ‘In relation to the family residence, it is the case in most marriages that the home, which is normally the principal item of family property, is owned by the husband and any mortgage repayments on it are generally made from his income’.\textsuperscript{59}

Today, due to various gradual but profound socio-legal developments, the landscape of home ownership has changed dramatically. As a result, the factors which initially provoked the introduction of the Family Home Protection Act 1976 are now of less significance and whether the legislation retains the intrinsic value it once possessed as the supreme inter vivos protector of the family home is open to debate. The question therefore arises: Is the legislation relevant in the Ireland of 2012? Three principal arguments against the continued importance of the Act may be advanced.

- Argument One: The traditionally dependent wife no longer exists rendering the legislation obsolete

The protection of a traditionally dependent wife was undoubtedly uppermost in the minds of the legislature and was an influential factor in formulating the legislation.\textsuperscript{60} Upon the introduction of the Family Home Protection Bill, it was noted ‘when a man marries and has a family, in view of the

\textsuperscript{56} S 5(1) of the Family Home Protection Act 1976. It also applies where the conduct may render the home unsuitable for habitation.

\textsuperscript{57} This section of the chapter is based on a paper entitled ‘The Family Home Protection Act 1976 – An Irrelevant Statute in the Ireland of 2010?’ delivered at the ‘Moving Forward Postgraduate Conference 2010’ in the University of Aberdeen, Scotland.

\textsuperscript{58} Lorna Fox, ‘Reforming Family Property–Comparisons, Compromises and Common Dimensions’ (2003) 15 CFLQ 1.

\textsuperscript{59} Report of the Commission on the Status of Women (n 12) 174-175.

\textsuperscript{60} As de Londras notes: ‘Although the Act is gender-neutral inasmuch as it protects husbands and wives equally, its broader societal significance was primarily in its impact on married women, who were generally not working in paid employment, and usually had no ownership rights in the family home through which they could protect themselves.’ See (n 2) 179.
responsibilities he has taken on automatically he forfeits ... some of his property rights under the Constitution. No man should be able to leave his wife and children without a home.61

Following the High Court decision in *Bank of Ireland v Smyth*, but prior to the Supreme Court judgment, Professor Mee raised some concerns about the fundamental ethos of the legislation in protecting dependent wives:

‘In relation to Smyth itself, in looking at the four points set out by Geoghegan J in relation to what is required for a wife to understand a transaction, one is struck by the passive role to be played by the woman. There is no question of her taking responsibility for her own actions. Rather, she must be sat down and “explained”, “told” and “recommended” to, as if she were a child. In the terminology of gender politics, there is no recognition of the agency of the woman.’62

He added:

‘[T]he essential problem remains that all married women are treated, without distinction, as vulnerable. This ignores the fact that, despite the continued existence of gender inequality in our society, many such women do not need any special tenderness from equity in relation to their financial arrangements.’63

A number of points may be made in response to Professor Mee’s concerns. First, although it is accepted the stereotype of female dependency or helplessness no longer applies to the vast majority of the population, significant numbers of women continue to work exclusively in the home.64 Second, the language of the Act is expressed in gender-neutral terms and applies to both spouses equally thus negating the argument that it operates merely to ensure the protection of the traditionally dependent wife.65 Third, in unanimously upholding the decision of the High Court, Blayney J for the Supreme Court in *Bank of Ireland v Smyth* stated that the Act’s protection of the home was for the benefit of the family as a whole and not merely for the dependent spouse.66 Similarly, in *Dunne v Hamilton* the court observed, ‘The Act provides for the protection of the family home, presumably as an implementation of the constitutional duty that falls on the State to protect the family and to guard with special care the institution of marriage.’67 Fourth, the continued

61 Dáil Deb 25 May 1976, vol 291, col 103-4 per Minister for Justice, Mr. Burke.
62 John Mee, ‘Family Home–Consents, Guarantees and the “Badge of Shame”’ (1994) 1(1) DULJ 197. The four requirements to demonstrate an understanding of the nature and consequences of a transaction were: (a) notice of the amount of the loan and whether the security covers future advances; (b) explanation of the repayment terms; (c) explanation of the consequences of non-payment, especially the possibility that the bank may seek possession and sale of the home; (d) recommendation to seek independent legal advice.
63 ibid.
64 Recent statistics show that over half a million women in Ireland are currently exclusively engaged in work in the home. See Central Statistics Office (CSO), *Women and Men in Ireland 2011* (Stationery Office 2012) 27. Many more work part-time or intermittently. Such irregular employment or reduced hours necessarily impact on their ability to acquire or generate an interest in the family home. See Chapter 5 below for more discussion of this report.
65 The CSO figures also show that a limited proportion of men were occupied full-time in the home. Less than 10,000 such men were recorded, ibid.
66 (n 27).
67 *Dunne v Hamilton* [1982] ILRM 290 at 30 by Henchy J (emphasis added).
importance of such legislation in protecting spouses with no interest in the family home is also evidenced by the inclusion in Part IV of the Civil Partnership Bill 2009 of measures preventing the unilateral disposition of the shared home which essentially replicate the provisions of the Family Home Protection Act 1976.68

Therefore, although clearly the traditionally dependent wife is no longer as common as was the case in 1976, the presence of such a character is not, in fact, necessary when considering the continued vitality of the legislation.

- **Argument Two: Increased co-ownership renders the legislation obsolete**

The increasing incidence of legal co-ownership between spouses, particularly among new homeowners, has undoubtedly had a major impact on the relevance of the legislation today. From a sociological point of view, increased levels of education, a growing awareness of legal rights and the rise of feminism have ensured that many women who in the past would not have been co-owners are now more likely to insist that their name appears on the title to the family home. Moreover, purely economic practicalities have also played an important role in this change. Where property is purchased on foot of a mortgage loan, it must be purchased in the names of all the borrowers. As a result of the enormous expense involved in purchasing a home, mortgages raised to finance such purchases regularly require both spouses to be borrowers and, hence, co-owners in order to generate a loan sufficient to finance the purchase.

However, although the prevalence of exclusive ownership of the family home is undoubtedly reduced, there remains an important, vulnerable and often forgotten segment of society for whom the legislation remains of fundamental importance in protecting against the unilateral disposition of the family home. First, many homes purchased in the 1950s, 60s, 70s and 80s continue to be held in the sole name of one spouse. Second, while it is undoubtedly rare nowadays to have newly-purchased properties vested in one spouse only, anecdotal evidence suggests such a scenario may arise where, upon inheritance, a family home is placed in the sole name of the beneficiary. Third, a spouse may have purchased or built the property prior to marriage and failed to transfer the property into joint names after the wedding. Fourth, it has been suggested that sole-ownership could arise where one spouse has serious health issues and may not be in a position to get life assurance to underpin a mortgage.69 Fifth, despite the fact that it is the general policy of lending institutions to ensure that where a property is purchased on foot of a loan it is held in the names of all borrowers, this is subject to one caveat. It may arise that, in a joint loan application, one of the proposed joint borrowers may be taking a gift of a site from their parents. While the beneficiary of the gift from their parents is unlikely to be liable for Capital Acquisitions Tax, any other borrower whose name appears in the title deeds would be. Thus, in order to avoid such a tax liability for the other borrower, the beneficiary of the gift may seek to have the property vested in their name.

68 See n 21.
It appears that lending institutions will usually agree to this on the basis that the mortgage deed is signed by the exclusive owner and the non-owning spouse provides their prior written consent as required under section 3 of the Family Home Protection Act 1976. Furthermore, in such circumstances, it is generally the expressed intention of both parties to subsequently transfer the property into their joint names. Finally, the family home could be purposely placed in one spouse’s name in order to protect it from the creditors of the non-owning spouse. Therefore, despite the considerable societal changes since the mid-1970s which have undoubtedly transformed socio-legal behaviour in Ireland, situations continue to arise in which the family home remains exclusively owned by one spouse, usually the husband. In these circumstances, non-owning spouses continue to rely on the protections afforded by the legislation.

The Family Home Protection Act 1976 may also be relevant in certain co-ownership situations, specifically where the parties are in dispute over whether to sell the property. In *O'D v O'D* it was established that a co-owning spouse could benefit from the protection afforded by the Family Home Protection Act 1976 in an action under the Partition Acts 1868 and 1876. Murphy J in the High Court denied the applicant husband who was entitled to a half share in the matrimonial home the order for sale sought. Where the co-owner who requested the sale was entitled to a 50 per cent share or more in the ownership of the property, section 4 of the 1868 Act stated the court could not, in the absence of ‘good reason to the contrary’, refuse to award a sale of the property and a division of the proceeds.

Murphy J held that what constituted ‘good reason to the contrary’ within the meaning of section 4 of the Partition Act should ‘properly have regard to the rights of parties under the Family Home Protection Act 1976’. He explained:

‘There is no reason to suppose that an order for the partition or sale in lieu thereof was intended to overreach the provisions of the Family Home Protection Act ... It would only be the fact that the spouses themselves joined in the conveyance that would overcome the need to procure their consent and it seems to me unthinkable that the Court would direct a conveyance to be made under the 1868 Act without having regard to the right of the spouse to withhold his or her consent and indeed the express duty imposed on the Court not to

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70 With regard to bank policy and the family home, I am sincerely grateful to Mr. Michael Kelly, Securities Policy and Training Manager, Allied Irish Bank for his welcome assistance. Any errors are my own.
71 If, in the case of cohabitants, they wait until after they have married the transfer will be exempt from tax and stamp duties pursuant to s 14 of the Family Home Protection Act 1976. Indeed some solicitors, anticipating the subsequent transfer (post marriage), have the mortgage deed signed jointly at the outset (ie even while the property is in the sole name), thus avoiding the need for the execution of a fresh mortgage deed post marriage.
72 Note, however, that the Supreme Court held in *Nestor v Murphy* (n 24) that where the title is vested in both spouses and the co-owning spouses have agreed to a conveyance of the family home, they are not required to consent for the purposes of the Family Home Protection Act 1976. See also *Barclays Bank (Ireland) Ltd v Carroll* (HC, 10 September 1986).
73 (High Court, 18 November 1983).
dispense with consent without taking into account all the relevant circumstances including in particular those specified in section 4(2) of the 1976 Act.\textsuperscript{74}

Consequently, the factors in section 4 of the 1976 Act which the courts are required to have regard to in dispensing with consent under the Family Home Protection Act, were also of relevance if a co-owner’s spouse wished to obtain an order for the sale of the family home under section 4 of the Partition Act 1868. As a result, it was observed that the Family Home Protection Act 1976 had made ‘substantial inroads’ into the jurisdiction of the court afforded by the Partition Acts.\textsuperscript{75} Conway states, ‘while it may be true to say that the primary purpose of the 1976 Act, is to protect the non-owning spouse, the Act does accord some protection to the legal title owner by requiring his consent in these circumstances.’\textsuperscript{76}

Section 31 of the Land and Conveyancing Law Reform Act 2009 has now repealed and replaced the Partition Acts and provides that any person with an estate or interest in land which is co-owned whether at law or in equity may apply to the court for an order under this section.\textsuperscript{77} However, section 31(5) of the 2009 Act states that nothing in this section shall affect the jurisdiction of the court under the Family Home Protection Act 1976. Thus, the approach applied in \textit{O’D v O’D}\textsuperscript{78} will presumably remain good law under the Land and Conveyancing Law Reform Act 2009 ensuring the continued importance of the 1976 Act for co-owners.\textsuperscript{79}

- Argument 3: The development of the purchase money resulting trust renders the legislation obsolete

On initial analysis, it appears the development of the purchase money resulting trust which has arisen since the introduction of the Family Home Protection Act 1976 provides a much more powerful protection for a spouse whose name does not appear on the title deeds than that afforded by the legislation. First applied by the courts in \textit{Heavey v Heavey},\textsuperscript{80} the purchase money resulting trust

\textsuperscript{74} ibid at 11. Woods argues the applicant wife should not have received the protection of the 1976 Act in this case as she had ceased to be a ‘spouse’ at the time of the transaction, see Una Woods ‘Property Disputes Between Co-owning Cohabitees–Ireland and England Compared’ (2006) 3 Comm L W Rev 297, 317. See also \textit{AL v JL} (HC, 27 February 1984), where Finlay P refused to order the sale of the family home in the absence of the consent of the respondent husband in whose name the family home was vested. Upon the breakdown of the marriage the applicant wife sought a declaration of her beneficial interest and an order for sale under the Partition Acts. Such an order, he held, at 4-6, could not be made ‘unless the Court [was] ... satisfied that it should dispense with the consent of the non-agreeing spouse under s 4 of the 1976 Act’.
\textsuperscript{75} Heather Conway, \textit{Co-ownership of Land: Partition Actions and Remedies} (2nd edn Bloomsbury 2012) 325.
\textsuperscript{76} ibid 324.
\textsuperscript{77} S 31(2) adds: ‘An order under this section includes—(a) an order for partition of the land amongst the co-owners, (b) an order for the taking of an account of encumbrances affecting the land, if any, and the making of inquiries as to the respective priorities of any such encumbrances, (c) an order for sale of the land and distribution of the proceeds of sale as the court directs, (d) an order directing that accounting adjustments be made as between the co-owners, (e) an order dispensing with consent to severance of a joint tenancy as required by s 30 where such consent is being unreasonably withheld, (f) such other order relating to the land as appears to the court to be just and equitable in the circumstances of the case.’
\textsuperscript{78} (n 73).
\textsuperscript{79} Conway also notes, ‘Murphy J’s observations in \textit{O’D v O’D} are equally applicable to co-ownership contests under s 31 of the Land and Conveyancing Law Reform Act 2009’, see \textit{Co-ownership of Land: Partition Actions and Remedies} (n 75) 322.
\textsuperscript{80} \textit{Heavey v Heavey} (1974) 111 ILTR 1.
trust affords such spouses the ability to generate an equitable interest in the family home through contributions to the purchase price, both direct and indirect. As Shatter explains:

‘It is now well established that if the legal title to the family home is held in the sole name of one spouse and the other spouse directly or both directly and indirectly contributes to its acquisition, the latter may successfully claim a proprietary or beneficial interest in it.’

It has been established that contributions to the purchase price of a property whether in an outright purchase or financed by mortgage repayments generate a beneficial interest. Moreover, contributions to a family fund while a mortgage is being repaid also give rise to a beneficial interest. In addition, unpaid work in the homeowner’s business shall give rise to a successful claim for a beneficial interest in the home. The protection generated by this interest is further consolidated through its status as an overriding interest under section 72(1)(j) of the Registration of Title Act 1964 or an interest which is protected under the doctrine of constructive notice when coupled with actual occupation of the property. This means it will bind a purchaser or a mortgagee of the family home. Where overriding status is not obtained, or the doctrine of notice does not apply, the interest will attach to the proceeds of sale or loan following such a transaction. Thus, a preliminary analysis would suggest that the purchase money resulting trust represents a much deeper and more substantial protection for non-owning spouses than the mere right of veto afforded by the 1976 Act.

However, there are number of weaknesses inherent in the purchase money resulting trust. The Family Home Protection Act 1976 remains particularly important for spouses whose contributions are not recognised under the equitable remedy. First, the issue of whether unpaid work in the home ought to generate a beneficial interest has proved particularly contentious. As it currently stands, the law on this point represents the greatest weakness in the purchase money resulting trust. In L v L, Barr J in the High Court acknowledged that it was well established that a spouse was not entitled to a beneficial interest of the family home on the basis of contributions made through work in the home. However, he held that as a woman who performed the constitutionally preferred role of wife and mother was precluded from making financial contributions to the acquisition of the home, ‘her work as home-maker and in caring for the family should be taken into account in

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81 (n 4) 778. This is provided the contribution is made with an intention of obtaining an equitable share rather than making a gift.
85 This position is preserved by s 21(3)(b)(iii) of the Land and Conveyancing Law Reform Act 2009.
87 See Fox, ‘Creditors and the Family Home: Three Perspectives on Family Property Policy’ (n 13) 8.
88 [1989] ILRM 528, [1992] 2 IR 77. He referred to RK v MK (High Court, 24 October 1978) per Finlay P.
89 Article 41.2.1° provides, ‘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.’ Article 41.2.2° continues, ‘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.’ Woods notes that ‘resorting to Article 41.2 as a basis for conferring a beneficial interest on a housewife was misguided and unnecessary.’ See Una Woods, ‘The Matrimonial Home Bill 1993—Should the Government Try Again?’ (2001) 4(4) JFL 8, 12.
calculating her contribution towards that acquisition’. On this basis, he awarded the applicant a fifty percent beneficial interest in the family home. On appeal, the Supreme Court unanimously overruled this decision. In justifying the judgment of the court, Finlay CJ stated the adoption of this new doctrine would constitute ‘a usurpation by the courts of the function of the legislature’.

Second, it was held in *W v W* that making or paying for improvements to property will not generate an entitlement in the absence of evidence of an agreement that they would be recompensed for the expenditure or that, in light of the surrounding circumstances, they were induced to believe such compensation would result. In *NAD v TD* Barron J held:

‘The circumstances in which a wife may contribute to the improvement of the property of her husband may obviously vary considerably between minor decorative improvements at the one end of the scale and payment for the erection of an entire dwelling house at the other end. In each case, since the legal and beneficial ownership of the property was already vested in her husband he is entitled at law in the absence of a contrary agreement to take the entire benefit of the improvement.’

Third, even if a contribution does give rise to a beneficial interest, the means of calculating the interest may also cause injustice as the claimant will receive an equitable interest proportionate to his or her contribution. As a result, parties are required to record all contributions made to ensure the proportionate interest principle accurately reflects their contribution. This may give rise to

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90 *L v L* (n 88) at 99.
91 Ibid at 107. Indeed, it was held in *N v N* (n 84) at 122 per Finlay P that a contribution in ‘money or money’s worth’ is required in order to generate a beneficial interest. However, see *BM v AM* [2003] IEHC 170 where the High Court appeared to grant a housewife and mother a beneficial interest in the family home on the basis of her work within the home. Peart J stated: ‘I have ... concluded that Mrs. Murphy made an indirect contribution to the household by her involvement in the rearing of the children and her running the house, as it were, and this replaces the reference in (AL v JL) to both the husband and the wife contributing to a joint pool from which the mortgage repayments were made.’ De Londras (n 2) 216 notes: ‘The authorities on this point were not considered extensively and no in-depth reasoning was engaged in ... The decision appears to be ... at most, an aberration that might result in some change in this area of law in the future but Peart’s willingness to engage in this decision without, it seems, conceiving of it as at all controversial is interesting.’
92 (n 82). An applicant who wishes to rely on such a contribution must instead avail of the doctrine of equitable estoppel.
93 [1985] ILRM 153. This view was confirmed by the Supreme Court in *N v N* (n 84) where Finlay CJ contradicted his earlier approach in *W v W* (n 82) and held that where such an agreement exists it could give rise to a beneficial interest in the property. In *CF v JDF* [2005] 4 IR 154, McGuinness held obiter, ‘Even in the somewhat liberal context of family law the making of improvements to property cannot establish any form of beneficial title.’ It is also worthwhile to note that if the improvements were financed by a mortgage, and the non-owning spouse contributed to the mortgage repayments, this would give rise to a beneficial interest. See John Mee, ‘The End of the Affair–The Equitable Rights of Cohabitees’ (2001) 6(2) CPLJ 43.
94 See *R v R* (n 74); *GNR v KAR* (High Court, 25 March 1981). However, Delany notes, ‘This is a sensible and pragmatic approach which recognises the reality that few spouses or partners will think of making any specific agreement to the effect that any contributions they might make will give rise to a beneficial interest.’ Hilary Delany, *Equity and the Law of Trusts in Ireland* (5th edn Thomson 2011) 190.
95 Woods notes it could be argued that this requirement ‘is unrealistic to expect in an intimate relationship.’ See Woods, ‘Property Disputes Between Co-owning Cohabitees—Ireland and England Compared’ (n 74) 298. Delany suggests this proportionate interest principle ‘has ensured a degree of consistency in decision-making, although perhaps at the expense of an element of flexibility which might be preferable in certain circumstances’. Delany (n 94) 191. However, some flexibility was evidenced in *GNR v KAR* (n 94).
difficulties where the contributions on which the interest is based were indirect. Where accurate
records do not exist, the interest awarded may not represent the contributions made. Fourth, it is
clear that post-acquisition contributions shall never give rise to a beneficial interest. Moreover,
although it has yet to be considered before the Irish courts, it seems reasonable to assume that pre-
acquisition contributions shall not be treated as giving rise to a beneficial interest. In light of these
shortcomings, it is clear that not all spouses are in a position to prove a beneficial interest in the
family home under the purchase money resulting trust. In such circumstances, the Family Home
Protection Act assumes critical importance.

Therefore, while the protection of the family home inter vivos is no longer the sole preserve of the
1976 Act, the continued importance of the Family Home Protection Act in this matrix should not be
underestimated. The decision in O’D v O’D, in particular, demonstrates the powerful axis which has
been created by the combined forces of the purchase money resulting trust, the Land and
Conveyancing Law Reform Act 2009 and the Family Home Protection Act 1976. This decision ensures
that where the beneficial ownership of the family home is shared, a co-owner shall not succeed in
obtaining an order for sale under the 2009 Act if it would be reasonable to withhold consent under
the 1976 Act.

- Public Support for Protection against Unilateral Dispositions

Recent research gauging public opinion in England and Wales shows that protection against the
unilateral disposition of the home is considered by society at large as a worthwhile legislative
intervention. Empirical research conducted by Barlow, Cooke and Callus demonstrates a ‘strong
groundswell of opinion’ that spouses should not be vulnerable to having the family home sold or
mortgaged over their heads. In the research undertaken, when faced with a case study concerning
the unilateral disposition of the home, 61 of the 74 respondents felt that that the family home
should not be sold without the consent of a non-owning wife, 7 believed the owning husband should
merely inform the non-owning wife, while the final 6 respondents supported an unqualified right to
sell. Moreover, respondents were asked whether in a scenario in which a wife acquired a house
before marriage she should be able to use the property as security for a business venture without
her husband’s consent. The results showed that 51 of the 74 respondents did not support such a
right while 8 of the respondents did. Ultimately, the report demonstrates that protection against
unilateral disposition of the family home continues to be important to the public.

96 See McGill v S [1979] IR 238.
97 See Mee, ‘The End of the Affair’ (n 93) who notes ‘the better view seems to be that no resulting trust can
arise in this situation. It would surely be strange if the non-owning partner could claim a share following the
purchase when, prior to the purchase, she had no claim whatsoever to her partner’s savings (since there had
been no purchase and no repayment of a mortgage).’
98 (n 73).
99 Elizabeth Cooke, Anne Barlow and Thérèse Callus, Community of Property: A regime for England and Wales?
(Nuffield Foundation 2006) 43.
100 ibid. These figures were considerably lower when faced with an identical scenario involving cohabitants.
101 ibid. Oddly, however, when the situation was altered to consider a scenario where the house was bought in
the wife’s name after marriage, the respective figures were 49 to 13. On independent enquiry, these figures
were confirmed by Professor Barlow who suggested that perhaps if the property was purchased in the wife’s
sole name after the marriage, the couple must have considered it to be her property rather than jointly owned
Although the socio-legal environment has undoubtedly changed considerably since the introduction of the Family Home Protection Act 1976, the protection afforded by the legislation remains of vital importance to many spouses. In fact, it is contended that, in light of the current economic climate and the decision in First National Building Society v Ring,103 the legislation could witness a resurgence in its importance in the coming years as more and more judgment mortgagees seek to realise their security.

1.4 Restrictions on Unilateral Dispositions of the Family Home: A Case Study

In order to assess the effectiveness of the Family Home Protection Act 1976 in protecting a spouse whose name does not appear on the title to the family home, and compare the nuances of the Irish approach with the approach adopted in British Columbia under the Land (Spouse Protection) Act 1996, the use of a case study will be employed. Applying the law to the case study, the strengths and weaknesses inherent in both regimes become apparent. Furthermore, in light of the potential protection they may afford, both on their own and in conjunction with the legislation just mentioned, the main equitable protections available in Ireland and British Columbia are also considered.

1.4.1 The Kelly Family

Mr. and Mrs. Kelly were married in 1987. They have four children ranging in age from 12 to 20 years old. While the two eldest children are in college, the younger two children are engaged full-time in secondary school education and are living at home. Mrs. Kelly, a promising photographer employed full-time with a local newspaper, gave up work after the birth of her first child and has dedicated herself to caring for their children and their home ever since. Mr. Kelly has a successful career as a senior sales assistant in a second hand car dealership in rural Ireland. He also inherited a small family farm of approximately 20 acres from his father who passed away in 1985 which was worth approximately €80,000 at the time of his marriage to Mrs. Kelly. Mr. Kelly continues to farm the land on a part-time basis. Mr. Kelly’s earns on average €35,000 net income per annum from these two sources. In 1988, Mr. Kelly constructed the family home on a site adjoining the farm yard with the aid of a mortgage. The house was completed in 1990. The home is currently worth approximately €180,000 and title to the property is held exclusively in Mr. Kelly’s name. The mortgage was redeemed a number of years ago and Mr. Kelly made all the mortgage repayments.

Recently, Mr. Kelly expressed his desire to remortgage the family home. Mrs. Kelly is appalled at the idea. However, Mr. Kelly has told her he will go ahead with the plan, with or without her support. He intends to leave his current place of employment and invest the

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102 Moreover, the report highlights the widespread usage of such legislation across Europe. Countries such as Sweden, France, Scotland and the Netherlands employ differing means to prevent the unilateral disposition of the family home without necessitating registration of an entry against the title by the non-owning spouse. ibid 45.

money generated by the remortgage of the family home into opening a new car dealership. He plans to focus on high end cars including Ferrari, Mercedes Benz and Porsche thereby fulfilling a childhood dream. Mrs. Kelly believes that leaving a permanent, full-time, job and starting a new business focused on high-end clientele would represent a disastrous business venture in the current economic climate and would seriously jeopardise their financial security. She is particularly worried about the consequences if Mr. Kelly fails to make the repayments on the proposed remortgage or if there is an accumulation of other debts arising from this venture.

1.4.2 Mr. & Mrs. Kelly, Galway, Ireland

Regardless of Mr. Kelly’s threat, it is clear that Mrs. Kelly’s consent is required pursuant to section 3 of the Family Home Protection Act 1976 to facilitate the lawful conveyance of the family home, whether by sale or mortgage. This consent must be ‘free’ and ‘fully informed’ and the burden of proving this standard of consent is placed on the purchaser or mortgagee. Therefore, it is highly unlikely a financial institution will accept the family home as security in the absence of Mrs. Kelly’s consent as demanded by the Family Home Protection Act 1976. If a conveyance does take place without Mrs. Kelly’s consent either through the sale to a third party or the creation of a mortgage over the property, she may, within a period of six years, instigate proceedings to declare the transaction void. However, this limitation period shall not apply to Mrs. Kelly if she stays in actual occupation of the family home. This is likely to be the case if Mr. Kelly simply re-mortgages the home. Moreover, the conveyance may only be declared void at her instigation.

However, notwithstanding the general rule that a conveyance without Mrs. Kelly’s consent will be void, certain exceptions do exist. First, a conveyance to a bona fide purchaser for full value without notice of the fact that the property is a family home shall not be void in the absence of Mrs. Kelly’s consent. The doctrine of notice places a considerable burden on purchasers or mortgagees to analyse the title provided by a vendor such as Mr. Kelly, to make the relevant enquiries arising from this perusal and to ensure satisfactory explanations are provided. Consequently, it is unlikely that a mortgagee will be unaware of the need for Mrs. Kelly’s consent. In addition, if Mr. Kelly tries to conspire with a mortgagee and produces an obviously false statutory declaration, the mortgage will not be valid.

A more immediate concern for Mrs. Kelly is that if she refuses to provide her consent, Mr. Kelly may bring an application under section 4. Pursuant to section 4, if the court considers Mrs. Kelly’s consent was withheld unreasonably, the court may order that the requirement for consent is dispensed with. If the court does dispense with her consent to the remortgage and Mr. Kelly later
defaults on the repayments, the bank will be able to realise its security by seeking an order for possession and sale.\textsuperscript{110}

In \textit{GP v IP} an order was made under section 4 in circumstances similar to the Kellys, albeit subject to strict conditions.\textsuperscript{111} In that case, the applicant husband applied for an order under section 4 seeking to dispense with his wife’s consent to allow him to use the family home as security to raise money on mortgage to finance the start-up of his own business. It was suggested that setting up a business would place him ‘in a position to maintain his wife and children for the future’.\textsuperscript{112} The application was successful in the High Court. The order authorised him to raise a maximum of £20,000 on two conditions: first, that he used part of the money to meet a bank debt of approximately £5,000; second, that he advised his wife’s solicitors of the exact amount of mortgage liability he had incurred. He subsequently raised £7,000. However, the plaintiff wife proved in the second hearing that he did not apply it for the purposes approved, namely starting a new business. Neither did he meet the conditions imposed. Consequently, in the latter hearing, O’Hanlon J described the defendant husband as ‘an untruthful and untrustworthy person’.\textsuperscript{113}

In the second hearing, the court was especially concerned about the potential risk to the family home posed by creditors in light of the debts the husband was generating. The court observed that the husband had engaged on a course of conduct designed to deprive the plaintiff of the family home and to extract the maximum financial benefit from the premises for himself, without any regard for the needs of his wife and children.\textsuperscript{114} Therefore, O’Hanlon J made order under section 5 of the 1976 Act requiring the husband to transfer his interest in the house to his wife. The court held the wife was entitled to the entire beneficial interest previously held by the husband

‘to the intent that no further arrangement entered into by the [husband] with a view to encumbering the … property and no judgment registered against the [husband] which is sought to be converted into a judgment mortgage … and which has not been so registered … prior to the date of this judgment, shall take effect as a valid encumbrance against the property.’\textsuperscript{115}

\textsuperscript{110} Although s 7 of the Family Home Protection Act 1976 allows the court to stay proceedings for possession or sale of the family home where the spouse of the mortgagor is willing and capable of paying the arrears in a reasonable time and meet future repayments, this section is unlikely to benefit Mrs. Kelly due to her lack of resources. However, even if Mrs. Kelly is not able to buy time using s 7, s 97 of the 2009 Act now provides a mortgagee must obtain a court order to take possession unless the mortgagor consents in writing to the mortgagee taking possession within seven days of such action. S 100(2) further provides that the power of sale shall no longer be exercisable without a court order, again unless the mortgagor consents within the specified time frame. For more on the 2009 Act, see Wylie, \textit{Irish Land Law} (n 9) 784-788, 803; Una Woods, ‘Property and Trust Law (Irish Monograph)’, \textit{International Encyclopaedia of Law Series} (Kluwer Law 2011) 103-105.

\textsuperscript{111} While this case involved two court hearings, the author was unable to acquire a record of the first, dated 10 February 1984. All references made here relate to the second hearing, \textit{GP v IP} (HC, 19 October 1984).

\textsuperscript{112} ibid at 1.

\textsuperscript{113} ibid at 3.

\textsuperscript{114} ibid.

\textsuperscript{115} ibid at 3, 4. The court ordered the husband to transfer his interest in the family home to his wife and not to raise loans and further declared that until a conveyance was executed transferring the interest in question to the wife, she was deemed to be the beneficial owner subject only to the mortgage.
It is worrying for Mrs. Kelly that an order under section 4 could be made dispensing with her consent. However, it is submitted that her circumstances may be distinguished from those described in GP v IP, despite the obvious similarities. First, it can be inferred from the second judgment in GP v IP that the argument advanced by husband in the first court hearing was centred on his need to start a business in order to maintain the family. By contrast, Mr. Kelly possesses a stable job with a regular income. No argument in favour of an order dispensing with Mrs. Kelly’s consent under section 3 may therefore be based on a need to maintain the family. Second, while it is not clear from the judgment in GP v IP whether alternative sources of security were available, it appears not. On the other hand, this would presumably be a factor of some weight in relation to Mr. Kelly’s application, countering any claim for an order under section 4. It makes more sense to use the farm as security than the family home. Moreover, if the farm is already mortgaged to capacity, it is arguable that the home should not be used as security as Mr. Kelly would appear to already be heavily indebted. Finally, the viability of the venture would presumably be considered by the court. Regrettably, the judgment in GP v IP does not shed light on the presence or otherwise of a business plan or details of the proposed venture. Nevertheless, it is submitted that Mr. Kelly’s proposal seems wildly out of step with the economic climate which currently prevails and, on an objective assessment, seems doomed for failure. Although it is contended that a court would be unlikely to make an order dispensing with Mrs. Kelly’s consent, it cannot be ruled out. However, even if such an order is made, where, as in GP v IP, the specified attendant conditions are not met, an order pursuant to section 5 transferring Mr. Kelly’s interest to Mrs. Kelly may be made to protect the family home.

Indeed, section 5 could present Mrs. Kelly with very valuable protection provided a judgment mortgage has not yet been registered against the family home by any of Mr Kelly’s creditors. She may apply pursuant to section 5 for an order to protect the home if Mr. Kelly is engaging in conduct which may lead to the loss of any interest therein. However, to avail of this protection, Mrs. Kelly must demonstrate that Mr. Kelly’s behaviour was such as to reveal his intention to deprive her of her residence in the family home. To this end, a considerable threshold must be surmounted. The conduct concerned must represent a deliberate attempt to lose, or actually have resulted in the loss of, such an interest. Evidence of carelessness or irresponsibility will be insufficient. The courts have taken a ‘restrictive view’ through the application of a subjective test when assessing the intention to deprive and the burden of proof is difficult to meet. Lyall states that cases in which

116 Where a judgment mortgage is already registered, s 5 is of minimal protection as it only facilitates the transfer of the interest actually held by the spouse which is unencumbered by the judgment mortgage. In O’Neill v O’Neill (HC 6 Oct 1989), the spouses were beneficial co-owners of the family home. The wife left the family home while the husband remained in it caring for the two children of the marriage. She sought an order for sale in lieu of partition of the home in order to repay a bank loan and was refused. The bank registered a judgment mortgage against her interest in the family home. Barron J made an order under s 5 ordering her beneficial interest to be transferred to trustees until she had discharged the judgment mortgage. Lyall notes: ‘Assuming the title to the house to be unregistered, the effect of registration of the affidavit would be to transfer the interest of the judgment mortgagor to the mortgagee, leaving the wife with a type of equity of redemption expectant upon the discharge of the mortgage. It was presumably this interest which was ordered to be vested in trustees.’ See Andrew Lyall, Land Law in Ireland (3rd edn Roundhall 2010) 485.

117 For behaviour likely to meet the criteria of this section, see Shatter (n 4) 760.

118 As de Londras (n 2) 195 notes, ‘The intention requirement has been strictly applied, sometimes in a way that causes real difficulties.’

119 As noted in S v S [1983] 3 ILRM 387 per McWilliam J.

120 Lyall (n 116) 481.
an order under section 5 is made ‘do not, unfortunately, provide any consistent guide as to evidence of deliberate intention’. De Londras observes:

‘This ad hoc approach, has the tendency to undermine the potentially significant protective properties of section 5(1) ... for the simple reason that succeeding in such an application must inevitably be perceived as an unlikely eventuality and ... practitioners will be somewhat reluctant to advise their clients to claim under this section alone. Thus, while such applications may form part of a larger claim, it seems unlikely that the jurisprudence on section 5(1) is stable enough for a practitioner to be able to confidently advise a client as to its potential usefulness in an apposite case.’

Nevertheless, where the husband either misled the court or violated an order, Lyall suggests a ‘realistic approach to the case law suggests that this factor is likely to overcome the general reluctance of the judges to find the necessary intention in section 5’. If the court refuses to make an order under section 5(1), a small consolation for Mrs. Kelly is that the court may make a compensation order if the home is subsequently lost.

However, the greatest concern for Mrs. Kelly is the possibility of a judgment mortgage being registered against the family home. While Mrs. Kelly’s consent is required if Mr. Kelly wishes to mortgage or charge the family home, if he generates substantial unsecured debt it is possible that a lender or creditor may sue for the amount borrowed and have a judgment mortgage registered against Mr. Kelly’s interest in the family home. In such a scenario Mrs. Kelly’s consent is not required under the Family Home Protection Act 1976. Rejecting the proposition that a judgment

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121 In ED v FD (HC, 23 October 1980) while the defendant husband spent extravagantly resulting in the institution of ejectment proceedings by mortgagees, Costello J held there was no evidence that he possessed the necessary intention to deprive the wife of his interest. See also CP v DP [1983] 3 ILRM 380 where the court again were not satisfied there was sufficient intention to deprive evident. Likewise, in S v S (n 119) McWilliams J acknowledged that the loss of an interest in the family home was a natural and probable consequence of the defendant husband’s improvident and arguably dishonest actions. However, he was not satisfied sufficient intention to deprive the applicant spouse was evident. Despite this apparent judicial reticence in invoking s 5, the court did exercise their discretion in making such an order in the aforementioned GP v IP (n 111) above.

122 De Londras (n 2) 196. Later, at 354, she opines that ‘the likelihood of success with an application for relief under s 5(1) ... is slim’.

123 Lyall, (n 116) 485.

124 S 5(2) of the Family Home Protection Act 1976. Shatter (n 4) 768 describes it as a ‘curious anomaly’ that while in the absence of a finding of intention to deprive the spouse or the family home the court cannot act under s 5(1), they can make an order for compensation once the family home is actually lost under subsection 5(2). However, he notes that the anomaly is overcome to some extent by the ability to make property adjustment orders on divorce and judicial separation. He adds at 767, ‘Although the Family Home Protection Act has been in force for over twenty years, the courts have not as yet fully explored the nature of the jurisdiction conferred by s 5 of the Act’. He states that a ‘major defect’ is the absence of guidance regarding the basis on which the amount of compensation due is to be calculated where the spouse is entitled to compensation.

126 Since the Nineteenth century a judgment creditor is entitled to register his judgment as a mortgage against the property of the judgment debtor. For current legislation governing this area, see ss 115 – 119 of the Land and Conveyancing Law Reform Act 2009 which repealed and replaced the Judgment Mortgage (Ireland) Acts 1850 and 1858. See also Wylie, Irish Land Law (n 9) 867-882.
mortgage which had been registered without the prior consent of the wife was void under the 1976 Act, in Containercare Ireland Ltd v Wycherley, Carroll J held:

‘[A] judgment mortgage is a process of execution ... A judgment mortgage, if registered against a family home, is not a disposition by a spouse purporting to convey an interest in the family home. It is a unilateral act by a judgment creditor ... it cannot be construed as a conveyance by a spouse.’\(^\text{127}\)

It appears, therefore, that the threat presented by the lacuna in the legislation vis-à-vis judgment mortgages represents a particularly serious problem for Mrs. Kelly. On the basis of Carroll J’s decision, it seems that where a judgment mortgage is registered against the family home an order for sale should be made where no beneficial interest accrues to the non-debtor spouse.\(^\text{128}\)

However, if Mrs. Kelly can succeed in demonstrating a beneficial interest in the home, she may have some protection in light of the decision in First National Building Society v Ring.\(^\text{129}\) Ring concerned a creditor who registered a judgment mortgage against a family home on foot of a judgment obtained against the husband for £160,000. While the wife did not possess a right of veto under the Family Home Protection Act 1976,\(^\text{130}\) Denham J considered the fact that the property in question was a family home was a relevant factor which ought to be considered by the court when deciding whether or not to exercise its discretion to refuse a sale under section 4 of the Partition Act 1868.\(^\text{131}\) Having considered the particular facts of the case Denham J concluded:

‘The second defendant who is a co-owner and who is an innocent party and has no judgment registered against her would undoubtedly suffer a significant sacrifice if her property, part of the family home, were now sold. In these circumstances it does not appear appropriate now to order partition or sale in lieu of partition.’\(^\text{132}\)

\(^{127}\) [1982] IR 143 at 149-150. Furthermore, the proceedings could not be adjourned under s 7 of the 1976 Act as it did not apply to judgment mortgages.
Likewise, Barrington J noted in Murray v Diamond [1982] 2 ILRM 113 at 115: ‘I do not think that the mere fact that a man has irresponsibly allowed himself to get into debt, or allowed a judgment to be obtained against him and thereby allowed a situation to develop in which his creditor registers a judgment against his interest in the family home, would justify a court in saying that he has conveyed or purported to convey his interest in the family home to the judgment mortgagee.’ However, Wylie and Woods raise the possibility that if a spouse has colluded with the creditor in enabling him to obtain the judgment which is registered, this may amount to a disposition by that spouse coming within the Act. See Irish Conveyancing Law (n 25) para 16.49. While, in this regard, allowing debts to accumulate or acting irresponsibly in ignoring threats to take proceedings will arguably not be enough, it is considered that a failure to enter a defence to a claim which otherwise should have been defended might be sufficient, see John Farrell, Irish law of Specific Performance (Butterworths 1994) para 7.15.

\(^{128}\) Notwithstanding the fact that the application in Containercare (n 127) involved the exercise of the creditor’s normal power of sale rather than the application of the Partition Acts 1868 and 1876, Carroll J did make an order for sale after the expiration of one year.

\(^{129}\) (n 103). However, there are conflicting views on the reliability of the precedent in Ring, see below, 50.

\(^{130}\) See Containercare v Wycherley (n 127).

\(^{131}\) First National Building Society v Ring (n 103) at 379-380.

\(^{132}\) ibid at 381.
Since the enactment of the Land and Conveyancing Law Reform Act 2009, the judgment mortgagee would have to apply for an order for sale pursuant to section 31 of the 2009 Act which replaces the Partition Acts and presumably the authority of Ring holds good.\textsuperscript{133}

Therefore, it should be clarified whether Mrs. Kelly has generated a beneficial interest in the home through her contributions.\textsuperscript{134} However, Mrs. Kelly made no direct contributions. Neither did Mrs. Kelly pay into the family fund while the mortgage was being repaid which would have generated a resulting trust in her favour through indirect contributions.\textsuperscript{135} Mrs. Kelly’s main contribution has been through work in the home, which does not generate a beneficial interest.\textsuperscript{136} While unpaid work in the home owner’s business is a viable method of generating an equitable interest,\textsuperscript{137} Mrs. Kelly appears to have had no direct involvement with the running of the farm. As a result, the precedent in Ring seems to be of no benefit to her – she possesses neither a legal nor an equitable interest in the home.\textsuperscript{138}

To sum up, therefore, it seems Mrs. Kelly is in a relatively secure position if Mr. Kelly seeks to remortgage the family home to generate funds for his business venture. Mrs. Kelly’s consent is required for such a transaction and the court is unlikely to dispense with it in the circumstances. However, her situation is precarious if a judgment mortgage is registered against the home. Her best hope in such circumstances is to take pre-emptive action before the registration of the judgment mortgage and seek an order under section 5. However, in light of the difficulties in proving an intention on Mr. Kelly’s part to deprive her of her residence in the family home, it is unclear whether such an order would in fact be made in her favour. If she fails in such an application or is too late to take an action as the judgment mortgage has already been registered, in the absence of an equitable interest in the home, it seems she is in a very vulnerable position. Her lack of consent will not render the judgment mortgage void and a judgment mortgagee may seek an order for possession and sale which is likely to be granted.

\textsuperscript{133} S 31 of the Land and Conveyancing Law Reform Act 2009 purports to replace ‘the complicated and uncertain provisions of the Partition Acts 1868 and 1876.’ Explanatory Memorandum of the Land and Conveyancing Law Reform Act 2009 at 20. However, although a judgment creditor may not possess an automatic right to an order for sale, such an order may still be made. In deciding whether an order will or will not be made, the facts of the case will be crucial, see Trinity College v Kenny [2010] IEHC 20 discussed below, 51, where an order for sale of the family home was granted where sufficient funds existed to purchase alternative accommodation.

\textsuperscript{134} For an overview of the purchase money resulting trust, see Delany (n 94) 185-209.

\textsuperscript{135} Kenny J hinted in C v C (n 82), albeit obiter dictum, that indirect contributions of this nature could potentially generate a beneficial interest. This proposition was subsequently confirmed in the High Court decision of W v W (n 82) and in the Supreme Court decision of McC v McC (n 83). Here, Henchy J stated at 2: ‘When the wife’s contribution has been indirect (such as contribution, by means of her earnings, to a general family fund) the court will in the absence of any express or implied agreement to the contrary, infer a trust in favour of the wife, on the grounds that she has to that extent relieved the husband of the financial burden he incurred in purchasing the house.’ It was also held in this case that the \textit{de minimus} principle applies in relation to all contributions made. As a result, a trust will only be ‘inferred when the wife’s contribution is of a size and kind as will justify the conclusion that the acquisition of the house was achieved by the joint efforts of the partners’.

\textsuperscript{136} L v L (n 88).

\textsuperscript{137} N v N (n 84) discussed below, 27.

\textsuperscript{138} Proposals for the reform of the purchase money resulting trust are discussed below, 53.
The pressing need to protect the family home from inter vivos unilateral dispositions also led to the introduction of homestead-style legislation in Canada\(^{139}\), which bestows ‘substantial powers of management on a narrow range of partners’.\(^{140}\) Specifically, the Land (Spouse Protection) Act 1996 currently applies in British Columbia and may provide some protection to Mrs. Kelly if Mr. Kelly seeks to remortgage the home.\(^ {141}\)

In a key difference to the regime applied under the Family Home Protection Act, Mrs. Kelly is not entitled to avail of the protection afforded by the Land (Spouse Protection) Act 1996 against the unilateral disposition of the family home unless she had previously registered her occupation of the home with the Land Title and Survey Authority. Section 3 provides that if an ‘entry’ has been made on the register, a disposition of the home by Mr. Kelly during his life or on death is void for all purposes unless made with her written consent.\(^ {142}\)

As is the case in Ireland, this protection is subject to Mr. Kelly’s right to petition the court to dispense with her consent where it is unreasonably withheld.\(^ {143}\) Thus, in this regard, at least, there is a striking similarity to the Irish provisions. It is clear that both legislatures recognise the importance of implementing a system which, although directed towards the protection of the non-owning spouse, ensures fairness for both spouses. In circumstances where, perhaps, a vindictive spouse

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\(^{140}\) Lorna Fox, ‘Reforming Family Property – Comparisons, Compromises and Common Dimensions’ (n 58) 11.

\(^ {141}\) Unfortunately, the study of this particular British Columbian legislation is hampered considerably by the nature of the role which it has assumed. While voluminous case law and academic commentary exists on the Family Relations Act 1996 and its impact on the family home on divorce, such material is scant with regard to the Land (Spouse Protection) Act 1996. There are several reasons for this foremost among which is that the need for positive action reduces the number of cases where the legislation will apply. By contrast, the automatic and universal application of the equivalent Irish legislation has ensured its relevance in a broad range of cases. As a result, while the Family Home Protection Act 1976 has received considerable academic attention owing it its practical importance in many circumstances, there is a distinct lack of such academic writings pertaining to the Land (Spouse Protection) Act 1996.

\(^ {142}\) To ensure the efficacy of the protection provided by the legislation, the Land (Spouse Protection) Act 1996 applies exclusively to property occupied by the married couple within one year immediately preceding the application. See Spoklie *v* Barton [1996] 1 CanLII 1048 (BCSC).

‘Disposition’ is defined in s 1 as including: a transfer, agreement of sale, assignment of an agreement for sale, lease or other instrument intended to convey or transfer any interest in land; a mortgage or encumbrance intended to charge land with the payment of money, and required to be so executed; a devise or other disposition made by will, and; a mortgage by deposit of duplicate indefeasible title or indefeasible title, or other mortgage not requiring the execution of any document.

For examples of the protection afforded by making an ‘entry’, see Rishi *v* Nijjar [2000] 1 CanLII 1607 (BCSC) where the parties were joint tenants of their previous matrimonial home, but in 1996 when they purchased their new family home, their main family asset, the defendant registered the title in his name as the sole owner. When the plaintiff learned of this fact, she filed an entry under the Land (Spouse Protection) Act 1996 protecting the family home. She subsequently instituted divorce proceedings. See also Straarup *v* Barton [2007] 1 CanLII 37 (BCSC). Here, the husband was unable to refinance a farm mortgage in order to pay off his debts as his wife had filed an entry under the Land (Spouse Protection) Act 1996 of which he was unaware. Although the mortgage was approved it could not be registered without her consent on discovery of the lien.

\(^ {143}\) S 8(1) of the Land (Spouse Protection) Act 1996. The court may also dispense with it where the spouses are living apart.
arbitrarily refuses to provide their consent without a valid explanation, the courts in both Ireland and British Columbia are empowered to dispense with the necessity for consent. Whether Mrs. Kelly’s refusal to provide consent would be considered unreasonable is difficult to predict.\footnote{Moreover, mirroring the Irish decision in \textit{Kyne v Tiernan} (n 24), the legislation includes a presumption of consent from participation in sale. S 9(1) states: ‘If the spouse on whose behalf an entry is made has executed a contract for sale of the homestead, joined in the execution of it with the other spouse or given written consent to the execution of it, and the consideration under the contract has been totally or partly performed by the purchaser, the spouse on whose behalf the entry was made is, in the absence of fraud on the part of the purchaser, deemed to have consented to the sale in accordance with this Act.’ S 9(2) of the 1996 Act adds that if a subsequent disposition by way of transfer of the homestead is presented for registration under the \textit{Land Title Act}, the consent previously given or the agreement executed, if produced and filed with the registrar, is sufficient for the purposes of the Act. This echoes the current Irish legislative provisions, namely s 3(9) of the Family Home Protection Act 1976 as inserted by s 54(1)(b) of the Family Law Act 1995.\footnote{Constance B. Backhouse, ‘Married Women’s Property Law in Nineteenth Century Canada’ (1988) 6 Law & Hist Rev 211, 215.}}

If Mrs. Kelly did not register an entry against the title to the family home, which is highly likely as she may not have been aware of the need for such positive action, or her consent to Mr. Kelly’s mortgage is dispensed with, she is in a very vulnerable position if Mr. Kelly fails to make the repayments as the bank may choose to foreclose on the mortgage.

However, the equitable remedies which apply in British Columbia to disputes regarding the ownership of the family home could be relevant. Historically, the rules of equity which developed in the English Courts of Chancery and succeeded in improving the position of married women throughout much of the Commonwealth ‘had very little impact’ in Canada.\footnote{This is unlike the unconscionable conduct criterion of the Australian courts and the reasonable expectations standard applied by the New Zealand judiciary. However, it is suggested that the above doctrines are ‘all driving in the same direction’, per Cooke P in \textit{Pasi v Kamana} [1986] 1 NZLR 603, 605. Of the three, the doctrine of unjust enrichment has ‘generated the most case law and academic comment’. See John Mee, \textit{The Property Rights of Cohabitees} (Hart Publishing 1999) 184. The Canadian courts have, in certain circumstances, imposed a resulting trust where indirect contributions are made. For example, paying for household expenses have generated an interest, see \textit{Brintnell v Grasley} [2000] CanLII 1322 (BC SC). However, the more flexible alternative afforded by the doctrine of unjust enrichment which also takes non-financial contributions into consideration is generally favoured in the absence of direct contributions to the purchase price. The development of the doctrine has, in legal terms, occurred quite rapidly. Mirroring the approach of many jurisdictions in the early 1970s the Canadian judiciary initially accepted the expression of law as stated by Lord Diplock in \textit{Gissing v Gissing} [1971] AC 886 at 906: ‘As in so many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party’s words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct. It is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself. It is for the court to determine what those inferences are.’} Instead, the Canadian courts, through the latter half of the Twentieth century, developed an approach based on the imposition of a constructive trust to prevention unjust enrichment.\footnote{This is unlike the unconscionable conduct criterion of the Australian courts and the reasonable expectations standard applied by the New Zealand judiciary. However, it is suggested that the above doctrines are ‘all driving in the same direction’, per Cooke P in \textit{Pasi v Kamana} [1986] 1 NZLR 603, 605. 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‘highly effective’ means of responding to unjust enrichment, adding it is ‘a flexible instrument available in a variety of circumstances beyond the purview of the “institutional” constructive trust.’

Following the celebrated case of Murdoch v Murdoch, the Canadian courts developed a ‘new conceptualisation’ of the constructive trust. Previously referred to in minority judgments in earlier cases, the doctrine of unjust enrichment was fully accepted by the Supreme Court of Canada in the seminal case on constructive trusts, Pettkus v Becker. Rejecting the applicability of the doctrine of resulting or constructive trusts coupled with the attendant requirement of monetary contribution or common intention, the court instead applied the principle of unjust enrichment to the facts of the case and imposed a constructive trust. Dickson J delivered the judgment of the court, noting ‘the principle of unjust enrichment lies at the heart of the constructive trust’. He set out a three-fold test for the application of the doctrine: an enrichment; a corresponding deprivation; and the absence of any juristic reason for the enrichment. In what is now considered ‘the kernel of the new Canadian approach to disputes over family property’, Dickson J stressed the importance of injustice in any claim:

‘The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another ... It is not enough for the court simply to determine that one spouse has benefited at the hands of another and then to require restitution. It must, in

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147 Ziff (n 139) 213.
148 [1975] CanLII 193 (SC C). Ziff noted the decision was ‘more than a harsh judgment; it became a cause celebre, and was a catalyst in the process of family property reform that was already underway in Canada’. See (n 139) 215. For a sharp criticism of the decision, see Peter Jacobson, ‘Murdoch v Murdoch: Just About What the Ordinary Rancher’s Wife Does’ (1974) 20 McGill LJ 308.
In Murdoch, an applicant wife who worked on her husband’s ranch was denied a remedy under the law of trusts by the Supreme Court of Canada. In particular, the majority of the court refused to attribute a common intention that her husband held such an interest in the disputed property for the applicant wife’s benefit. Instead, the Court held at 444 that the wife had had done ‘just about what the ordinary rancher’s wife does’ and, thus, had no right to any interest in the property.
149 Ziff (n 139) 215.
150 Despite the majority verdict in Murdoch v Murdoch (n 148), Professor Mee notes ‘a clear dissatisfaction with the English analysis was apparent in the dissenting judgment of Laskin J’. See The Property Rights of Cohabittees (n 146) 188. Laskin J considered the applicant wife had ‘established a right to an interest which it would be inequitable to deny and which, if denied, would result in the unjust enrichment of her husband.’ This was developed further in Rathwell v Rathwell [1978] CanLII 3 (SC C).
151 [1980] CanLII 22 (SC C). Here, the decision of the Ontario Court of Appeal was affirmed and the Supreme Court of Canada unanimously upheld the applicant’s claims. The case involved an applicant who sought a half share in a bee-keeping business she and her partner had established through their joint efforts. The couple, although unmarried, had lived together for 19 years. The applicant also claimed for other specified property arguing that early in the relationship she met all business expenses thereby allowing her partner to save his money in order to finance the purchase of property which he subsequently put in his own name. In addition, she contributed financially towards its renovation.
152 Six of the nine Supreme Court judges were in favour of imposing a constructive trust in order to remedy the unjust enrichment.
153 Pettkus v Becker (n 151) at 847.
154 Dickson J added, ‘This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.’ ibid at 848.
155 Mee, The Property Rights of Cohabittees (n 146) 191.
addition, be evident that the retention of the benefit would be ‘unjust’ in the circumstances of the case ...

I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.\textsuperscript{156}

The decision in \textit{Peter v Beblow} is especially relevant when considering Mrs. Kelly’s position.\textsuperscript{157} McLachlin J rejected the suggestion that domestic labour and child rearing could not give rise to a remedy based on unjust enrichment because the appellant had voluntarily assumed the role or because the services were provided out of natural love and affection. She ruled as follows:

‘This Court has held that a common law spouse generally owes no duty at common law, in equity or by statute to perform work or services for her partner ... The notion that household and childcare services are not worthy of recognition by the court fails to recognize the fact that these services are of great value, not only to the family, but to the other spouse. As Lord Simon observed nearly 30 years ago: “The cock-bird can feather his nest precisely because he is not required to spend most of his time sitting on it” ... The notion, moreover, is a pernicious one that systematically devalues the contributions which women tend to make to the family economy ... Today courts regularly recognize the value of domestic services. This became clear with the Court's holding in \textit{Sorochan}, leading one author to comment that “[t]he Canadian Supreme court has finally recognized that domestic contribution is of equal value as financial contribution in trusts of property in the familial context”.\textsuperscript{158}

As a result, Mee opines the court ‘effectively created a presumption that the performance of domestic services will give rise to a claim for unjust enrichment’.\textsuperscript{159} While such a result is not guaranteed,\textsuperscript{160} it is likely that Mrs. Kelly would be successful in a claim for unjust enrichment.

Once an unjust enrichment is established, the amount of restitution owing to Mrs. Kelly must be determined. This may be achieved by determining the value of labour performed at an hourly rate, the increase in value of an asset as a result of the donor’s contributions or a value derived in some other manner. However, where an order for financial compensation is inappropriate or, particularly when the labour or financial contribution of the party is linked to a specific property, the court may

\textsuperscript{156} \textit{Pettkus v Becker} (n 151) at 848-9. In adopting this approach, he referred to \textit{The Ruabon Steamship Company, Limited v London Assurance} [1900] AC 6 (HL).

\textsuperscript{157} [1993] CanLII 126 (SC C).

\textsuperscript{158} Ibid (citation omitted).

\textsuperscript{159} \textit{The Property Rights of Cohabittees} (n 146) 192.

\textsuperscript{160} Payne and Payne warn, ‘The issues become more cloudy’ in the case of relationships of shorter duration and where the claim for an interest in property owned or acquired by the other party is exclusively founded on household or domestic services provided. They note, in such circumstances, ‘courts may be more reluctant to find a causal connection between the alleged contribution made and the asset acquired or maintained’. They add, ‘In long-term cohabitational relationships, however, the causal connection will usually be found and an equal sharing of specified property may be found appropriate.’ See Julian D. Payne and Marilyn A. Payne, \textit{Canadian Family Law} (3rd edn Irwin Law 2008) 61-62.
impose a constructive trust.\textsuperscript{161} Therefore, while it is possible Mrs. Kelly may receive an interest in the property, such an award is discretionary. Moreover, it has been noted, awards, in general, tend to be ‘modest’.\textsuperscript{162}

What does it mean for Mrs. Kelly if she is awarded an interest in the premises under a constructive trust? If Mr. Kelly re-mortgages the home and defaults on payment, Mrs. Kelly may be able to protect the property since the mortgage will not affect her share of the home. As the security would only attach to an undivided share of the home, the bank would be obliged to seek an order for sale pursuant to the Partition of Property Act 1996.\textsuperscript{163}

If Mr. Kelly defaults on his repayments, the mortgagee may apply to the court for an order \textit{nisi}. Usually, in such circumstances, the court will make such an order. It will also often make an order affording the borrower, Mr. Kelly, a redemption period of six months, subject to the possibility of

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\item Hovius notes ‘there is a good deal of discretion in deciding what remedy to award and in determining the quantum of any compensation, whether by way of a property interest or cash payment. The entire analysis involves considerable flexibility and the results are not always predictable or consistent.’ See Berend Hovius, ‘Property Rights for Common Law Partners’ from Martha Shaffer (ed) \textit{Contemporary Issues in Family Law—In Memory of McLeod} (Carswell 2007) 141.

In Peter v Beblow (n 157), McLachlin J stated: ‘Occasionally the remedial notion of constructive trust is even conflated with unjust enrichment itself, as though where one is found the other must follow.’ In order to overcome this confusion, she reiterated the general principles to be applied in establishing the appropriate remedy: ‘it seems to me that the first step in determining the proper remedy for unjust enrichment is to determine whether a monetary award is insufficient and whether the nexus between the contribution and the property described in \textit{Pettkus v Becker} has been made out. If these questions are answered in the affirmative the plaintiff is entitled to the proprietary remedy of constructive trust. In looking at whether a monetary award is insufficient the court may take into account the probability of the award’s being paid as well as the special interest in the property acquired by the contributions ... The value of that trust is to be determined on the basis of the actual value of the matrimonial property -- the “value survived” approach. It reflects the court’s best estimate of what is fair having regard to the contribution which the claimant’s services have made to the value surviving, bearing in mind the practical difficulty of calculating with mathematical precision the value of particular contributions to the family property.’ See also \textit{Picklein v Gillmore} [1997] CanLII 3147 (BC CA) in which the British Columbia Court of Appeal chose to consider the increase in the contested properties’ value, rather than attempting to calculate each party’s exact contribution.

Moreover, the granting of an estate in land does not invariably amount to a fee simple. In certain circumstances, a lesser interest such as a life estate may be considered to represent a more appropriate response.

Continuing Legal Education Society of British Columbia, ‘Unjust Enrichment Claims: Practical Considerations’ (2008) <www.cle.bc.ca/PracticePoints/FAM/unjustenrichment.pdf> accessed 21 June 2012. See Peter v Beblow (n 157) however, in contrast, a large award was made in Pegler v Avio [2008] CanLII 128 (BC SC). Professor Mee highlights the fact that rather than adopting a system based on the law of restitution, the Canadian courts have developed a somewhat different approach in considering a remedy for unjust enrichment. He explains: ‘When it comes to assessing the appropriate remedy, the courts ignore the issues which they regarded as relevant under the headings of “enrichment” and “corresponding deprivation” and look instead at the assets in the defendant’s hands at the end of the relationship. Thus they are willing to impose a constructive trust over the family home ... or grant a monetary remedy reflecting the increase in value of the defendant’s general assets ... this means that the remedy covers not only the enrichment at the expense of the plaintiff ... but also enrichments which did not occur at her expense.’ See \textit{The Property Rights of Cohabittees} (n 146) 219.

The Partition Acts 1868 and 1876 remain the ‘underlying basis’ for partition and sale applications in Canada as noted in Marjorie L. Benson, Marie Ann Bowden and Dwight Newman (eds), \textit{Understanding Property: A Guide to Canada’s Property Law} (2nd edn Thomson Carswell 2008) 115. However, as Conway notes, although British Columbia ‘retains the basic structure of the Partition Acts’ it does so ‘within a more flexible legislative framework’. See \textit{Co-ownership of Land, Partition Actions and Remedies} (n 75) 181.
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extension. At the expiration of the redemption period, if the mortgage has not been redeemed, the court may make an absolute order for foreclosure. If this occurs, the mortgagee may obtain title to Mr. Kelly’s mortgaged interest in the property and become an equitable co-owner with Mrs. Kelly.\(^{164}\)

However, it is clear this process can often be quite time consuming. As a result, taking an undivided interest as security is not very popular among mortgagees in the province.\(^{165}\) It is contended that ‘requiring the mortgagee to wait out the redemption period and then apply for a final order would delay a sale that may be in the best financial interests of all parties while interest is continuing to run.’\(^{166}\) Consequently, proposals for reform have been advanced. Drawing from proposals made by the Law Reform Commission of British Columbia in 1988,\(^{167}\) the British Columbia Law Institute recently suggested that mortgagees should have the option of applying for an order for sale of the whole property once an order \textit{nisi} for foreclosure is obtained. It stated, ‘Allowing the mortgagee to obtain sale of the entire property at the order \textit{nisi} stage would … give the remaining co-owners an early opportunity to purchase the mortgagor’s interest and avoid having to deal with the mortgagee as a co-owner.’\(^{168}\)

As the law is currently applied, the bank would have to wait until the foreclosure of Mr. Kelly’s interest before bringing an application for an order for sale under the 1996 Act. Will Mrs. Kelly be able to prevent a sale in such circumstances? If Mrs. Kelly is awarded less than a 50% interest of the family home, Mr. Kelly’s mortgagee is in a relatively strong position in seeking an order for sale pursuant section 6. Only a ‘narrow discretion’ is afforded to the court to refuse the order sought thereunder,\(^{169}\) as such an order must be made unless the court sees ‘good reason to the contrary’. If Mrs. Kelly is awarded more than 50% of the beneficial interest of the property and, by corollary, Mr. Kelly’s interest, to which the mortgage attaches, constitutes less than 50% of the property, an order for sale could be awarded to the mortgagee under section 7 if the court believed a sale would be ‘more beneficial’ to them than a division, having regard to the nature of the property, the number of the parties interested and other criteria enumerated.

However, the judiciary adopts a pragmatic approach to the interpretation of these provisions when considering an application for the sale of the family home. While Ziff notes the same criteria apply, in theory, to both commercial and family relationships, he adds with regard to commercial relationships that ‘courts do seem less inclined to forestall one co-owner from bringing these property relationships – ie those “motivated solely by profit potential” – to an end.’\(^{170}\) On the other hand, despite the strong presumption in favour of granting an order sought where the applicant


\(^{165}\) ibid. At 13 the report explains: ‘The class of applicants eligible to obtain the remedies of partition and sale remains very narrow. Only co-owners with an immediate right of possession may obtain these remedies, yet others with interests in the land such as mortgagees, judgment creditors, and purchasers awaiting transfer of title may be affected to a considerable extent by whether they are granted or withheld.’\(^{166}\) ibid 15.


\(^{168}\) \textit{Report on the Partition of Property} (n 164) 15.

\(^{169}\) \textit{Bard v Bird} [1993] CanLII 2478 (BC CA) [6] per Wood J. Again, the decision was prior the introduction of the 1996 Act, however, the comment remains relevant for the application of the current legislation and was cited with approval in \textit{Machin v Rathborne} [2006] CanLII 252 (BC SC). See also \textit{Richardson v McGuinness} [1996] CanLII 681 (BC SC) [23].

\(^{170}\) (n 139) 326.
possesses more than a 50% beneficial interest, the court may be persuaded to adopt a more flexible approach and exercise its discretion in refusing an order for sale where notions of justice arise in a marital context. Indeed it was noted, albeit indirectly, in Caple v Dolman that ousting an individual from their residence could constitute good reason to refuse an order for sale.

Finally, while the Land (Spouse Protection) Act 1996 does prevent Mr. Kelly from encumbering the home without her consent, it does not include provisions allowing for the transfer of the home to the non-owning spouse where it is in danger of being lost. Indeed, if Mr. Kelly generates unsecured debt, additional difficulties may arise for Mrs. Kelly. As in Ireland, it is also possible that a judgment mortgage may be registered against the family home in British Columbia, irrespective of whether an entry is filed under the Land (Spouse Protection) Act 1996. Pursuant to the Court Order Enforcement Act 1996, a judgment creditor may apply to the British Columbia Supreme Court calling on the debtor, Mr. Kelly, or any other person who holds a legal estate in the property to demonstrate cause why the land should not be sold to secure payment of the debt subject to the judgment. As Mrs. Kelly is not a legal co-owner, this is of no benefit to her. However, if she is awarded a beneficial interest under a constructive trust, this may again give rise to some protection.

Where a sale is ordered, the sheriff may execute a conveyance of the judgment debtor’s interest. Following the registration of that conveyance, the third party purchaser is vested with this interest free of the judgment or any subsequent charges. The purchaser would then be able to apply for a sale of the property. However, it has been noted, ‘The need to take that step after buying the

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171 As Seaton J in Boeckler v Boeckler [1987] CanLII 2599 (BC CA) explained: ‘Each case will demonstrate different factors to be taken into account in determining whether or not justice requires that the home not be sold. There must be a careful consideration of the impact on those involved of an order that there not be a sale. Prima facie the owner is entitled to sell, and that right should not be set aside without good reason.’ He noted dependants, as well as co-owners, require consideration.

172 [1999] CanLII 5237 (BC SC). The case concerned an application under s 6 of the Partition of Property Act 1996 and the court noted at [24], ‘there is no factor which would lead me to conclude that a sale of the Property would lead to overriding unfairness or a miscarriage of justice. No one will be ousted from their residence’.

173 In Kowalewski v Kowalewski [1994] CanLII 412 (BCSC), the respondent held a jointly owned family home with his wife, the petitioner. However, upon the accumulation of debts, two creditors, Canadian Imperial Bank of Commerce and Canada Trust Company, obtained default judgments against him and registered the judgments against his interest in the family home, subsequent to the filing by Ms. Kowalewski of a claim under the Land (Spouse Protection) Act. Ss 33 to 63 of the Execution Act 1969, RSBC 1969 c. 135 as amended by the Execution Amendment Act 1978 British Columbia Bill No 32 which was proclaimed into force in July 1981 govern the registration of judgments against land in British Columbia. For a brief summary of the provisions prior to 1981, see the Irish Law Reform Commission, Consultation Paper on Judgment Mortgages (LRC CP30–2004) 33, 34. Under the legislation where a court judgment is obtained, a creditor may obtain a certificate of such judgment and have it registered in the appropriate Land Registry office. In this manner the judgment, like any other charge, may be registered directly against the title of property owned by the judgment debtor. Thus, it is clear, as in Ireland, a judgment creditor is automatically entitled to register a judgment mortgage once a judgment is obtained. However, unlike the Irish regime, the system applied in British Columbia allows a judgment creditor to register against a judgment debtor on the speculative possibility that the judgment debtor possessed an interest in land.

174 See ss 92 to 96 of the Court Order Enforcement Act 1996.
judgment debtor’s interest when there is a strong possibility it will be opposed by the other co-
owners is a disincentive to buying from the sheriff”.175

Again, reform appears to be on the agenda. The British Columbian Law Institute suggests, ‘It should be possible … for a judgment creditor to apply for partition or sale simultaneously with the application for the order for sale of the judgment debtor’s interest under the Court Order Enforcement Act, rather than being forced to make successive applications.”176 It is submitted that the introduction of this reform would not, however, substantively impact on Mrs. Kelly’s position. Irrespective of whether the judgment mortgagee or the third party purchaser seeks a sale, her beneficial interest shall be taken into consideration by the court in any application under the Partition of Property Act 1996.177

Therefore, Mrs. Kelly would be advised to register an entry against the family home under the Land (Spouse Protection) Act 1996 to prevent Mr. Kelly selling or remortgaging the family home. If he succeeds in remortgaging the home before she has an opportunity to register an entry against the title to the family home, she may be able to rely on the doctrine of unjust enrichment to gain an interest in the premises. However, whether restitution in the form of a constructive trust over the family home is made in her favour is at the discretion of the court. If it is, and Mr. Kelly subsequently defaults on payment of the loan, she may be in a stronger position to resist an application for sale of the home under the Partition of Property Act 1996. Similarly, although registration of an entry under the Land (Spouse Protection) Act 1996 does not prevent the registration of a judgment mortgage in relation to the home, if Mrs. Kelly does possess an equitable interest in the property, it may again play a vital role in protecting the home from an order for sale. Furthermore, if an order for sale is made, her beneficial interest will attach to the proceeds of sale.

1.5 Requirement for Registration – A Fatal Flaw

The application of the respective legal and equitable regimes in Ireland and British Columbia to the case study above clearly highlights the strengths and weaknesses inherent in the two approaches. While both the 1976 Act and the 1996 Act recognise the special status of the family home and reflect a desire to protect a non-owning spouse’s right to occupy same, significant differences exist in the depth and effectiveness of the protection afforded.

The primary strength of the Family Home Protection Act 1976 is the universal protection provided by the automatic conferral on a non-owning spouse of a right of veto with regard to conveyances of the family home. To this end, the written consent of the non-owning spouse is, in effect, a precondition to a valid conveyance of any interest in the home. By contrast, it is submitted the single greatest weakness of the Land (Spouse Protection) Act 1996 is that positive action is required by a non-owning spouse in order to qualify for the protection available thereunder. While valuable protection is undoubtedly provided to non-owning spouses who have filed an entry against the title of the family home, the depth of protection afforded by the 1996 Act is seriously undermined by the lack of automatic, universal, application which represents the cornerstone of the equivalent Irish legislation.

175 British Columbia Law Institute, Report on the Partition of Property (n 164) 16.
176 ibid.
177 See above, 41.
The adoption of a regime based on registration similar to that applied under the Land (Spouse Protection) Act was considered in Ireland prior to the introduction of the 1976 Act.\(^{178}\) While recognising that such an approach would have the advantage of comparative simplicity, it was nonetheless considered to be an ‘insufficient solution’ to the difficulties arising where a vindictive spouse sought the unilateral sale of the family home.\(^{179}\) Instead, the approach was described as ‘unfriendly and in most cases positively hostile’.\(^{180}\) Minister Cooney, the then Minister for Justice, noted,

‘under this system, so long as the wife does not take the step of registering, she is given no protection, and there is a danger that she will wait too long in a number of cases. Secondly, a registration system will not provide any protection in cases where the husband literally walks out of the home, having secretly arranged for its sale behind his wife’s back.’\(^ {181}\)

However, the Canadian province is not alone in requiring such registration. England and Wales apply a similar approach pursuant to section 30 of the Family Law Act 1996. There, it was noted that the lack of public awareness of the availability of such protection has resulted in a statutory regime which operates ‘in the main ... on the basis of the mass invalidation of the statutory charges for want of registration, with registration being effected only in cases of actual or impending disputes’.\(^ {182}\) Consequently, Gray and Gray note, ‘Its fundamental weakness has always been the difficulty implicit in attempting to engraft family based rights on to an existing system of registration of incumbrances governed by the general law of property.’\(^ {183}\) In considering the ‘residential security’ of spouses, they argue ‘this can ultimately be assured only by the introduction [of] a rule of automatic co-ownership of the legal estate’.\(^ {184}\)

All in all, it is clear that the scope of the Land (Spouse Protection) Act 1996 is undoubtedly inferior to that provided in Ireland under the Family Home Protection Act 1976. Due to the nature of the legislation and the requirement for positive action on the part of the non-owning spouse, the protection afforded is limited. Akin to the legislation in England and Wales, the British Columbian Act is now considered to apply primarily where a party has elected not to commence legal proceedings on the termination of a relationship but who nonetheless feels the need to protect his or her interest in the family home.\(^ {185}\) In effect, it provides an alternative to obtaining a Certificate of

\(^{178}\) At the time, the Irish legislature was considering the approach adopted in England under the Matrimonial Homes Act 1967, which has since been repealed and replaced by the Family Law Act 1996.

\(^{179}\) Dáil deb (n 61) col 56, Mr Cooney.

\(^{180}\) ibid.

\(^{181}\) ibid.

\(^{182}\) Wroth v Tyler [1974] Ch 30 at 46A-B per Megarry J. This has also proved to be true in British Columbia, see below, 45.

\(^{183}\) Kevin Gray and Susan Francis Gray, Elements of Land Law (5th edn OUP 2009) 1090-1091.

\(^{184}\) ibid. For a less radical proposal for reform, see Cooke, Barlow and Callus ‘Community of Property: A Regime for England and Wales?’ (n 99) where it was suggested that the disponor should have to provide an affidavit, rather than simply replying to preliminary enquiries and would be asked specifically about the presence of a spouse in the home. They note at 45: ‘The benefit of this would be that the disponor would be alerted to, and asked to think about, the spouse’s rights; and we think that this could be a useful reform in both sending a message and, in some cases, providing an extra layer of protection without undue inconvenience to anyone.’

\(^{185}\) Unfortunately, where difficulties arise in a relationship, by the time the non-owning spouse becomes aware of the protections available under the Act it may be too late to register as the disposition may already have taken place.
Pending Litigation. Therefore, it could arguably be described as an illusory protection while a marriage subsists as in the absence of awareness of the potential protection afforded by the Act, a non-owning spouse will rarely file an entry which would trigger the protection afforded by the legislation.\footnote{As Wylie notes, albeit in relation to England and Wales, where registration is generally only effected in cases where there is an actual or impending dispute, ‘from a practical point of view it is doubtful if it could be otherwise because, given the huge number of matrimonial homes in existence, mass registration of such charges might well overwhelm the registries’, see ‘An Irish Perspective on Protecting a Non-owning Spouse in the Home’ (n 1) 140. It is submitted the same may be true of British Columbia.} Moreover, it is speculated that where there is awareness of the provisions of the legislation, a non-owning spouse will be reluctant to file an entry due to a fear of potentially setting a seed of doubt in an otherwise healthy relationship. Indeed, with regard other systems necessitating registration, it has been described as an ‘unsuitable mechanism for protection of interests of a family character’.\footnote{ibid 139 quoting from Robert E. Megarry and Charles H.R.W. Wade, The Law of Real Property (citation omitted). On the other hand, however, it should be noted that, from a purely commercial and practical point of view, the British Columbian legislation does have the advantage of being ‘purchaser-friendly’, particularly with regard to the background checks required to be carried out prior to any conveyance.}

However, on initial investigation it would seem that the shortcomings of the legislative regime which applies under the Land (Spouse Protection) Act 1996 are perhaps mitigated by the development of the doctrine of unjust enrichment. After all, unlike the purchase money resulting trust which applies in Ireland, the doctrine of unjust enrichment allows for a wider range of contributions to be considered, including unpaid work in the home. Despite this, difficulties still remain. It is clear that the imposition of a constructive trust over the family home is only one possible remedy available to the court and may not be considered appropriate. As a result, there is no guarantee that an interest in the family home will result from a finding of unjust enrichment. Therefore, it is submitted the protection is less comprehensive than it initially appears.

Overall, the main lesson arising from an analysis of both British Columbia and Ireland is that, notwithstanding the need for some reform of the Family Home Protection Act 1976, legislation predicated on the basis of the model applied in British Columbia would not improve the situation in Ireland for non-owning spouses but would rather undermine the considerable protections currently existing inter vivos.\footnote{Moreover, despite the shortcomings of the Irish approach, the author does not support the development of a doctrine of unjust enrichment in the case of the family home as a replacement for the purchase money resulting trust.} The introduction of such a regime would represent a backward step in our protection of the family home which, it is submitted, is far superior to the regime applied by our British Columbian counterparts.

1.6 The Family Home Protection Act 1976 – A Critique

To guarantee the continued effectiveness of the Family Home Protection Act 1976, the inherent strengths of the Act must be identified and their position secured. Furthermore, a critical analysis of the weaknesses of the legislation must be undertaken and suggestions for reform considered.

1.6.1 Key strengths of the Family Home Protection Act 1976
First, the automatic and universal application of the requirement for section 3 consent in dispositions of the family home is a key strength of the legislation. It is submitted that the importance of conferring an automatic protection which is not dependent on registration, should not be underestimated. It represents the core difference between the strength of the Irish regime and the weakness of comparable regimes applied in other jurisdictions including British Columbia.

Second, in addition to the essential requirement for section 3 consent, the availability of protection under section 5 of the Family Home Protection Act 1976 for a non-owning spouse where the owning spouse is engaging in conduct which may lead to the loss of an interest in the home is a particularly positive protection afforded by the Irish legislation. This provision confers, in effect, a power on the judiciary to make a property adjustment between the spouses during the relationship. While the courts have clearly established a high-threshold of proof which must be surmounted to satisfy the court as to the applicability of the section, where this is met, the protection afforded thereunder is considerable.  

Third, it is contended that the fine balance struck by both the legislature and the judiciary in relation to the rights of mortgagees and purchasers on the one hand, and the desire to protect a non-owning spouse vis-à-vis the family home on the other, is central to the success of the legislation. It is submitted that both institutions have clearly signalled their intentions to prioritise the latter in line with the protection afforded to the family under the Irish Constitution. Conveyances lacking a valid consent are void, subject only to limited exceptions. The most important exception in this regard concerns *bona fide* purchasers for full value without notice. Defending the inclusion of this exception in the 1976 Bill, Mr. Cooney explained section 3(3)(a) ‘gives protection to a *bona fide* purchaser for value who proves that he has taken all reasonable steps and made all reasonable inquiries in regard to the purchase from a husband who turns out to have sold the home without the wife’s consent.’ However, implicitly, the protection of the family home is prioritised as to benefit from the exception, conveyancers are required to ensure complete and proper inquiries are undertaken to establish the position regarding the family home.

Furthermore, in determining the quality of the consent required under section 3 of the 1976 Act, the judiciary has struck a balance which again favours non-owning spouses. From a mortgagee or a purchaser’s perspective, the necessity for ‘free’ and ‘fully informed’ consent presents a considerable burden as the onus of proving that the consent meets the requisite standard is placed squarely on their shoulders. In determining whether a disposition is void under the Act, the court undertakes a subjective analysis of the consent provided from the non-owning spouse’s perspective. It is

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189 In order to render the section of even more benefit to non-owning spouses, it is contended a legislative amendment removing the requirement for intention could be introduced. See below, 55.
190 Dáil Deb (n 61) col 58 per Mr. Cooney. In this manner, the legislation protects a purchaser where the vendor conceals the fact that the property for sale is a family home and, having completed the relevant enquiries, the purchaser does not discover this fact.
191 See *Somers v Weir* (n 41). See also Casey and others (eds), *Law Society of Ireland Manual: Conveyancing* (n 5) 110.
192 See *Bank of Ireland v Smyth* (n 27). However, as Mee notes, ‘The elevation of the veto in Smyth to quasi-constitutional status creates problems for practitioners since ... consenting to a disposition of a home is a routine occurrence.’ See ‘The Family Home Protection Act: The Practical Implications of Bank of Ireland v Smyth: Part II’ (1996) 14 ILT 209. However, see below 49 regarding the time limits now applied under s 3(8) as inserted by s 54(1)(b) of the Family Law Act 1995.
irrelevant that the party receiving the consent is unaware that it is neither ‘free’ nor ‘fully informed’. Indeed, Sanfey notes ‘spouses giving consent may paradoxically find themselves in a better position if they have failed to take any adequate or proper steps to inform themselves of the consequences of what they are doing’. 193

As a result, the burden on the banks is considerable and serious repercussions may arise where a mortgagee fails to discharge the onus of proving that the consent provided under the 1976 Act was valid. Even where the nature and effect of a transaction are explained to the party giving the consent and independent legal advice is recommended, it is conceivable that a bank might still fail to show the consent was valid due to an evidentiary weakness. The net effect, in such circumstances, is that they would lose the security which they believed they had validly taken and on the basis of which they had advanced considerable funds. 194

Finally, the importance and widespread relevance of the legislation has been consolidated by the decision in O’D v O’D195 where the provisions of the Family Home Protection Act 1976 proved crucial in an application for the sale of co-owned property pursuant to the Partition Acts 1968 and 1876. It is assumed that this decision will continue to represent good law under the Land and Conveyancing Law Reform Act 2009, thus ensuring the continued relevance of the legislation in cases of co-ownership.

1.6.2 A need for slight tweaking or radical reform?

Despite the considerable strengths of the Family Home Protection Act 1976, the Act is nevertheless ‘limited in a number of respects’196 and suggestions for reform have been made to correct the various anomalies and ambiguities which have emerged.

It is clear that any weaknesses in the legislation can have serious implications for legal practitioners as the provisions of the 1976 Act are of ‘critical importance’ to the most common of transactions, namely the conveyance of the family home.197 As a result, the courts have witnessed a flood of litigation since its introduction and it has been remarked, ‘No piece of legislation enacted since the foundation of the State has caused conveyancers more difficulties than the Family Home Protection Act 1976’. 198

193 Sanfey (n 30). However, unlike a situation arising upon the creation of a mortgage or a charge which will be considerably more ambiguous, it will be much harder to prove that a spouse consenting to a sale of the family home did not understand the consequences. To this end, Mee adds, ‘It is highly unlikely that a spouse could argue that she failed to understand the nature and consequences of a simple sale, particularly since she will invariably have left the home in order to allow the sale to close with vacant possession.’ See ‘The Family Home Protection Act: The Practical Implications of Bank of Ireland v Smyth: Part II’ (n 192).

194 This sanction has been described as ‘disproportionate to any lapse in procedures which may have occurred on the part of the bank’. See Sanfey (n 30). The bank would be entitled, however, to apply to obtain a judgment and have it registered against the family home as a judgment mortgage. Whether an order for sale would then be made, would be an issue for the court, see above, 34.

195 O’D v O’D (n 73).


Having considered the implications for the consent requirement arising from the decision in *Bank of Ireland v Smyth*, Professor Mee suggests that a radical overhaul of the legislation in this area may be required:

‘Although the Family Law Act 1995 has brought a number of welcome improvements, more radical surgery appears to be necessary. The basic problem is that the text of the Act fails to consider obvious practical questions, so that it has been left to the Courts to fill in the gaps. However ... it is difficult for judicial law-reform to address the wider picture.’

While it is undoubtedly true that some issues do need to be tackled by legislative reform, it is submitted that this may be achieved without, necessarily, the need for invasive or ‘radical surgery’ as suggested. Instead, it is submitted that the judicious and prudent implementation of minor alterations would iron out many of the difficulties with the legislation which exist.

The inconsistency created by *Bank of Ireland v Smyth* vis-à-vis the quality of consent required to meet the demands of section 3 and the quality of consent required for joint conveyances of the family home is particularly problematic. The decision in *Nestor v Murphy* established that in situations where both spouses have joined in the conveyance, the need for either of them to consent under the Family Home Protection Act is negated as consent under the Family Home Protection Act is implied. As a result, Professor Mee notes, ‘If the rule in *Smyth* were not applied to joint conveyances, then the level of protection afforded to non-owning spouses by the Supreme Court would seem arbitrarily to be denied to jointly-owning spouses.’

He argues that the consent afforded to such dispositions should be subject to the same rigors applied to the consent provided under the 1976 Act to ensure that both spouses entered into the conveyance freely and with full knowledge, thereby correcting the ‘extremely uneven’ coverage currently provided by the legislation. To this end, he proposes, ‘A revised Family Home Protection Act (which linked the rule in *Smyth* to a well-considered statutory certification procedure) would make life much easier for conveyancers while still serving the vital social function of protecting family homes.’

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199 (n 27).
201 (n 27).
202 (n 24).
203 ‘The Family Home Protection Act: The Practical Implications of Bank of Ireland v Smyth: Part I’ (n 34). The same standard should also be applied to the consent provided under the s 3(9) of the 1976 Act as inserted by s 54(1)(b) of the Family Law Act which should also be free and fully informed. The section states: ‘If, whether before or after the passing of the Family Law Act 1995, a spouse gives a general consent in writing to any future conveyance of any interest in dwelling that is or was the family home of that spouse and the deed for any such conveyance is executed after the date of that consent, the consent shall be deemed, for the purpose of sub-s (1), to be a prior consent in writing of the spouse to that conveyance.’ Indeed, in considering this section, Professor Mee notes, ‘Given that they can have wider consequences than ordinary consents, it would seem that, if anything, the onus of the person attempting to prove validity would be higher in relation to general consents.’
205 ibid.
However, the extension of a rigorous consent requirement to co-owning spouses would arguably run
counter Mee’s previously expressed belief that in demanding ‘free’ and ‘fully informed consent’, the
court runs the risk of ‘taking paternalism too far’. It is respectfully submitted that such legislative
intervention is unnecessary as a deed which a co-owner enters into against their wishes or on the
basis of inaccurate information could be set aside in equity under the doctrine of undue influence or
on the basis of misrepresentation.

Another area of concern which arises in light of the decision in Bank of Ireland v Smyth, is the
meaning attributed to ‘full value’ for the purposes of section 3(3)(a). To this end, section 3(5) defines
‘full value’ as ‘such value as amounts or approximates to the value of that for which it is given’. However,
from a purchaser’s point of view, Professor Mee notes, ‘The rather alarming consequence of Smyth is that if “full value” has not been given, then the absence of a free and fully informed consent will render the transaction void irrespective of whether the lender or purchaser had notice of the invalidity.’

Despite raising concerns over the issue, Professor Mee did not make any recommendations as to
how this difficulty could be overcome. Notwithstanding the potential trouble posed by this wording,
it does not appear to have given rise to any litigation or even featured as a peripheral factor in case
law. It is submitted that where a property is purchased at an under-value or received as a gift, a
recipient will rightly forego some protections due to the differing nature of the transaction. Therefore, it is contended that surgery is not required to remedy this perceived weakness.

In addition, the actual meaning attributed to ‘void’ for the purposes of the Act has given rise to some
debate and has proved to be a source of concern for conveyancers. On the basis of decisions such as
Bank of Ireland v Smyth, it appeared that, since the absence of requisite consent deprived the
lender of any interest, the word ‘void’ meant a conveyance had no effect. However, it could be
argued that this was not the case because the conveyance could only be declared void for lack of
consent at the instigation of the non-consenting spouse. This would suggest it is merely voidable
where the consent requirement is not met.

The importance of this distinction was of particular relevance when determining the validity of
subsequent transactions which were based on the mistaken belief that the original conveyances
post-1976 were completed with the requisite consent. The introduction of the six year time limit by
section 3(8) of the Family Home Protection Act 1976 as inserted by section 54(1)(b) of the Family
Law Act 1995 has, however, eliminated these difficulties. Consequently, it is submitted that the
potentially ‘draconian effect’ of section 3 has been tempered.

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207 (n 27).
208 ‘The Family Home Protection Act: The Practical Implications of Bank of Ireland v Smyth: Part I’ (n 34)
(emphasis original).
209 (n 27).
210 Barclays Bank Ireland v Carroll (n 36).
211 Casey and others (eds), Law Society of Ireland Manual: Conveyancing (n 5) para 6.2.2.
Finally, while the Supreme Court in *Bank of Ireland v Purcell*\(^\text{212}\) ‘dropped a heavy hint that it disapproved of the idea that judgment mortgages were not covered by the Family Home Protection Act 1976’,\(^\text{213}\) this appears to be the reality. Shatter explains the situation thus:

‘if a husband incurs business or other debts for which he is personally liable, while he cannot raise money to discharge such debts by mortgaging the home without his wife’s cooperation, where the debts are not discharged and a judgment is obtained against him for the money due, a judgment creditor may register the judgment against the husband’s interest in the home and then bring an application before the courts to seek an order for sale to enforce payment of the monies due to him out of the husband’s share of the proceeds realised from any such sale of the home.’\(^\text{214}\)

As a result, the ‘main deficiency’ of the legislation now concerns the law pertaining to judgment mortgages.\(^\text{215}\) Indeed, as long ago as 1985, the *Report of the Joint Oireachtas Committee on Marriage Breakdown* recommended ‘legislative action should be taken immediately in order to prevent the spirit of the [1976] Act being defeated whereby judgment mortgages can be used to secure the sale of the family home without the consent of either or both spouses’.\(^\text{216}\)

No action followed. In 2004, the Law Reform Commission’s *Consultation Paper on Judgment Mortgages* was published. It noted that while no specific statistical data was available, it seemed ‘reasonable to assume that a significant proportion of judgment mortgages’ are registered against family homes.\(^\text{217}\) In light of the difficulties in the area, it also recommended reform of the law governing judgment mortgages and the family home. Again, no legislative action was forthcoming.

Therefore the question arises: How vulnerable is an ‘innocent’ spouse in such circumstances and what can be done to make their position more secure? The decision in the aforementioned *First National Building Society v Ring* appeared to throw an important lifeline to vulnerable spouses by indicating that an order for sale may not automatically be made against the family home upon an application by a judgment creditor under the Partition Acts.\(^\text{218}\) However, the importance and the strength of the precedent afforded by *Ring* was a source of confusion.\(^\text{219}\) Indeed, it was considered

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\(^{212}\) *Bank of Ireland v Purcell* (n 20).

\(^{213}\) The Law Reform Commission, *Consultation Paper on Judgment Mortgages* (n 173) 49 (citation omitted).

\(^{214}\) Shatter (n 4) para 15.59


\(^{216}\) *Report of the Joint Oireachtas Committee on Marriage Breakdown* (Stationary Office 1985) 66.

\(^{217}\) Law Reform Commission, *Consultation Paper on Judgment Mortgages* (n 173) 49. It did note at 3-4 however that in 2003, 239 judgment mortgages were registered in the Registry of Deeds and 1540 were registered in the Land Registry. The paper noted, ‘Statistical evidence indicates that it is a widely used procedure.’ Presumably, the prevalence of judgment mortgages has increased considerably in the intervening years.\(^\text{218}\) (n 103).

\(^{218}\) One of the key shortcomings of the decision is the fact that the property in question was registered land. Therefore, the creditor in this case did not have *locus standi* to pursue an action for partition or sale. However, it seems this fact was over looked by Denham J. The fact that the judgment mortgagee over registered land in this case did not, under the former legislation, have the *locus standi* to seek to invoke the Partition Acts was recently noted in *Irwin v Deasy* [2004] IEHC 104; [2006] IEHC 25. Professor Mee argues that due to this ‘misapprehension’ of the nature of the partition and sale jurisdiction, the decision ‘does not establish a reliable precedent’. See John Mee, ‘Judgment Mortgages, Co-ownership and Registered Land’ (1999) 4 CPLJ 28. See also John Mee, ‘Partition and Sale of the Family Home’ (1993) 15 DULJ 78, 88-89. Moreover, as a result of this
by some academics to be contrary to the established practice under the Partition Acts. Nevertheless, Laffoy J again referred to *Ring* in the 2010 High Court decision of *Trinity College v Kenny* and distinguished the facts in *Ring* from the facts at hand in the present case. Considering an application seeking an order for sale of the family home pursuant to a judgment mortgage, the court found that the couple, in their seventies, would be in a position to purchase alternative accommodation for themselves with the balance of the proceeds of sale once the debt was repaid. The court also observed that the couple’s five adult children had all left home. Notwithstanding that there would be a ‘degree of disruption to their lives’, an order for sale was, therefore, granted.

The decisions in *Ring* and *Trinity College* appear to establish that where a family home is used as security, a judgment creditor is not conferred with an automatic entitlement to an order for sale of the property upon the registration of his interest in it. Whether such a request is granted, depends on the facts of the case. Moreover, it is suggested that, while the situations were by no means the same, such an approach is in keeping with the decision of *O’D v O’D* – an approach which appears to be preserved in the Land and Conveyancing Law Reform Act.

It is possible some doubts may still remain about the strength of the precedent in *Ring*. However, it is submitted that the introduction of the Land and Conveyancing Law Reform Act 2009, which repeals and replaces the Partition Acts, leaves the door ajar for the approach in *Ring* to be developed on more solid footing. On one hand it has been argued that the 2009 Act removes the framework for judicial discretion as previously existed under the Partition Acts 1868 and 1876 ‘and replaces it with an entirely open-ended regime where the co-owner has no certainty of being able to bring the co-ownership to an end and no criteria are mentioned to guide the court’ thereby affording the judiciary ‘untrammelled discretion’. While this is clearly a concern, on the other hand, it could present an opportunity for the positive development of the law in relation to judgment mortgages. As Conway notes:

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See above, 24-25, for discussion of the approach formerly applied under the Partition Acts. Denham J in *Ring* noted a lack of information as to the parties interested in the property, particularly the circumstances of the wife, the valuation of the property, the feasibility of sale or the ability of the wife to purchase the husband’s share of the home. Due to this lack of information, the impact of an order for sale could not be assessed and the court adjourned the proceedings with liberty to re-enter. In *Trinity*, Laffoy J noted, there was ‘no such dearth of evidence’.

This is acknowledged by Conway, *Co-ownership of land: Partition Actions and Remedies* (n 75) 343. It is also important to note that, even if a sale is ordered, an equitable co-owner does still enjoy some protection by virtue of s 52(2) of the Registration of Title Act 1964. This provides a transferee not for valuable consideration, such as a judgment mortgagee, is bound by any prior unregistered rights which bound the judgment mortgagor. Therefore, they will benefit from the proceeds of sale commensurate to the value of their beneficial interest.

*Ring* involved the interference of a creditor while the litigation in *O’D v O’D* was between the spouses. *O’D v O’D* (n 73). Both the actions in *Ring* and *Trinity College* were taken under the Partition Acts.

‘the new statutory jurisdiction under section 31 is more flexible than that under the Partition
Acts, where the court’s discretion was usually restricted to making an order for either
partition or sale and the difficulties formerly associated with the former remedy usually
created a strong presumption in favour of the latter. This may have some bearing on the
final outcome’. 228

Furthermore, it is contended the development of an approach akin to that adopted in *Ring* would
not be unduly unfair to third party creditors. In light of both the legislative and judicial development
of the law in this area, mortgagees who hold the family home as security ought to be acutely aware
of the high level of protection afforded to the family home. It is arguable that they ought to be alert
to the special nature of the property and the fact that it may constitute a riskier form of security in
comparison to other types of premises.

In considering methods of circumventing the difficulties posed by the lacuna in the 1976 Act where a
judgment creditor seeks an order for sale of a co-owned family home, Professor Mee raises an
interesting possibility. 229 He suggests that a judgment debtor could arguably avail of his right of veto
under the Family Home Protection Act 1976 where a judgment creditor, having obtained a court
order for the sale of the property, conveys the husband’s own share of the family home to a
purchaser and then requires the wife to also convey her interest in the home to the purchaser. This
conveyance by the wife, he argued, fell within the scope of section 3(1) of the 1976 Act and
therefore necessitated the prior written consent of the husband which he could, theoretically,
refuse. Mee explains that the ‘right of veto is a valuable, independent right. It arises in the husband,
not because of his own property rights over the home, but because of his wife’s ownership of a
share in the home.’ 230

In considering this possibility, Conway suggests that ‘while it seems wrong in principle’ that a spouse
who has incurred a debt precipitating the registration of a judgment mortgage against the family
home should be able to utilise a protection which was introduced with the intention of protecting an
‘innocent’ spouse, 231 this use of the Act would correlate with the ‘ethos’ of the legislation which is
focused on ensuring the protection of the family home. 232 Despite this view, it is submitted that even
where a husband refuses to give his consent in such a scenario, there is a high probability that the
court is likely to dispense with the consent under section 4 of the 1976 Act. 233

What is beyond debate is that where the family home is not co-owned either at law or in equity, the
non-owning spouse appears to be especially vulnerable to the registration of a judgment mortgage

228 Conway, *Co-ownership of land: Partition Actions and Remedies* (n 75) 343. Although she adds, ‘since the
normal methods of enforcement are not available to a judgment creditor whose security is restricted to one
coo-owners’ interest in the joint property, the court may also be aware that an order for sale of the home under
s 31 of the 2009 Act is the only effective method of allowing the creditor to recover the debt owed to him’.
229 ‘Partition and Sale of Family Home’ (n 219) 90-93. See also Mee ‘Judgment Mortgages, Co-Ownership and
Registered Land’ (n 219) 31-32.
230 ‘Partition and Sale of Family Home’ (n 219) 91.
231 *Co-ownership of Land: Partition Actions and Remedies* (n 75) 344.
232 ibid.
233 Conway acknowledges this is likely, ibid 345. See also *Trinity College v Kenny* (n 133) where the point was
raised though not decided. If the Law Reform Commission’s recommendations were implemented, this
difficulty would be dealt with effectively during the hearing upon the application for a court order.
and, in due course, a court order for the sale of the premises. \(^{234}\) What solutions can be presented? One obvious means of improving the situation for a potentially wide cohort of non-owning spouses is through reform of the purchase money resulting trust. If recognition was afforded to unpaid work in the home, this would allow many more spouses to avail of the precedent in \textit{Ring} where a judgment mortgage is registered against the family home. However, as de Londras observes:

\begin{quote}
‘To say that courts ought to step in and realise socio-economic rights—such as ownership rights for financially disenfranchised stay-at-home mothers and house-wives—\textit{is not}, as Gerry Whyte has noted, \textquoteleft\textquoteleft to say that they should be first into the fray. There are good institutional reasons why we should look initially to the legislative and executive branches for protection of such rights … the courts should only be used as a last resort, when it is clear that the political process is incapable of protecting the right in question\textquoteright\textquoteright.\(^{235}\)
\end{quote}

Shatter suggested the amendment of section 36 of the Family Law Act 1995 to provide that the contribution made by both spouses to the welfare of the family would be deemed a contribution in money or money’s worth capable of generating a beneficial interest in the family home. \(^{236}\) He also recommended that the ‘artificial distinction’ between contributions to the acquisition of property and the improvement of property should be removed. \(^{237}\) These recommendations did receive some support from the Law Reform Commission in its 2004 \textit{Consultation Paper on the Rights and Duties of Cohabitees}:

\begin{quote}
‘Shatter’s proposals are attractive in that they do not necessitate any radical change in the existing law. They also have the added advantage that third parties would not be unduly disadvantaged as it would be as difficult to predict whether an interest was acquired by means of unpaid work within the home as opposed to unpaid work outside the home. The interests of prospective purchasers or mortgagors could be protected by the creation of a new requisition on title dealing with the matter.’\(^{238}\)
\end{quote}

However, while these recommendations undoubtedly have merit, their implementation may create more problems than they would solve. First, despite Shatter’s claims to the contrary, the quantification and valuation of unpaid work in the home would be difficult. \(^{239}\) Second, the

\(^{234}\) Nevertheless, a court may, before the registration of a judgment, invoke s 5 in order to protect the family home on application by a non-owning spouse, see above 20-21 and 32.

\(^{235}\) De Londras (n 2) 215.

\(^{236}\) Shatter (n 4) para 15.209.

\(^{237}\) ibid. S 20 of the Matrimonial Home Bill 1993 did include such a provision for reform however this was not carried over in the Family Law Act 1995. Shatter noted, ‘There is no logical reason for this necessary reforming measure being omitted as it was not subjected to any constitutional criticism’. The need for such reform is even more pressing in light of the anomaly between improvements paid for in cash and those funded by a mortgage, see n 93.

\(^{238}\) (n 21) 49.

\(^{239}\) Shatter argued, ‘The courts have experienced no practical difficulties in applying such provision to the determination of applications for ancillary relief in judicial separation and divorce proceedings’. Shatter (n 4) para 15.209. Two arguments can counter this. First, this assertion was made in 1997, a time when marital breakdown legislation was in its infancy. In the intervening years it has become clear there is difficulty in ascribing value to work done in the home, see Chapters 4 and 5. Second, notwithstanding these difficulties, the problems of quantification would be even more acute under the purchase money resulting trust than under
recommendations would not assist spouses who made pre- or post-acquisition contributions. This was highlighted as a key weakness by the Law Reform Commission. As a result it noted, ‘While the rules governing the purchase money resulting trust could be amended to consider such contributions ... to do so would be to force property law to solve what is essentially a family law problem.’

Alternative solutions need to be considered. One approach which would avoid these weaknesses is the reintroduction of an amended version of the Matrimonial Home Bill 1993. Section 4 of the 1993 Bill provided that where a spouse was the sole owner of the matrimonial home on the commencement date, or became a sole owner thereafter, the beneficial interest in the property would vest in both spouses as joint tenants. However, the Supreme Court unanimously found the Bill to be unconstitutional as it infringed on the authority of the family. In particular, the retrospective application of the legislation proved to be its downfall.

Nevertheless, a number of academics have suggested that such legislation could be reintroduced without constitutional question provided its application is limited to prospective effect. Although this reintroduction would undoubtedly be a welcome improvement in the law, it would have to be part of a wider reform of matrimonial property law. As Woods notes:

‘If ... the reintroduced Bill only applied to a matrimonial home purchased by a spouse after the commencement date, it could be argued that this would unfairly discriminate against the non-owning spouse whose matrimonial home had been acquired before the commencement date.’

Therefore, the reintroduction of the amended Bill would have to be in conjunction with reform on the basis of Shatter’s proposals for the development of the purchase money resulting trust. Despite the respective weaknesses of both proposals, the combined effect of these reforms would certainly go a long way to overcoming the lacuna in the Family Home Protection Act which has arisen in relation to judgment mortgages.

Unfortunately, although de Londras notes it is ‘somewhat surprising’ that no government has proposed a community of property scheme since the failure of the Matrimonial Home Bill, it is unlikely whether such reform will, in fact, be forthcoming in the near future. The legislature seems to demonstrating signs of ‘Once bitten, twice shy’. Indeed, even if the proposals were introduced, not all non-owning spouses would be able to avail of the protection they afford.

the Family Law Act 1995 and 1996 as the proportionate interest principle would apply to the equitable remedy.

240 Law Reform Commission, Consultation Paper on the Rights and Duties of Cohabitees (n21) 49.
241 Re Article 26 of the Constitution & in the matter of the Matrimonial Home Bill, 1993 (n 19).
242 Woods notes, ‘One could assume that if the Bill was reintroduced without retrospective application, it would withstand constitutional scrutiny.’ See ‘The Matrimonial Home Bill 1993 — Should the Government Try Again?’ (n 89). See also de Londras (n 2) 221.
244 De Londras (n 2) 221.
245 For instance, where the couple were married before the introduction of the legislation, the amended legislation would not apply. If the unpaid contributions in the home were made before or after the acquisition of the property, such spouses would still be left without protection.
Alternative solutions must, therefore, be considered. To this end, Shatter once again comes to the rescue. Advancing a partial solution in 1997, both in cases of sole-ownership and co-ownership, Shatter proposed that, whether or not legal or equitable co-ownership exists, section 5 of the Family Home Protection Act could be modified to ensure the protection of the property against the registration of a judgment mortgage. He recommended the amendment of section 5 to facilitate court orders transferring the entire ownership or a share of it from one spouse to the other ‘without the applicant spouse having to prove that the spouse so behaving specifically intends that his or her conduct deprive the applicant spouse and/or dependent children of the family of their right to reside in the home’. 246

Although de Londras describes this requirement of intention as a ‘counterbalance’ to the ‘somewhat speculative nature of protecting against harm that has not yet accrued’, 247 it is contended that in circumstances where the family home is clearly in danger of being lost due to the actions of the owning spouse, the balance of fairness should weigh in favour of intervention. Therefore, it is submitted such law reform is particularly attractive and presents an effective solution on the simplest terms.

What if it is too late to get a section 5 order and a judgment mortgage has already been registered against the property? In such circumstances, it is submitted that the implementation of the Law Reform Commission’s 2004 Consultation Paper on Judgment Mortgages proposals would represent a fair solution. It recommended that to protect the interests of a non-owning spouse ‘no order for sale of a family home pursuant to a judgment mortgage should be possible unless the court so orders, having heard all the interested parties’. 248 In this manner, it proposed that the situation arising on the registration of a judgment mortgage would more closely mirror section 61(4) of the Bankruptcy Act 1988 which states:

‘Notwithstanding any provision to the contrary contained in subsection (3), no disposition of property of a bankrupt, arranging debtor or person dying insolvent, which comprises a family home within the meaning of the Family Home Protection Act 1976, shall be made without the prior sanction of the Court, and any disposition made without such sanction shall be void.’

It also recommended a principled approach to the exercise of the court’s discretion by laying down specific factors to which the court should have regard in determining whether to order a sale of the family home pursuant to a judgment mortgage. 249 Yet despite their apparent simplicity and

246 Shatter (n 4) para 15.209. He adds at para 15.99, ‘the court’s refusal in a number of cases to infer or impute the existence of the necessary intention on the part of the spouse to deprive the other spouse of a right of residence in the family home by an objective, rather than subjective, assessment of the former’s conduct, has diluted the protection that could be afforded to dependent spouses and could inhibit the courts from intervening to ensure the continued availability of a family home for a dependent spouse and children in circumstances in which such intervention may be desirable.’

247 De Londras (n 2) 195.


249 The factors included the financial means of both the judgment creditor, the non-debtor owner and the family of the non-debtor owner residing in the property; whether the sale of the property would generate sufficient funds to allow the non-debtor owner to purchase reasonably similar accommodation in the area; the
attractiveness, the proposals were not implemented by the provisions governing judgment mortgages included in the recent Land and Conveyancing Law Reform Act. 250

Two factors appear to have influenced this omission. First, it was considered that it would be more appropriate to deal with this issue by amending the Family Home Protection Act 1976. Second, it was considered that the 2004 Law Reform Commission’s proposals were merely contributions to a consultation paper and the provisional recommendations had not followed normal procedure and been firmed up into a report before the project leading to the 2009 Act began. 251 While the latter is, perhaps, a legitimate explanation, it could be easily overcome. However, the former excuse seems questionable. It is contended that extending the 1976 Act to include judgment mortgages is impractical. It is highly unlikely that a spouse would agree to the registration of a judgment mortgage and such a refusal to consent could hardly be regarded as unreasonable in light of the negative consequences which would flow from such an action. Indeed, the Law Reform Commission noted, ‘it appears to us that imposing such a requirement would render the judgment mortgage procedure unworkable’. 252 As de Londras states, ‘What seems to be needed ... is a protection measure for the spouse ... at the point of the proposed enforcement of the judgment mortgage, as opposed to at the point of its creation.’ 253

The recommendations of the Law Reform Commission ought, therefore, to be introduced as a matter of priority, particularly in light of the current economic turmoil. The combined effect of implementing Shatter’s proposal regarding section 5 and these recommendations of the Law Reform

amount of the judgment mortgage as a proportion of the value of the property; and the ability of the judgment debtor to provide reasonable alternative accommodation from the proceeds of sale, ibid 54-55. 250

However, from a procedural point of view, changes were introduced under s 116 of the 2009 Act. A judgment creditor may now apply to the Property Registration Authority for the registration of such a judgment using a new, simplified form of affidavit. The affidavit is then sworn and converted into a mortgage by filing the affidavit in the court where the judgment was obtained and in the Property Registration Authority. Once this occurs, a confirmation of registration of the judgment mortgage is sent to the respective parties. In addition, prior to the enactment of the 2009 Act, it was a matter of some confusion as to whether it was necessary to renew a judgment mortgage after five years. S 116 also clarifies this anomaly stating definitively that there is no requirement to re-register a judgment mortgage in order to maintain its enforceability against a purchaser of the land.

Moreover, under the law formerly applied, considerable differences arose in relation to the powers of enforcement open a judgment creditor depending on the status of the land (ie whether it was registered or not). The Land and Conveyancing Law Reform Act 2009 now ensures the uniformity of treatment of judgment mortgages across both registered and unregistered land. Once a judgment mortgage is registered, this operates to charge the judgment debtor’s estate or interest in the land with the judgment debt and entitles the judgment mortgagee to apply to the court for an order under s 31 or s 117 of the 2009 Act. S 30(3) also now provides that in the case of a joint tenancy there is no severance where the estate or interest of one joint tenant has a judgment mortgage registered against it, irrespective of whether the land in question is registered or unregistered. Therefore, if the joint tenancy remains unsevered the judgment mortgage will be extinguished on the death of the judgment debtor.

I am most grateful to Mr. Seamus Carroll, Principal Officer, Department of Justice for his welcome insight. Any errors are my own.

Consultation Paper on Judgment Mortgages (n 173) 53.

De Londras (n 2) 354. She notes that s 117 of the Land and Conveyancing Law Reform Act 2009 provides a judgment debtor can make an application for sale and distribution of proceeds. She adds at 354-355, ‘it is to be expected that (as has, in fact, long been the practice) the court would take into account the fact that the property is a family ... or shared home when deciding whether and, if so, on what conditions to make any such order.’ However, this is only of benefit to co-owning spouses.
Commission would go a long way to providing much needed protection for non-owning spouses where a judgment mortgage is registered against the family home.

1.7 Conclusion

In relation to enactments which restrict the unilateral disposition of the family home, it is clear that, although the danger against which they guard ‘is not as serious as it used to be, [it is] by no means eliminated’. In this regard, it is clear the Family Home Protection Act 1976 provides substantial protection to the family home and is vastly superior to the Land (Spouse Protection) Act 1996 applied in British Columbia. While the 1976 Act does not confer a proprietary interest in the property on the non-owning spouse, merely providing a statutory right to veto any conveyance thereof, as Geoghegan J noted in the High Court, the rights conferred on a spouse under the Act ‘are very important quasi proprietary rights, even if they are not ownership rights’. Indeed, in considering the nature and degree of the proprietary protection conferred on the non-owning spouse in relation to the family home by virtue of the Family Home Protection Act 1976, Fox notes, ‘Family property policy in relation to the protection of the family home against creditors in Ireland has engendered a system which is narrow in its scope, but which provides a substantial or “deep” protection for spouses.’ In particular, the absence of a requirement for registration renders the protection of considerable value to all non-owning spouses in Ireland.

In general, therefore, the Family Home Protection Act 1976 continues to operate effectively and the courts have adopted a pragmatic and common sense approach to ensuring that it succeeds on a practical level in protecting vulnerable spouses vis-à-vis the family home. Nevertheless, although the success of the legislation should be acknowledged, minimal tweaking of the provisions would further strengthen the legislation and would reap considerable rewards in eliminating the perceived areas of weakness inherent in the current regime.

As Fox notes, ‘By safeguarding the home itself against the claims of third parties, the Family Home Protection Act 1976 reflects the fact that the reality of the spouses’ interests in the property, particularly in disputes with creditors, is usually to “hang on to the home”’. In this regard, unfortunately, difficulties have arisen in relation to judgment mortgages. However, where the family home is co-owned, the precedent afforded by First National Building Society v Ring provides some hope for those who can avail of it. Nevertheless, non-owning spouses are especially vulnerable. It is contended that the amendment of section 5 of the 1976 Act, as proposed by Shatter, presents a deceptively simple yet particularly attractive solution. It is submitted that such reform would go some way to ameliorating the protections available to non-owning spouses who fear the registration of a judgment mortgage over the family home. Where, however, a judgment mortgage has already been registered over the family home, the implementation of the Law Reform Commission’s 2004

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255 Bank of Ireland v Smyth (n 27).
256 Fox, ‘Creditors and the Family Home: Three Perspectives on Family Property Policy’ (n 13) 8.
257 ibid. Fox adds, ‘This outlook also dovetails with the idea of respect for the home included in Article 8 of the European Convention on Human Rights.’
258 First National Building Society v Ring (n 103).
proposals would ensure fairer treatment of the non-owning spouse where the judgment creditor seeks an order for the sale of the family home.

Let us now move to the other end of the relationship spectrum and consider the legislative protections afforded to the family home on death.
Chapter Two
Succession and the Family Home: The Law in Practice

2.1 Introduction

While almost everyone will, at some point in their lives, come into direct and personal contact with the legal provisions which regulate family property on death, this area of Irish law has generated relatively little attention compared to other matrimonial property issues. Elsewhere, the impact of succession law in this area is also often overlooked. As Shapo noted in 1993:

‘The intellectual history of family law over the past thirty years features vehement disagreements over the proper roles of support and property division at divorce. By contrast, analogous issues in succession law have inspired surprisingly little controversy.’¹

In relation to the Irish position, Professor Binchy noted as far back as 1984, ‘There has been little public discussion in recent years of the policy of giving surviving spouses substantial entitlements in relation to the property of deceased spouses.’² Unfortunately, in the interim, this trend has continued. It is this writer’s contention that the provisions of the Succession Act 1965 dealing with the property entitlements of the surviving spouse should be reviewed to assess their effectiveness in securing the protection of the family home following the death of the owner spouse.³ It is of fundamental importance that Irish legal scholars and the Irish legislature do not become complacent in our approach to succession law but rather retain an open mind to possible avenues for improvement.

Across the globe, a huge variety of systems are applied to regulate spousal property rights on death and to protect the family home. Moreover, various common law jurisdictions including British Columbia,⁴ Alberta,⁵ England and Wales,⁶ Scotland⁷ and New South Wales⁸ have recently placed their respective laws of succession under the spotlight. The resultant body of discussion papers, consultation papers and reports is useful to any scholar endeavouring to identify and analyse the

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³ As Albert Keating noted in the preface to the third edition of Keating on Probate (3rd edn Roundhall 2007), ‘the Succession Act may have to be re-visited to take account of modern realities’.
⁴ British Columbia Law Institute, Wills, Estates and Succession: A Modern Legal Framework (BCLI Report No 45–2006). The report subsequently resulted in the Wills, Estate and Succession Act 2009 which, although enacted, has not yet fully commenced, see below, 70.
main strengths and weaknesses of our succession law regime while seeking viable methods of improving it.\(^9\)

This chapter first sets out the historical context for the law which currently prevails in Ireland before discussing the overriding social policy objectives which the system seeks to implement. It then applies the respective succession law regimes of Ireland and British Columbia to the case study. The results demonstrate that while both jurisdictions are based on the same English, common law, tradition, British Columbia nevertheless offers certain interesting and sometimes significant differences in approach to both testate and intestate family provision pursuant to the Wills, Estate and Succession Act 2009.

2.2 Succession Law in Ireland

2.2.1 The Historical Development of Succession Law in Ireland

The history of the law of succession in Ireland has, as Professor Wylie notes, been rather ‘chequered’.\(^{10}\) Under the feudal system of tenure which was applied in the British Isles, intestate succession prevailed. Although testamentary dispositions originally developed under Roman law, a devise of land was not possible in Ireland until 1634. Instead, landowners availed of the use to make a devise of property.\(^{11}\) With the introduction of the Statute of Uses (Ireland) 1634, however, it was felt this function of the use would be adversely affected and thus the Statute of Wills (Ireland) was introduced in the same year to directly facilitate testamentary bequests.\(^{12}\)

Under the original Roman law of wills, testamentary freedom was subject to the rules of *legitima portio*. This represented a share of the estate which could be claimed by a disinherited spouse or child. Despite this precedent, when wills were introduced into the English system, this legal portion did not form part of the law. Indeed, Minister Lenihan, in discussing the Succession Bill in 1965, noted, ‘Complete freedom of testation is a peculiarly English idea which, apart from England and Wales, is only to be found in countries forcibly brought under British rule.’\(^{13}\) Thus, parity between Irish and English succession law was brought about by section 10 of the Irish Statute of Distributions 1695 which Brady notes ‘abolished the so-called “Custom of Ireland” by which one-third only of one’s property was disposable by will’.\(^{14}\) Henceforth, in Ireland, testators enjoyed unfettered

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\(^{11}\) For example, if a landowner X wanted to make a devise of land to Y this could be achieved by conveying the property to Z to the use of the landowner X for life, remainder to the use of Y in fee simple.


testamentary freedom and were not bound by any legal or statutory requirements to make provision for a spouse or child; the only claims on their estate were those relating to pre-existing debts, funeral and testamentary expenses.

Distribution on intestacy continued to be subject to certain established rules. The descent of realty was governed by the Inheritance Act 1833 which gave statutory recognition to the common law of inheritance, based on the principle of primogeniture. These rules provided for the lineal descent of an intestate’s realty to his heir and, in the identification of the heir, males were preferred to females and where two or more males possessed an equal degree of relationship to the intestate, the eldest was preferred. As a result, females could only inherit where no male heir existed.

The common law scheme of intestate succession did, nevertheless, provide for surviving spouses through the common law rights of dower and curtesy. A widow was entitled to the right of dower which provided her with a life estate in one third of the fee simple or fee tail estate of the deceased, excluding any part of the estate disposed of inter vivos or by will. This protection was given legislative status with the Dower Act 1833. However, a caveat was included which prevented a widow from claiming dower if it had been barred by her husband through a declaration in a deed or in his will. The right of dower only applied where the birth of issue was possible, even if it had not yet occurred. By contrast, the right of curtesy, or, more properly, a tenancy by the curtesy of England, entitled widowers to a life estate in the whole of the real estate of his deceased wife which had not been disposed of inter vivos or by will, provided that issue of the marriage capable of inheriting the land had already been born alive.

Gradually, legislative reforms were introduced which endeavoured to provide greater protection to a surviving spouse where the deceased spouse died intestate. On intestacy, where the deceased died leaving a spouse and issue, the Statute of Distributions (Ireland) 1695 ensured the surviving spouse took one-third of the personal estate with the remaining two-thirds being distributed between the children. Where the deceased died leaving only a surviving spouse, they were entitled to one-half of the intestate’s personal estate. Almost two hundred years later, the law was reformed by the Intestate Estates Act 1890. The 1890 Act provided that the real and personal estate of an intestate, leaving a surviving spouse and no issue, passed to the surviving spouse absolutely if the value did not exceed £500. Where this value was exceeded, the surviving spouse was entitled to a first charge for £500, at a rate of 4% interest, coupled with a half share in the remainder. This value was adjusted

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15 Moreover, settlements often incorporated a fee tail male whereby the land was entailed to male descendents ensuring the closest male relation would inherit instead of daughters. For more, see Wylie, *Irish Land Law* (n 10) 919-926.
16 Dower and curtesy only arose in connection with a fee simple or fee tail and did not apply to leasehold land, life estates or joint tenancies. In addition, the rights only arose where the deceased spouse was seized of the land or entitled in possession to an equitable interest.
17 See Wylie, *Irish Land Law* (n 10) 292-293. See also Brady (n 14) from para 8.08. Dower and curtesy were abolished in Ireland by s 11(2) of the Succession Act 1965.
18 However, a married woman’s ability to dispose of property was seriously curtailed prior to the introduction of the Married Women’s Property Act 1882.
19 Where any of the children had already died leaving issue, their issue took their parent’s share equally.
20 This share of the remainder was to be applied in a manner akin to a situation where the remainder was the whole estate and the 1890 Act did not exist. For more, see Wylie, *Irish Land Law* (n 10) 922.
upwards over time and under the Intestates’ Estates Act 1954 the surviving spouse became entitled to £4,000, or the whole estate if worth less.  

2.2.2 The Succession Act 1965 – Main provisions

Today, the law in this area has changed dramatically through the introduction of what is known as the legal right share and more generous provision for surviving spouses on intestacy. Continuing the ancient tradition of the Brehon laws and similar to the forced heirship provisions of continental Europe, a testator’s freedom of disposition is now tempered in Ireland.

Pursuant to section 111, where a testator leaves a spouse and no children, the surviving spouse has a right to one-half of the entire estate. Alternatively, where the testator leaves a spouse and children, the spouse is entitled to one-third of the estate. These provisions will apply unless the married couple had voluntarily renounced the share to which they are entitled as a legal right in an ante-nuptial agreement or in writing after marriage and during the lifetime of the testator. However, if a renunciation was not voluntary but rather obtained by force, fear or fraud, or if the spouse did not have the mental capacity to appreciate the nature of a renunciation it may be set aside by the courts. Likewise, it may be set aside under the rules of contract if the renunciation was obtained under duress, undue influence or fraud, or through lack of capacity or fairness of the transaction.

Moreover, while a testator is not obliged to make provision for his children, section 117 allows a child to apply to the court for ‘proper provision’ where the court is of opinion that the testator has failed in his moral duty to make such provision for them. The court shall consider the application ‘from the point of view of a prudent and just parent.’ Finlay CJ held in CC v WC, ‘a positive failure in moral duty’ to make ‘proper provision’ must be established. To this end, Keating notes, ‘Whatever the nature of the moral duty, there is a relatively high onus of proof placed on the applicant child to establish a positive failure in moral duty by the testator.’

In light of these provisions, ‘a considerable restraint on an individual’s testamentary freedom’ now exists. It was accepted that the rights which a testator enjoys, allowing them to dispose of their property as they wish, are less important than their duties to make proper provision for their families. Consequently, a testator must afford due consideration to obligations arising in respect of their spouse and children when drafting their will.
The Succession Act 1965 also introduced a new scheme of distribution on intestacy which dramatically improved the situation of surviving spouses. Section 67 now states that where an intestate dies leaving a spouse and no issue, the spouse is entitled to the whole estate. On the other hand, where an intestate dies leaving a spouse and issue, the spouse takes two-thirds of the estate. Furthermore, to prevent non-testamentary dispositions which have the effect of disinheriting a spouse or children, the legislation also includes anti-avoidance provisions.

Finally, recognising the importance of the family home, the Irish legislature enacted measures specifically directed at securing this property for the surviving spouse. Section 56 states that, subject to certain restrictions, where the estate of a deceased person includes a dwelling in which, at the time of the deceased's death, the surviving spouse was ordinarily resident, the surviving spouse may require appropriation of the home in or towards satisfaction of any gift under the will, legal right share or share on intestacy to which they were entitled. Section 55(2) which forbids an appropriation being made which would prejudice any specific devise or bequest does not apply where application for an appropriation is made under section 56. Moreover, pursuant to section 56(8)(b)(a), the personal representative cannot sell or dispose of the dwelling as long as the right under section 56 continues to be exercisable, except in circumstances where it is the only asset of the deceased. However, where it is sold, a surviving spouse cannot rely on section 56 against the new purchaser.

No definition of ‘appropriation’ is included in the 1965 Act. However, it is generally considered to refer to the act of devoting or segregating certain property for a particular purpose, person or use. The term ‘dwelling’ is defined in section 56(14) as

‘an estate or interest in a building occupied as a separate dwelling or a part so occupied, of any building and includes any garden or portion of ground attached to and usually occupied with the dwelling or otherwise required for the amenity or convenience of the dwelling.’

This definition was considered in Hamilton v Armstrong. O’Hanlon J allowed the appropriation of a dwelling and a five acre field in satisfaction of a surviving spouse’s legal right share. The plot of land was not considered a ‘garden’ nor used for ‘amenity and convenience’. However, it did hold the septic tank and piped water for the house and, as a result, was considered ‘attached’ to the land. Although the decision appears to represent good law, it has been subject to criticism for attributing ‘too a wide definition to “dwelling” as defined in the Act.’

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28 The remainder will be distributed among the issue subject to s 67(4) which states if all the issue are in equal degree of relationship to the deceased the distribution will be in equal shares among them; if they are not, it will be per stirpes.
29 See s 121 of the Succession Act 1965 discussed below, 90.
30 S 56(1) states: ‘Where the estate of a deceased person includes a dwelling in which, at the time of the deceased’s death, the surviving spouse was ordinarily resident, the surviving spouse may ... require the personal representatives in writing to appropriate the dwelling under section 55 in or towards satisfaction of any share of the surviving spouse.’ The legislation further provides for situations where the share of the surviving spouse is less than the value of the home, see ss 56(9) and 56(10) discussed below, 79-80.
Finally, the right to appropriate the family home is subject to certain restrictions pursuant to sections 56(5) and 56(6) of the Succession Act 1965. These restrictions arise, in circumstances where:

(a) where the dwelling forms part of a building, and an estate or interest in the whole building forms part of the estate; 
(b) where the dwelling is held with agricultural land an estate or interest in which forms part of the estate; 
(c) where the whole or a part of the dwelling was, at the time of the death, used as a hotel, guest house or boarding house; 
(d) where a part of the dwelling was, at the time of the death, used for purposes other than domestic purposes.\(^{33}\)

The appropriation of such family homes will only take place where the court is satisfied that the appropriation is unlikely to diminish the value of the assets of the deceased, other than the dwelling, or to make it more difficult to dispose of them in due course of administration.\(^{34}\) It is widely accepted that these restrictions ‘will cover very many dwellings in Ireland’.\(^{35}\)

### 2.3 The Succession Rights of a Surviving Spouse in Context

Before discussing the law as it currently stands, it is necessary to make some preliminary points and place the succession rights of a surviving spouse in context. First, what provisions apply will depend upon whether the deceased made a will or died intestate. In Ireland, both situations, though giving rise to different rules, are governed by the Succession Act 1965.

An intestate death is not always the result of an individual simply failing to make a will. A will may be made with the intention of disposing of an estate but found to be invalid, due to a failure to comply with the formalities set out by section 78 of the Succession Act 1965 or if the testator was held to have been mentally incapable of making a will or under the undue influence of another party. Alternatively, a will may be revoked by marriage, unless the will was made in contemplation of that marriage.\(^{36}\) Finally, it is possible that an individual may choose to rely on the intestacy provisions as they may reflect their desire for the distribution of their property. Unfortunately, no figures were available at the time of writing to determine the current proportion of intestate deaths in Ireland. However, it is believed that the figure is not insignificant.\(^{37}\)

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\(^{33}\) S 56(6) of the Succession Act 1965.  
\(^{34}\) S 56(5)(b) of the Succession Act 1965.  
\(^{36}\) S 85 of the Succession Act. See *The Goods of Leslie Goode* (HC July 1986) and *Re Fleming* [1987] 7 ILRM 638. This also now applies to civil partnerships under s 79 of the Civil Partnership and Certain Rights and Obligations Act 2010, see Albert Keating, ‘Wills Made in Contemplation of Marriage or Civil Partnership’ (2012) 17(3) CPLJ 49.  
\(^{37}\) In March 2010, the Community Foundation for Ireland released a report entitled ‘Realising the Power and Potential of Charitable Bequests in Developing Irish Philanthropy’ <www.foundation.ie/images/uploads/file/Realising%20the%20Power%20and%20Potential%20of%20Charitable%20Bequests.pdf> accessed 11 October 2011. The report states that according to research undertaken for Irish charities in 2006, 30% of adults have made a will. While the figure increased to 50% for those in the 45-64 age group, the research also showed that only 20% of those over 65 had made a will. This, in effect, means that those who need a will most are least likely to have one. More recent research showed the overall figure of adults possessing a will increasing to 32% in 2008 and to 36% in 2009.
Second, while specific protections are available under the Succession Act to a surviving spouse vis-à-vis the family home, the reliance which a surviving spouse will place on these provisions varies depending on the way in which title to the property is held. Assuming the surviving spouse is not the sole owner, the second most secure position for a surviving spouse arises where the family home is held by the spouses as co-owners. In this regard, the highest level of protection arises in the case of a joint tenancy due to the right of survivorship which ensures that the deceased’s interest passes automatically to the surviving, co-owning, spouse. While there is a lack of statistical information detailing the way in which title to the family home is held in Ireland, it is presumed that the joint tenancy represents the most prevalent form of co-ownership. Moreover, the introduction of section 30 of the Land and Conveyancing Law Reform Act 2009 has made it more difficult to convert this form of shared ownership into a tenancy-in-common with the abolition of unilateral severance.

In all other circumstances, the protections afforded under the Succession Act by the legal right share, the share on intestacy and the right to appropriate the family home are of much greater importance. While it is probably less common, a family home may be held by spouses as tenants-in-common. Upon the death of a tenant-in-common, the deceased’s interest in the property will fall into their estate to be distributed under their will or the rules governing intestacies. Assuming the deceased’s interest is not left to the surviving spouse, the legal right share or share on intestacy may, in such circumstances, secure the family home for the surviving, co-owning, spouse. Where it is not sufficient, the surviving spouse may nonetheless combine their newly acquired interest with their own share as a tenant-in-common in order to mount an arguably stronger challenge to an application for the sale of the family home brought pursuant to section 31 of the Land and Conveyancing Law Reform Act 2009 by a beneficiary who acquired the deceased’s share under his or her will.

Breathnach also recently undertook research to explore testamentary behaviour in Ireland from 1904-1964 noting a ‘consistently high level of intestacy’ in the period. See (n 10) 309. Likewise, on the introduction of the Succession Bill in 1964 Minister Lenihan noted that half of all deaths resulted in intestacies. See Dáil Deb 15 December 1964, vol 213, col 1066. The Law Commission for England and Wales produced Intestacy and family provision claims on death: a consultation paper (n 6) and note at para 1.4 a ‘great many people’ die intestate in England and Wales. However, exact figures were not provided. In Scotland, Barr notes, ‘As most people die intestate, the rules on intestacy are of vital practical importance’. See Alan Barr, ‘Reform of the law of succession: a view from practice’ (2010) 14(2) Edin LR 313, 314. Similarly, the Scottish Law Commission’s Report on succession (n 7) refers at 11 to research which found that only 37% of Scots had made a will but that this increased to 69% of those aged 65 or over (citation omitted).

In England, research has shown that the public often believes that the surviving spouse receives the family home pursuant to succession law rather than the rules of survivorship, see the Law Commission for England and Wales, Intestacy and Family Provision Claims on Death: A Consultation Paper (n 6) para 3.47. Legal co-ownership between spouses by means of a joint tenancy is particularly popular among new homeowners, see above, 23.

See Woods, ‘Unilateral Severance of Joint Tenancies – The Case for Abolition’ (n 9) who puts forward the case in favour of abolition, while for a contrary view, see John Mee, ‘The Land Conveyancing Law Bill 2006: Observations on the Law Reform Process and a Critique of Selected Provisions—Part II’ (2006) 11(4) CPLJ 91. However, as s 31 of the 2009 Act, which now replaces the Partition Acts 1868 and 1876, does not offer the court guidance as to how the jurisdiction to order a sale or partition should be exercised, it is not possible to
While most family homes are likely to be purchased jointly by a married couple today, sole ownership by one spouse remains a possibility. There remains an important, vulnerable and often forgotten segment of society for whom legislation conferring protection in relation to the family home remains of fundamental importance. While the continued relevance of the Family Home Protection Act 1976 in preventing inter vivos unilateral dispositions of the family home was discussed in Chapter 1, it is also important to bear in mind that the growth in co-ownership of the family home over the past decades primarily protects younger generations, while many middle-aged and older individuals, for whom succession law is of more direct relevance, remain in traditional situations where the family home is in the sole name of one spouse, usually the husband. In these circumstances, the rights conferred by the Succession Act 1965 on the surviving spouse, including the right to appropriate the family home, remain of paramount importance.

2.4 Rationale for the Succession Rights of Spouses

To fully assess the need, if any, for the reform of the succession rights of spouses an important question must be addressed: What was the overriding social objective of the relevant provisions of the 1965 Act?

A communitarian agenda was certainly in the mind of the legislature when formulating the legislation. Indeed, the introduction of the Succession Act 1965 was surrounded by a whirl of communitarian rhetoric. Minister Lenihan noted:

‘I am firmly of the opinion that, in the case of a spouse, the provision of a legal right to a specific share, irrespective of dependency, is the only system compatible with the true nature of the obligations and responsibilities that bind husband and wife. Under this system, the spouse will be entitled to a share which is just and equitable having regard to his or her status as a member of the family.’

say, with any degree of certainty, how the judiciary would approach such an application and an order for sale could still be made irrespective of the size of the share held by the surviving spouse. See above, 25 and 51.

Moreover, due to the current economic turmoil and rising unemployment rate, the need to protect spouses who are not homeowners also needs to be considered. While, the right of survivorship provides considerable protection for a surviving spouse where a joint tenancy exists, the need for legislative protection on death is heightened where the family home is in the sole name of one spouse or the couple do not own property. Indeed, while Ireland does have high homeownership levels, the rate of homeownership has fallen considerably since the early 1990s to 73.7% in 2009. Ireland was placed 17th out of 27 Eurozone countries for rates of homeownership in recent figures produced by Eurostat. See Anna Rybkowska and Micha Schneider, ‘Housing Conditions in Europe in 2009’ (Eurostat Report) COM (2010) 758 final <http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-004/EN/KS-SF-11-004-EN.PDF> accessed 23 June 2012.

Dáil Deb 14 July 1965, vol 59, col 415. For an overview of Minister Lenihan’s justifications for interfering with freedom of testation, see Brady (n 14) 211-212.
On another occasion the Minister stated, ‘I envisage that the position will be somewhat the same as in France where husband and wife, in the absence of a pre-marriage contract, own their own property in common’. However, it is clear that these provisions of the Succession Act do not represent the functional equivalent of a community property regime and the real driving force behind the legislation was a desire to protect surviving spouses against disinheritance. The evidence for this conclusion is overwhelming.

First, if communitarianism was the driving force behind these provisions of the Succession Act 1965, surely the legislature would have sought to introduce a community property system which would vest matrimonial property rights in a spouse during their lifetimes as well as on death. Instead, no further effort to introduce communitarian legislation was forthcoming until the failed Matrimonial Home Bill 1993 some 28 years later. Second, if these provisions of the Succession Act were principally designed to incorporate communitarian values into Irish matrimonial property law, presumably the share to which the surviving spouse should be entitled would be one-half, regardless of the existence of children, and the property over which it should be exercisable would be limited to family assets? Third, if the goal was the introduction of a community property system, logically, the legal right share should vest automatically rather than being subject to an election in the majority of cases. Finally, under a community property approach the deceased spouse should also be entitled to a share in the family assets held by the surviving spouse.

Historically, inheritance legislation was introduced as part of a policy to prevent people becoming wards of the state upon the death of the financially stronger spouse. It is submitted that the objective of ensuring adequate financial support for the surviving spouse continues to be the primary goal behind such provisions today. Nevertheless, the fact that communitarian principles were implemented to a greater or lesser degree was undoubtedly a conscious decision. Indeed, as Buckley states, the legislation ‘was clearly based on both communitarian and constitutional

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45 Dáil Deb 2 December 1964, vol 213, col 349. While this may have been Mr. Lenihan’s vision, it never reached fruition.
46 In many community property jurisdictions, a community fund is formed on marriage which operates inter vivos. Alternatively, a deferred community of property regime ensures a community of property arises on the termination of marriage, either by death or divorce. Such an approach is adopted in Germany and in many states of the USA.
47 While communitarian rhetoric was also relied upon with the introduction of the Family Home Protection Act 1976, it did not give spouses an inter vivos interest in the property, merely a right of veto, see Chapter 1.
48 See s 115 of the Succession Act 1965 which states where there is a devise or a bequest under a will, the surviving spouse may elect to take the devise or bequest under the will or their legal right share. Where no election is made, the surviving spouse will take under the will. A devise or bequest may also be chosen in partial satisfaction of the legal right share.
49 See previous discussion of the historical context of succession law, in particular the emergence of dower and curtsey considered above, 62. Willis notes, ‘Inheritance law serves not only to facilitate donative intention but also to minimise society’s social welfare burdens and to alleviate hardship.’ See (n 27).
50 It is widely accepted that the policy under which a system of entitlement to a fixed share of an estate on death is implemented, in non-community property jurisdictions, is the protection of the surviving spouse from disinheritance. This was noted by Alan Newman, ‘Incorporating the Partnership Theory of Marriage into Elective Share Law: The Approximation System of the Uniform Probate Code and the Deferred-community-property Alternative’ (2000) 49 Emory LJ 487, 493.
principles.\textsuperscript{51} The communitarian rhetoric was also in line with modern views of partnership and evolving social standards.

Moreover, in light of the fact that women live longer than men on average and generally earn less money, if any, the principal public policy concern was, and presumably continues to be, the financial support of surviving wives.\textsuperscript{52} Referring to the development of intestate protection in England for a surviving spouse, Professor Fleming explains:

‘The predominant concern for the surviving spouse has little to do with women’s liberation, but much with the importance of an independent home for the widow, amidst housing shortage, the vanishing sense of responsibility by children to support their aged parents and, most important of all perhaps, the substantially increased life expectancy of people over the last one hundred years.’\textsuperscript{53}

In a similar vein, albeit in relation to the Uniform Probate Code, Professor Brashier notes:

‘[D]espite the recent tendency of scholars to reclassify the forced share as an acknowledgment of marriage as an economic partnership, case law involving the forced share indicates that most courts still perceive the predominant purpose of the share to be that of protection: the surviving spouse should not be left impecunious if disinherited by the decedent.’\textsuperscript{54}

Finally, an associated policy linked to the provision of financial support for the surviving spouse is also evident in the Succession Act 1965. This is the protection of the family home for the surviving spouse achieved through the inclusion of a right of appropriation by section 56 of the Succession Act 1965.\textsuperscript{55} While there are important restrictions on this right of appropriation which have undoubtedly weakened its effectiveness, it nonetheless has the potential to be fundamentally important in the protection of the surviving spouse.\textsuperscript{56} Thus, while undoubtedly communitarian principles are evident in the legislation this does not mean that the legislation was solely or even primarily the result of a

\textsuperscript{51} Lucy-Ann Buckley “‘Proper Provision” and “Property Division”: Partnership in Irish Matrimonial Property Law in the wake of T v T’ (2004) 3 IJFL 9, 10. In light of the protection afforded to mothers and the family in general under Article 41, the Minister argued such constitutional protection is irreconcilable with a system which allowed a man to disinherit his wife.

\textsuperscript{52} However, the law is placed in gender neutral language and all rights are reciprocal between husband and wife.


\textsuperscript{54} Ralph C. Brashier, ‘Disinheritance and the Modern Family’ (1994) 45 Case W Res L Rev 83, 151-152. By contrast, however, Kenny J in \textit{Re GM v TAM} (1972)106 ILTR 82 stated that unlike the English, New Zealand or New South Wales legislation which were based on a duty to provide maintenance, the Succession Act was premised on the notion that a testator has a duty to leave some of their estate to their spouse.

\textsuperscript{55} This policy of protecting the family home is also evident in the Family Home Protection Act 1976 and, more indirectly, in the overriding status attributed to the equitable interest of a person in ‘actual occupation’ of registered land pursuant to s 72(1)(j) of the Registration of Title Act 1964.

\textsuperscript{56} Moreover, the provision of s 56(10)(b) of the Succession Act 1965 where, if the value of the home exceeds the legal right share or share on intestacy, the court may waive the payment due to the estate in light of the hardship which meeting the shortfall would cause, again points to financial support being the predominant force behind the legislation rather than communitarianism. These issues will be looked at in greater detail below.
policy of communitarianism or partnership. It is submitted that the overriding aim of the legislation was the protection of the surviving spouse against disinheritance.

2.5 General Outline of Succession Law in British Columbia

Recognising the fragmented and ‘unusually archaic’ nature of British Columbian succession statutes and aware that the legislation governing succession law was last comprehensively reviewed in 1920, the British Columbia Law Institute recently undertook a three year review of the law governing succession within the province. Following this review, the Wills, Estate and Succession Act 2009 was enacted on September 24, 2009, which aimed to modernise succession law in British Columbia and to make it more user-friendly. However, it is important to note that, although enacted, a commencement order is awaited for the 2009 Act.

Testamentary autonomy remains paramount under the Wills, Estate and Succession Act 2009 and, unlike the situation pursuant to the Succession Act 1965, a system of forced heirship does not exist in favour of the surviving spouse. Nevertheless, a surviving spouse or child may apply to the court to make ‘adequate, just and equitable’ provision for them. In this regard, the applicant must establish that the will does not make ‘adequate provision’ for their ‘proper maintenance and support’.

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57 British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework* (n 4) ii.
58 The Institute subsequently produced a comprehensive report on succession law reform, ibid. The Attorney General Wally Oppal then introduced the Wills, Estate and Succession Act Bill into the Legislative Assembly in April 2008.
59 The new Act, described as an omnibus statute, repeals and replaces the Estate Administration Act, the Probate Recognition Act, the Wills Act, and the Wills Variation Act. The 2009 Act succeeds in reducing the number of separate acts involved in Estate Law from seven to one.
60 As noted in *Clucas v Clucas Estate* [1999] CanLII 267 (BC SC) [12] per Satanove J: ‘In the absence of other evidence a Will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the person and institutions closest to him.’
61 S 60 of the Wills, Estate and Succession Act 2009 as amended by s 23 of the Wills, Estate and Succession Amendment Act 2011 states: ‘Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court’s opinion, make adequate provision for the proper maintenance and support of the will-maker’s spouse or children, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker’s estate for the spouse or children.’ This effectively replicates the provision formerly found in the Wills Variation Act 1996.

In order to avail of the power of the court to vary a will, a surviving spouse must commence an application within 180 days from the date the representation grant is issued, see s 61 of the 2009 Act. S 63 furthermore states the court may ‘refuse to make an order in favour of a person whose character or conduct, in the court’s opinion, disentitles the person to the benefit of an order under this Division.’

In relation to an earlier version of the legislation, namely the Wills Variation Act 1979, Amighetti suggested, ‘The jurisprudence indicates that the purpose of the Act has become nebulous.’ He added, ‘it is difficult to state with any degree of certainty whether the Act is truly remedial “to provide proper maintenance for dependants” or whether, as in his opinion, it is “a diluted and whimsical form of heirship”.’ See Leopold Amighetti, *The Law of Dependents’ Relief in British Columbia* (Carswell 1991) 28.

It was recently noted in British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework* (n 4) xvi that the principles on which the relief is based are ‘heavily influenced by the law of matrimonial property’. For a consideration of the impact of marital breakdown legislation on the succession rights of spouses, see Chapter 4.
support’. Following a review of the situation, the court may then vary the will in order to make such provision for them. Thus, although the legislation does not create a proprietary right in the deceased’s estate, it nonetheless ‘confers a broad discretion on the court’ to restrict a testator’s freedom. Unfortunately, unlike similar legislation in other jurisdictions, the court is afforded no statutory guidance on the factors which should be considered in determining how this discretion should be exercised.

The ‘definitive judgment’ in relation to the identical provisions set out by the Wills Variation Act 1996 was delivered by the Supreme Court of Canada in *Tatarayn v Tatarayn Estate*. Developing the judicial principles first enunciated in *Walker v McDermott*, McLachlin J in *Tatarayn* explained the approach of the court in deciding whether or not to vary a will and to what extent. Recognising that a court must attempt to balance testamentary autonomy with the testator’s legal and moral obligations, McLachlin J explained:

‘In many cases, there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is

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62 An objective test of this standard was employed under the Wills Variation Act 1996, see *Cucas v Cucas Estate* (n 60) [12]. This will presumably continue under the 2009 Act.

63 At the time the original legislation in this regard was introduced in 1920, namely the Testators’ Family Maintenance Act 1920, the Attorney General stated the Act was ‘one of the links in the Governments chain of social welfare legislation’ which would ‘tend towards the amelioration of social conditions within the province’ as quoted in *Tatarayn v Tatarayn Estate* [1994] CanLII 51 (SC C), [1994] 2 SCR 807 at 813. This appears to indicate that the legislation was intended to meet economic need. However, in light of *Walker v McDermott* [1930] CanLII 1 (SC C), [1931] SCR 94 the legislation varying wills ‘has been interpreted in a much more expansive fashion, acting, in effect, as a means of preventing disinherirtance’. See British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework* (n 4) 56. See also Gordon Bale, ‘Palm Tree Justice and Testator’s Family Maintenance–The Continuing Saga of Confusion and Uncertainty in BC Courts’ (1987) 26 ETR 295.

64 *Tatarayn v Tatarayn Estate* (n 63). Although made in reference to the Wills Variation Act 1996, it presumably applies equally to the 2009 Act.

65 In England, s 3 of the Inheritance (Provision for Family and Dependents) Act 1975, which operates a similar regime based on judicial discretion, directs the court to have regard to 8 statutory factors.


67 (n 63). This judgment will presumably continue to shape the interpretation of the new legislation in this regard as the 2009 Act essentially replicates the wording of the 1996 Act.

68 (n 63). This decision first discussed the enforcement of the moral obligations of spouses noting that the court must ‘proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty’. For more on *Walker v McDermott*, see Amighetti (n 61) 32-36.

69 Here, in *Tatarayn*, the court established a ‘standard analytical approach which the courts of British Columbia are faithfully following’. See Cameron Harvey, *The Law of Dependents’ Relief in Canada* (Carswell 1999) 21. For a more in depth analysis of the moral obligations of parents to children, see 22-24.
the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires.\textsuperscript{70}

She added:

‘If the phrase “adequate, just and equitable” is viewed in light of current societal norms, much of the uncertainty disappears. Furthermore, two sorts of norms are available and both must be addressed. The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society’s reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is ‘adequate, just and equitable’ in the circumstances of the case.’\textsuperscript{71}

It is submitted this interpretation with its reference to the legal obligations of an individual gives tacit recognition and effect to the spouse’s prima facie entitlements under the Family Relations Act 1996 which applies on divorce.\textsuperscript{72} As a result, a surviving spouse could arguably expect to receive, at least what they would have gained if the marriage was dissolved while both spouses were alive, specifically a one-half share in the family assets.\textsuperscript{73} This equation of the minimum reasonable provision at death with financial provision at divorce is now an important element in the protection of a surviving spouse in British Columbia. However, a statement to the effect that regard must be had by the courts to the entitlements under the Family Relations Act 1996 has not been included in the Wills, Estate and Succession Act 2009 in keeping with the approach of the British Columbian legislature not to fetter the judiciary with statutory guidelines.\textsuperscript{74}

If a surviving spouse or child is successful in their application for ‘adequate, just and equitable’ provision, the court is empowered under section 64 to order provision in the form of a lump sum, a

\textsuperscript{70} Tataryn v Tataryn Estate (n 63) (emphasis added).
\textsuperscript{71} ibid (emphasis added).
\textsuperscript{72} It should also be noted that the Family Relations Act 1996 will soon be repealed and replaced by the Family Law Act 2011. The 2011 Act will considerably affect the assets available for distribution on divorce in many cases. As a result, there could be important knock-on consequences for provision under the Wills Variation Act 1996 or the Wills, Estate and Succession Act 2009 once commenced. For more on these changes, see Chapters 4 and 5.
\textsuperscript{73} British Columbia Law Institute, Wills, Estates and Succession: A Modern Legal Framework (n 4) 56 and 57. This is of course subject to the size of the estate and other legitimate claims on it. The report notes at 57 that moral obligations involve an assessment of what an astute person would do having regard to the ‘contemporary community standards’. See also James J. MacKenzie, Feeney’s Canadian Law of Wills (4th edn Butterworths 2000) para 9.16.
\textsuperscript{74} By contrast, s 3(2) of the Inheritance Act 1975 in England states: ‘[I]n the case of an application by the wife or husband of the deceased, the court shall also, unless at the date of death a decree of judicial separation was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a degree of divorce’.

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periodic or other payment, a transfer of property or a creation of a trust. Where the court orders a periodic payment or investment of a lump sum under a trust, these orders are then subject to cancellation, variation or suspension under section 71.

On intestacy, British Columbia also adopts an approach quite different to that which currently applies in Ireland. Instead of a fixed fractional share of the entire estate, the provision made on intestacy is based on a fixed Canadian dollar amount. This is known as the preferential share. If the estate of the deceased exceeds the preferential share, the surviving spouse and children are entitled to a fraction of the remainder. However, while the approaches to intestate provision are clearly different, as in Ireland, the position of the surviving spouse is seen as paramount with the British Columbian legislature recognising ‘the need to secure the position of a surviving spouse who may well be advanced in years at the time of the intestate’s death’. Indeed, under the new Wills, Estate and Succession Act 2009 the rights of a surviving spouse have been ‘significantly enhanced’. To this end, the preferential share was dramatically increased. The increase in the fixed dollar amount from $65,000 to $300,000 was precipitated by the change in the value of money and the increase in

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75 The inclusion of a power to transfer property was new to the 2009 Act. S 7 of the Wills Variation Act 1996 had provided for a lump sum or a periodic or other payment. Harvey had questioned whether ‘other payment’ included ordering a specified property transfer, however, he was unable to provide an answer. See (n 69) 181.

76 S 71 of the 2009 Act as amended by s 26 of the Wills, Estate and Succession Amendment Act 2011 states: ‘If the court has ordered periodic payments, or that a lump sum be invested for the benefit of a person, the court may (a) inquire whether, at any subsequent date, changes in the circumstances of the person in whose favour the order was made have resulted, in whole or in part, in the person’s entitlement to adequate provision separate from the order, and (b) cancel, vary or suspend its order, or make another order.’ Under the 2009 Act as originally framed, this ability to vary an order also extended to all orders made under s 60 including orders for the transfer of property.

77 This fixed Canadian dollar amount and share of the remainder only arises where the deceased leaves a spouse and descendents. Under s 20, where the deceased dies intestate leaving only a spouse, the surviving spouse will take the entire estate.

78 British Columbia Law Institute, Wills, Estates and Succession: A Modern Legal Framework (n 4) xvii. Likewise, in England and Wales, the Law Commission noted: ‘that the intestacy rules should give primacy to the interests of a surviving spouse, at least where the deceased left a relatively modest estate’. See Law Commission for England and Wales, Intestacy and family provision claims on death: a consultation paper (n 6) para 3.63. In justifying the increase of the statutory legacy in 1993 it was noted the increase would ‘provide additional protection for a surviving spouse in order to enable him or her in the great majority of cases, where the size of the intestate’s estate permits it, to remain in the former matrimonial home and to have a sufficient surplus on which to live’, as quoted in Stephen M. Cretney, ‘Reform of Intestacy: The Best we can do?’ (1995) 111 LQR 77, 82-83 (citation omitted).

Interestingly, in British Columbia, calls were recently made for a proposed reform allowing for variation of the preferential share on intestacy on the basis of need. The British Columbia Law Institute, Wills, Estates and Succession: A Modern Legal Framework (n 4) 58 noted, ‘Dependants relief legislation applies to intestacies in all Canadian jurisdictions other than British Columbia and Nova Scotia. While dependents relief orders appear to be made rarely in intestacies, variation of the intestate distribution scheme in a case of need is consistent with the purposes of the legislation. It is also perverse to allow dependants relief legislation to be avoided by deliberately dying intestate, in the knowledge that the resulting distribution would be unjust and could not be varied. Part 5 (Dependants Relief) of the proposed Wills, Estates and Succession Act would extend to intestacies.’ However, such reform was not introduced in the 2009 Act.

79 British Columbia Law Institute, Wills, Estates and Succession: A Modern Legal Framework (n 4) xvii.

80 Prior to the introduction of the 2009 Act provisions regarding intestate estates were located in the Estate Administration Act 1996. The 1996 Act provided for a preferential share of a mere €46,291 ($65,000) based on CAD$1 = €0.712 as provided by <www.xe.com> accessed 10 August 2011.

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property values in British Columbia in the period since 1983 when the preferential share was last set. In establishing the new figure, reference was made to typical estate values in British Columbia and ‘contemporary social standards that favour a generous provision of an estate for the surviving spouse’. 

Unlike the approach in Ireland, a distinction is made on intestacy between the position of a surviving spouse who is also the parent of all the deceased’s children and the position of a surviving spouse who is a step-parent to any surviving children of the deceased. The preferential share of $300,000 only applies if all of the deceased’s descendents are common descendents of both the deceased and the surviving spouse. If all the deceased’s descendents are not common to the intestate and their spouse, the preferential share of the surviving spouse is $150,000. Finally, the 2009 Act increases the spousal share of the remainder of the estate from one-third where there are children to one-half in all circumstances. The remaining one-half will be distributed equally among the children. Furthermore, the preferential share is not reduced in the event of partial intestacy, even where the surviving spouse has received some benefit under the will.

As in Ireland, special provisions apply in relation to the family home in British Columbia. Indeed, Conway and Girard explain ‘[i]t is in the post-mortem context that there is the most variation between provinces with regard to the treatment of the matrimonial home’ in Canada. Pursuant to the 2009 Act, where a spouse dies intestate, or dies testate but fails to dispose of the family home, a surviving spouse may chose to have the family home appropriated to satisfy their preferential share on intestacy. Moreover, akin to the Succession Act 1965, in order to ensure the effectiveness of
this provision, the 2009 legislation prohibits the disposition of the family home, otherwise than by will, pending the exercise of the right of appropriation.\textsuperscript{89}

The 2009 Act also deals with the issues which may arise where the surviving, non-owning, spouse’s entitlement to a share of her deceased’s estate is less than the value of the home. However, some differences emerge between the two jurisdictions on this point. First, as in Ireland, section 31 of the Wills, Estates and Succession Act 2009 affords the non-owning spouse an opportunity to purchase the remainder of the owning spouse’s interest. Alternatively, the surviving spouse may apply to the court to make further orders to secure the family home. In this regard, the court may make any of the following orders:\textsuperscript{90}

\begin{itemize}
  \item[a)] vesting the same interest in the spousal home in surviving spouse that the deceased spouse had;
  \item[b)] specifying the amount of money the surviving spouse must pay to the descendants towards satisfaction of their interest in the estate;
  \item[c)] converting the remaining unpaid interest of the descendants in the intestate estate into a registrable charge against the title to the surviving spouse’s interest in the spousal home.\textsuperscript{91}
\end{itemize}

While the courts are undoubtedly afforded considerable power in this regard, they may only exercise their discretion if certain conditions are fulfilled.\textsuperscript{92} While some of the conditions are essentially procedural in nature,\textsuperscript{93} one of the key requirements is the need to satisfy the court that "entitled, but for section 96, to a share in the distribution of the spousal home, if it is shown that any land contiguous to the spousal home could not reasonably be regarded as contributing to the use and enjoyment of the spousal home as a residence, the court may decrease the size of the parcel of land that devolves to and becomes vested in those persons by law beneficially entitled to it under s 96.’ In addition, all household furnishings devolve to the surviving spouse under s 96(2)(b) of the Estate Administration Act 1996. Under the 2009 Act the statutory life estate is abolished as it is ‘perceived to create valuation problems’, ‘overcomplicate the administration of intestacies’ and renders the family home ‘unmarketable in reality’. See British Columbia Law Institute, \textit{Wills, Estates and Succession: A Modern Legal Framework} (n 4) xvii, 9. It was also noted in the 2006 report at 9 that s 96 did not state whether the spousal share of an intestate estate should be calculated exclusively or inclusively of the value of the family home or the intestate’s interest in it.\textsuperscript{89}

S 28 of the Wills, Estate and Succession Act 2009 states: ‘A personal representative must not, without the written consent of the surviving spouse, dispose of the spousal home during the 180 days after the date on which the representation grant is issued or for any period of time extended ... unless assets other than the spousal home are not sufficient to pay the debts and liabilities of the estate and a mortgage or charge on the spousal home would not raise sufficient money to pay those debts and liabilities.’ \textsuperscript{90}

S 33 of the Wills, Estate and Succession Act 2009.

The court may, pursuant to s 33(2)(d), determine an interest rate, as that term is defined in s 7 of the Court Order Interest Act, or at any other rate the court considers appropriate, for the amount the descendants are entitled to when implementing this subsection. Moreover, the court are empowered under s 33(2)(e) in determining the value of the registrable charge referred to in paragraph (c) ‘to include the principal amount owing to the descendants entitled to share in the intestate estate or that part of the estate that is to be treated as an intestate estate and the expected value of the future interest that will be earned under paragraph (d)’. Ss 34 and 35 elaborate further on the impact of a registrable charge and the consequences where it falls due.

See s 33(1) of the Wills, Estate and Succession Act 2009.

These include the requirement that the surviving spouse is ordinarily resident in the spousal home at the time of the deceased person’s death; that the assets in the estate are not sufficient to satisfy the interests of all descendants entitled to share in the intestate estate or that part of the estate that is to be treated as an
purchasing the spousal home under section 31 would impose ‘significant financial hardship’ on the surviving spouse.\textsuperscript{94} Moreover, if the intestacy provisions apply the surviving spouse must establish that, in all the circumstances, a greater prejudice would be imposed on them by being unable to continue to reside in the spousal home than would be imposed on the descendants entitled to share in the intestate estate\textsuperscript{95} by having to wait an indeterminate period of time to receive all or part of their share.\textsuperscript{96}

Finally, where the family home is devised to a third party, the importance of the protection afforded by the Land (Spouse Protection) Act 1996 comes to the fore. If the surviving spouse has made an entry on the title of the home under the 1996 Act, they are entitled to receive a life estate in the family home irrespective of the disposition.\textsuperscript{97}

\textbf{2.6 The Succession Rights of Spouses: A Case study}

In order to effectively demonstrate the practical implications of the relevant provisions of the Succession Act 1965 for a surviving spouse vis-à-vis the family home, and compare them with those arising pursuant to the Wills, Estate and Succession Act 2009, let us again turn to the Kelly family.

\textbf{2.6.1 The Kelly Family}

Mr. and Mrs. Kelly were married in 1987. They have four children ranging in age from 12 to 20 years old. While the two eldest children are in college, the younger two children are engaged full time in secondary school education and are living at home. Mrs. Kelly, a promising photographer employed full-time with a local newspaper, gave up work after the birth of her first child and has dedicated herself to her life in the home ever since. Mr. Kelly has a successful career as a senior sales assistant in a second hand car dealership in rural Ireland. He also inherited a small family farm of approximately 20 acres from his father who passed away in 1985 which was worth approximately €80,000 at the time of his marriage to Mrs. Kelly. Mr. Kelly continues to farm the land on a part-time basis. Mr. Kelly earns on average €35,000 net income per annum from these two sources. In 1988, Mr. Kelly

\textsuperscript{94} S 33(1)(c) of the Wills, Estate and Succession Act 2009.
\textsuperscript{95} Or that part of the estate that is to be treated as an intestate estate.
\textsuperscript{96} Pending the introduction of the legislation, no case law has as yet been generated. Despite this, many commentators eagerly await judicial commentary in relation to the latest legislative initiatives to gain an insight into the real-world application of the new measures, particularly in relation to the standard to be met in demonstrating ‘significant financial hardship’.
\textsuperscript{97} S 4(1) of the Land (Spouse Protection) Act 1996, as amended by s 226 of the Wills, Estate and Succession Act 2009, states if an entry has been made on the title of the family home under s 2, ‘s 162(1) of the Wills, Estate and Succession Act applies to the devolution of the homestead.’ S 162(1) relates to the devolution and administration of the estate stating: ‘Unless there is a right to land by survivorship, on the death of the land owner, land devolves to and is vested in the deceased owner’s personal representative in the same manner as personal property.’ S 4(2) of the Land (Spouse Protection) Act 1996 then adds, ‘Despite any testamentary disposition or rule of law and subject to the liability of the land comprising the homestead for foreclosure or the payment of debts, a personal representative holds the homestead in trust for an estate for the life of the surviving spouse’.
constructed the family home on a site adjoining the farm yard with the aid of a mortgage. The house was completed in 1990. The home is currently worth approximately €180,000 and title to the property is held exclusively in Mr. Kelly’s name. The mortgage was redeemed a number of years ago and Mr. Kelly made all the mortgage repayments.

In a shocking turn of events, Mr. Kelly has died suddenly. As well as being deeply distraught about the loss of her husband, Mrs. Kelly realises she also has practical matters to consider. She is unsure whether or not her husband has made a will and is concerned that she may be required to leave the family home.

Summary of Mr. Kelly’s Assets:

<table>
<thead>
<tr>
<th>Asset</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>20 Acres @ €10,064</td>
<td>€201,280</td>
</tr>
<tr>
<td>Farm equipment</td>
<td>€50,000</td>
</tr>
<tr>
<td>Family Home</td>
<td>€180,000</td>
</tr>
<tr>
<td>Personal savings</td>
<td>€20,000</td>
</tr>
<tr>
<td><strong>Total Value of Estate</strong></td>
<td><strong>€451,280</strong></td>
</tr>
</tbody>
</table>

2.6.2 Mr. & Mrs. Kelly, Galway, Ireland

If Mr. Kelly died testate, making no provision for his wife, Mrs. Kelly has certain fixed property rights which cannot be defeated by the will. These provisions will apply unless renounced by the spouses in an ante-nuptial agreement, see n 23.

2.6.2 Mr. & Mrs. Kelly, Galway, Ireland

If Mr. Kelly died testate, making no provision for his wife, Mrs. Kelly has certain fixed property rights which cannot be defeated by the will. Thus, Mrs. Kelly has a right to one-third of the estate valued at approximately €150,426. If Mr. Kelly has made provision for Mrs. Kelly in his will, and died totally or partially testate, Mrs. Kelly may elect to take either that devise or bequest or her legal right share. If no election is made, Mrs. Kelly will take under the will. Alternatively, if Mr. Kelly chose to leave nothing to Mrs. Kelly in his will, or if there is a legacy or devise expressed to be in addition to her legal right share, the legal right share, similar to a share arising on intestacy or an interest arising under a will, will vest automatically upon Mr. Kelly’s death. Moreover, this legal right share...
is more privileged than the devises or bequests contained in the will as it stands next in priority following the payment of funeral and testamentary expenses and the discharge of all debts owing and due, and must be discharged before the distribution of the estate amongst the beneficiaries.\textsuperscript{104}

If Mr. Kelly died intestate, a different scheme of distribution will apply. Mrs. Kelly shall take two-thirds of the estate valued at approximately €300,853, while the remainder shall be distributed equally between the children with each receiving €37,606.\textsuperscript{105} If Mr. Kelly made a will which effectively disposed of only part of his estate, the remainder would be distributed as if he had died intestate and left no other estate.

If Mrs. Kelly decides to take her legal right share or share on intestacy, the personal representative or administrator intestate must determine the method of fulfilling that share. The personal representative has complete discretion in this regard and they cannot, in general, be compelled to appropriate any specific property.\textsuperscript{106} One crucial exception to this general rule exists, however.

The legislature, recognising the importance of securing occupation of the family home for a surviving spouse, introduced measures allowing the surviving spouse to require the appropriation of the family home under the Succession Act 1965. Pursuant to section 56, even if the home was in the sole ownership of Mr. Kelly and devised to a third party, Mrs. Kelly may seek the family home to be appropriated in or towards satisfaction of her share of Mr. Kelly’s estate since appropriation may still take place despite being prejudicial to specific devises or bequests in the will. In this regard, Mrs. Kelly’s share which may be satisfied by such an appropriation could be a gift under the will, her legal right share or a legacy to which she is entitled under the rules of intestacy. Moreover, the personal representative has a duty pursuant to section 56(4) to notify Mrs. Kelly in writing of the right conferred by this section. Section 56(5)(a) Succession Act 1965 states that Mrs. Kelly has six months from the receipt of notification of this right from the personal representative or one year from the first taking out of representation of the deceased's estate, whichever is the later, in which to exercise the right to require appropriation of the family home.\textsuperscript{107}

Although it is clear Mrs. Kelly would have ample provision on intestacy to secure the home, where a will exists, the legal right share of €133,332 would be insufficient to appropriate the family home at its current valuation of €180,000.\textsuperscript{108} Where, as in this case, the share to which she is entitled is not sufficient to meet the value of the home, section 56 provides Mrs. Kelly with three options:

under a will or a share arising on intestacy and thus arose in the same way on the death of the testator. However, see also \textit{Re Urquart} (n 22) where it was held in the Supreme Court by Walsh J at 215 that the legal right could be described as a ‘statutory offer which is not binding upon the surviving spouse until it is accepted’.\textsuperscript{104}

\textsuperscript{104} S 112 of the Succession Act 1965. Furthermore, the legal right share cannot be affected should the children make a successful application under s 117 for discretionary provision. See below, 79.

\textsuperscript{105} S 67(2) of the Succession Act 1965.

\textsuperscript{106} S 55 of the Succession Act 1965.

\textsuperscript{107} Spierin (n 35) 174 notes, ‘a spouse ... will not be prejudiced by the failure of the personal representatives to perform their duty, and the rights will remain for so long as this duty remains unfulfilled.’ In \textit{Re Hamilton’s Estate} [1984] ILRM 306, O’ Hanlon J held that once a surviving spouse requires the personal representatives to appropriate the dwelling, it is immaterial that they die before the appropriation is complete.

\textsuperscript{108} If she wishes to have the family home appropriated in favour of her legal right share, the valuation date is the date of the exercise of that appropriation. See \textit{Strong v Holmes} [2010] IEHC 70, discussed below, 90.
a) Mrs. Kelly may meet the difference of €29,574 by paying money into the estate.\(^{109}\)

b) If the children under 21 years of age are beneficiaries under the will and Mrs. Kelly is a trustee for them for such shares as they are entitled to, this may be added to her legal right share in order to appropriate the home.\(^ {110}\) If no provision is made for the children under the will, they may apply for ‘proper provision’ to be made out of the estate, although, such provision is at the discretion of the court under section 117.\(^ {111}\) If successful, any beneficial share of an infant child (provided Mrs. Kelly was appointed trustee) could be added to Mrs. Kelly’s legal right share to reach the value required to appropriate the home.\(^ {112}\)

c) Mrs. Kelly may apply to the court to waive the payment due to the hardship which meeting the shortfall would cause.\(^ {113}\)

Where Mrs. Kelly does not have the financial resources to pay the shortfall into the estate or cannot add her children’s beneficial share of the estate to her own, she would therefore be forced to instigate litigation in the hope that the court would waive the payment. However, this may not present an attractive prospect. First, in light of the dearth of reported judgments arising from such applications, Mrs. Kelly would not have any firm basis on which to assess the potential success of her claim and, therefore, might be reluctant to litigate. Second, considering the high costs which would result from the instigation of legal proceedings, such a course of action could be perceived as quite a gamble having regard to her precarious financial position. While Mrs. Kelly does have a right to apply to the court to waive the payment of the shortfall, in seeking what is essentially further provision from the estate, she could seriously deplete what limited financial protection she has if

\(^{109}\) S 56(9) Succession Act 1965. However, considering the size of the shortfall and Mrs. Kelly’s position as essentially an unpaid housewife for the past 25 years, this may not be a viable solution.

\(^{110}\) S 56(3) Succession Act 1965 states the right to appropriation may be exercised in respect of the share of any child for whom the spouse is a trustee under s 57.

\(^{111}\) Subject to the limitation that any provision for a child cannot affect the legal right share, upon application by the Kelly children, where the court is of the opinion that Mr. Kelly has failed in his moral duty to make proper provision for them in accordance with his means, the court may order that such provision shall be made for the children out of the estate ‘as the court thinks just’.

\(^{112}\) While the Act is silent on the issue, Spierin believes that where s 56(3) is invoked: ‘The spouse … will presumably … hold as trustee upon trust for himself and any infants concerned as tenants in common, in proportion to their respective contributions. The status of the spouse … as a trustee for an infant beneficiary, where the interest of the infant has been appropriated under this section, should not be overlooked in practice.’ See Spierin (n 35) 169. By contrast, Brady argues, ‘since the main thrust of the section is to secure the place of the surviving spouse in the family home and such infant will invariably have succession rights to the estate of the surviving spouse, it is unnecessary to give such infant a share in the family home at the time of its appropriation under s 56.’ See (n 14) 222. While it is submitted it is not ‘invariable’ that such a child will receive the benefit on the death of the surviving spouse, since in the case of testacy a child does not have a right to any provision from a parent’s estate but will be compelled to apply under s 117, it is nonetheless probable that in most cases they will receive a share from the survivor’s estate on their death. However, in the case of stepchildren and second families, the danger of a child being excluded from sharing in the ultimate devolution of the estate is arguably greater.

\(^{113}\) S 56(10)(b) of the Succession Act 1965.
unsuccessful. As a result, if Mrs. Kelly decides not to take such a risk, she will be forced to secure alternative accommodation using the legal right share of €150,426.

It should be noted that an informal solution to this problem is sometimes availed of by legal practitioners faced with the difficulties arising where the legal right share is worth considerably less than the value of the family home. In order to avoid the inordinate delays involved in probate litigation, deeds of family arrangement, also known as deeds of variation, may be entered into for up to two years after the deceased’s death and may be employed to rewrite a will. Where difficulties arise regarding the appropriation of the family home, the deed may often provide a surviving spouse with a life estate in the property. Nevertheless, while this may appear to provide some protection for Mrs. Kelly, two principal weaknesses are inherent in this essentially ‘man-made’, non-legislative, remedy. First, such a deed is only a possibility if the agreement of all the beneficiaries is forthcoming. Where such agreement cannot be attained, deeds of family arrangement may not be employed to solve the problem. Secondly, under section 18 of the Land and Conveyancing Law Reform Act 2009, a life estate is now converted into an equitable interest. In light of section 21, a conveyance of the home to a purchaser by two trustees would overreach the life estate, whether or not the purchaser has notice of the equitable interest, and it would instead attach to the proceeds of sale. Thus, it is clear that the protection afforded by the life estate through such deeds is far from comprehensive.

Unfortunately, even if Mrs. Kelly is entitled to a sufficient share of the estate to cover the value of the family home, she faces a further hurdle which could prevent her from appropriating it in satisfaction of that share. As Mr. Kelly’s estate encompasses a farm on which the family home is built, Mrs. Kelly’s right to require appropriation of the home is subject to a restriction, irrespective of whether she is availing of her entitlement to a gift, legal right share or share on intestacy. As a result, the right may not be invoked by Mrs. Kelly unless the court is satisfied on application that its exercise is unlikely to diminish the value of Mr. Kelly’s assets, other than the dwelling, or to make it more difficult to dispose of them.

The restriction imposed on the appropriation of farmhouses was considered in H v H. The surviving spouse applied to the court for an order under section 56 appropriating the family home in partial satisfaction of her legal right share. The dwelling was located on a farm of some 113 acres. It was argued by the respondents that such an appropriation would diminish the value of the rest of

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114 While Elliot v Stamp [2008] IESC 10 is authority for the proposition that the court will usually award costs to an unsuccessful litigant who challenges a will provided there was a reasonable ground for the litigation and it was conducted bona fide, this is at the discretion of the court. As a result, Mrs. Kelly cannot assume she would be awarded costs. It is arguable that where the legal right share is small, a surviving spouse is less likely to risk it by instigating legal proceedings thereby creating a vicious circle of sorts.

115 For examples of deeds of family arrangements, see Irish Conveyancing Precedents (Bloomsbury Professional, Issue 33), Precedent J.2.4 to J.2.5.

116 That is, where she is availing of the share on intestacy or where she is in a position to meet the difference in value between the legal right share and the value of the family home using one of the methods discussed above.

117 S 56(5)(b) of the Succession Act 1965 above 65.

118 [1978] IR 138. For analysis of this decision, see Brady (n 14) 224-226.

119 The plaintiff was entitled to one-half of the estate and the appropriation of this dwelling and some personal chattels would partially fulfil this entitlement.
the land. The Supreme Court found against the applicant spouse. It held that she had failed to prove that the appropriation would not adversely affect the value of the assets other than the dwelling and would not make it more difficult to dispose of them.

The court made three observations which may be relevant to a court considering an application by Mrs. Kelly. It held that the onus of proof rests with the applicant; the reference to assets of the deceased other than the dwelling concerns all assets, including those passing to a spouse who has exercised their legal right to one half of the estate; and the court must be satisfied that neither the diminishment of value or increased difficulty of disposing of the assets are likely to happen.

The case law in this area is not consistent, however. In the immediate aftermath of the decision in *H v H*, the Supreme Court approved an appropriation in similar circumstances in *H v O*. The estate in question comprised two ‘easily identifiable and severable’ plots of land. One of the plots contained the dwelling house. The main beneficiary under the will sought to prevent the appropriation of the family home and desired instead that both plots would be sold as single unit. The surviving spouse could be paid her legal right share in cash from the proceeds. The main argument posed against appropriation was that the value of receiving one of the plots would be worth less than receiving a half share in the proceeds of a sale if the plots were sold as a single unit. However, having heard evidence from land valuers, the court held the applicant spouse should receive the family home and approximately half the land with the main beneficiary under the will receiving the other plot of land. Despite this, it is arguable that *H v O* may be distinguished due to the severable nature of the plots. Whether this would also be a feature of the Kelly family farm is unclear. Nevertheless, it appears that the actual layout of the farm could be influential in whether Mrs. Kelly is successful in her claim for appropriation of the farmhouse.

The farm could also pose further problems for Mrs. Kelly in satisfying a share on intestacy. Mrs. Kelly is entitled to a share of the estate worth €300,853 under the rules of intestacy. However, even if she is permitted to appropriate the family home, it is only valued at approximately €180,000. Therefore, she is entitled to a further share of the assets to the value of €120,853. In such circumstances, where an estate is composed exclusively of land and the appropriation of the dwelling does not fulfil the share to which the surviving spouse is entitled as a legal right, problems can arise as to the composition of the shortfall. McDonald notes that if the personal representative utilises his general discretion under section 55, other assets sufficient to meet the balance of the legal right share may be appropriated. However, if this option is not availed of, it may be necessary to apply to the court to invoke its equitable jurisdiction under section 56(10) to resolve the fulfilment of the shortfall.

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120 It was not suggested by the executor that the lands, or any part of them, would be required to be sold in order to ensure administration of the estate.
121 [1978] IR 194. This case was commenced in the High Court the same day as Kenny J gave his judgment in *H v H* (n 118).
122 ibid per Henchy J.
123 ibid.
124 See McDonald (n 32).
125 ibid.
In addition, the right to appropriate provided by section 56 only applies to a dwelling in which the surviving spouse was ‘ordinarily resident’ at the time of the deceased’s death. If Mrs. Kelly had moved out of the family home prior to the death of her husband, for instance due to domestic violence, the right to appropriate will not be open to her, even if she had previously been entitled to a half share as a tenant-in-common. If Mr. Kelly left his share to a third party, his successor could apply for an order for the sale of the property under section 31 of the Land and Conveyancing Law Reform Act 2009. As Mrs. Kelly has no right to appropriate his successor’s share of the home under section 56, it is possible that an order for sale would be granted and she would lose her right to re-occupy the family home. However, as orders pursuant to section 31 are at the discretion of the court, it is also possible that in the circumstances such an order for sale would be refused. How exactly the judiciary will exercise the discretion which they are afforded under the 2009 Act remains to be seen.126

2.6.3 Mr. & Mrs. Kelly, Vancouver, British Columbia, Canada

The law of succession in British Columbia shows marked differences from the scheme applied in Ireland. The difference in the approaches is most striking in the law governing testate succession. In this regard, unlike the certainty provided by the legal right share under the Irish legislative regime, if Mr. Kelly dies testate in British Columbia, Mrs. Kelly appears to be in a much more precarious position.

If Mr. Kelly wishes to leave the family home to a third party and leave his wife completely out of his will, it is his prerogative to do so. However, this testamentary freedom is subject to two important caveats: the right to apply for discretionary provision from Mr Kelly’s estate and, provided Mrs Kelly has made an entry on the title pursuant to the Land (Spouse Protection) Act 1996, she is entitled to a life estate in the family home.

While Mrs. Kelly does not benefit from a statutory share of her deceased husband’s estate, the Wills, Estates and Succession Act 2009 does permit her to take positive action and claim relief against the terms of the will at the discretion of the court. She may apply to the court to make ‘adequate, just and equitable’ provision for her.127 In this regard, Mrs. Kelly must establish that, objectively, the will does not make ‘adequate provision’ for her ‘proper maintenance and support’.128 If she is successful in this application, the court may make such provision for her. However, while it is some consolation for Mrs. Kelly that she may appeal against the harshness of the will, unlike similar legislation in other jurisdictions, the court is afforded no statutory guidance on the factors which should be considered in determining how this discretion should be exercised.

126 To avoid such difficulties, it is submitted that the definition of a ‘family home’ for the purposes of the Succession Act 1965 should be amended to correspond with the definition applied under the Family Home Protection Act 1976 which defines a family home as including a dwelling in which the spouse ordinarily resided before leaving the other spouse, see s 2(1) of the Family Home Protection Act 1976.
127 S 60 of the Wills, Estate and Succession Act 2009 as amended by s 23 of the Wills, Estate and Succession Amendment Act 2011. In order to avail of the power of the court to vary a will, Mrs. Kelly must commence an application within 180 days from the date the representation grant is issued, see s 61 of the 2009 Act.
128 See Clucas v Clucas Estate (n 60) [12].
On the basis of Tataryn, it appears Mrs. Kelly could arguably expect to receive at least what she would have gained if the marriage was dissolved while both spouses were alive, specifically a half share in the family assets. Applying the Family Relations Act 1996, it is likely that if the couple divorce, Mrs. Kelly could reasonably expect to be entitled to property valued at approximately €228,140.

What if Mr. Kelly died intestate? As all the children are common descendents, where Mr. Kelly dies intestate with an estate valued at €451,280, Mrs. Kelly will possess a preferential share of €213,626 ($300,000), or a greater amount if prescribed. She will also be entitled to a one-half of the remainder of the intestate estate, namely €118,827. This ensures Mrs. Kelly will receive a total of €332,453. The remaining one-half will be distributed equally among the four children with each receiving €29,706. The preferential share to which Mrs. Kelly is entitled is not reduced in the event of partial intestacy, even where she has received some benefit under the will.

Furthermore, as in Ireland, special provisions apply in relation to the family home in British Columbia. Pursuant to the 2009 Act, where Mr. Kelly dies intestate, or dies testate but fails to dispose of the family home, Mrs. Kelly may chose to have the family home appropriated to satisfy her preferential share on intestacy. Moreover, the family home may not be disposed of, otherwise than by will, pending the exercise of the right of appropriation. Once Mrs. Kelly receives notice of this power, she has 180 days after the date on which the representation grant is issued to exercise this right unless the court extends the time by which the right may be exercised.

The importance of the protection afforded by the Land (Spouse Protection) Act 1996 comes to the fore where Mr. Kelly has executed a will, devising the family home to a third party. If Mrs. Kelly has made an entry on the title of the home under the 1996 Act, she will be entitled to receive a life estate in the family home irrespective of the disposition. However, if no such entry has been made, it appears Mrs. Kelly will be in a precarious position and will have to apply to the court to exercise its jurisdiction to vary the will in her favour.

However, if the provision made by Mr. Kelly for Mrs. Kelly in his will or the family provision made by the court in an application for a variation of Mr. Kelly’s will was less than the value of the home, difficulties arise. Mrs. Kelly may purchase the remainder of Mr. Kelly’s interest. If difficulties

129 Tataryn v Tataryn Estate (n 63).
130 See below, 170-174.
131 S 21(6) of the Wills, Estate and Succession Act 2009. All conversions are based on CAD$1 = €0.712 as provided by <www.xe.com> accessed 10 August 2011.
133 S 26(2) of the Wills, Estate and Succession Act 2009.
134 S 28 of the Wills, Estate and Succession Act 2009.
135 S 27(2) of the Wills, Estates and Succession Act 2009.
136 S 4(1) of the Land (Spouse Protection) Act 1996, as amended by s 226 of the Wills, Estate and Succession Act 2009.
137 If there is a partial testacy in which Mr. Kelly disposes of the family home and Mrs. Kelly has registered her entry under the Land Spouse Protection Act, presumably Mrs. Kelly will receive a life estate in the family home in addition to her preferential share on intestacy from the intestate portion of the estate.
138 S 31 of the Wills, Estates and Succession Act 2009.
subsequently emerged in meeting these costs, Mrs. Kelly could apply to the court to make further orders to secure the family home. In this regard, the court could make any of the following orders:

- a) vesting the same interest in the spousal home in Mrs. Kelly that Mr. Kelly had;
- b) specifying the amount of money Mrs. Kelly must pay to the descendants towards satisfaction of their interest in the estate;
- c) converting the remaining unpaid interest of the descendants in the intestate estate into a registrable charge against the title to Mrs. Kelly’s interest in the spousal home.  

Moreover, the courts may only exercise their discretion if certain conditions are fulfilled. In addition to the procedural issues, the court must be satisfied that purchasing the spousal home under section 31 would impose ‘significant financial hardship’ on Mrs. Kelly. One aspect which does not pose a difficulty for Mrs. Kelly in British Columbia, compared to her Irish equivalent, is the fact that the family home is built on agricultural land. No specific limitations governing such a scenario are included in the 2009 Act.

### 2.7 Conclusion

While over the years, the extent of the protection afforded to surviving spouses in Ireland varied considerably, the provisions introduced by the Succession Act 1965 represented a significant improvement on the previous position. The inclusion of special provisions directed at securing the protection of the family home are to be particularly commended.

Nevertheless, despite the clear strengths of the Succession Act 1965, it is important to always be alert to the possibility of improvement. Following the application of the respective legislative regimes to the case study, it would appear that the financial provision available to Mrs. Kelly in Ireland is roughly equivalent to her British Columbia counterpart under the provisions which would apply if Mr. Kelly died intestate but more robust if he died leaving a will. However, it is clear that under the Irish fractional share approach which governs both testate and intestate deaths, the level of provision is dependent on the value of the overall estate. As a result, it is submitted that further consideration of the preferential share approach adopted in British Columbia is merited. Chapter 3 considers the advantages of applying such an approach to protect a surviving spouse in the context of both an intestate and a testate death, particularly its ability to more effectively secure the protection of the family home. The introduction of a preferential share as an alternative to the legal right share is a particularly novel idea and warrants careful consideration. Difficulties which arise in the Irish context in appropriating a family home which is located on agricultural land have also emerged from the case study. Chapter 3 investigates how this issue could be more effectively resolved by legislative reform which would allow the surviving spouse to continue to reside in the

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139 S 33 of the Wills, Estate and Succession Act 2009.
140 S 33(1)(c) of the Wills, Estate and Succession Act 2009. Moreover, if the intestacy provisions apply Mrs. Kelly would be required to establish that, in all the circumstances, a greater prejudice would be imposed on her by being unable to continue to reside in the spousal home than would be imposed on the descendants entitled to share in the intestate estate by having to wait an indeterminate period of time to receive all or part of their share.
home in situations where it would not unduly prejudice the rights of those entitled to inherit the farm.
Chapter Three
Succession and the Family Home: Proposals for Reform

3.1 Introduction

Pursuant to the Succession Act 1965, Ireland operates a comprehensive system of financial provision for surviving spouses which affords special protection to the family home. While it is important not to undervalue the role of these protections, it is equally important not to be blind to the possible shortcomings of the regime and the potential for improvement through legislative reform.¹ Two main weaknesses emerged from the application of the current regime to the circumstances presented by the Kelly family in Chapter 2. First, the value of the legal right share was not sufficient to facilitate the appropriation of the family home. Although if Mr Kelly had died intestate, no such problem would arise, the application of a fixed fractional approach in smaller intestate estates could give rise to a similar difficulty. Second, the case study illustrated the obstacles presented in seeking to exercise the right to appropriate a family home which is a farmhouse. Chapter 3 considers how the law in this area could be reformed, drawing on certain aspects of the British Columbian regime.

First, in analysing potential avenues for reform, it examines the relative merits of fixed or discretionary family provision regimes in the realm of succession law, focusing primarily on the position of the surviving spouse and their rights vis-à-vis the family home. Second, having highlighted the weaknesses inherent in a fractional share system, it argues that serious consideration should be afforded to the introduction of a system of rights for surviving spouses based on a preferential share representing a fixed monetary value of the estate plus a share of the remainder where the deceased spouse dies intestate. Moreover, it proposes that the application of a preferential share could present a viable alternative to the current legal right share in the protection of surviving spouses where the deceased spouse dies leaving a will. The introduction of such reform would make it easier for a surviving spouse to appropriate the family home than it is under the fixed fractional approach. Finally, the serious difficulties in exercising the right to appropriate the family home where it is located on agricultural land are considered and the introduction of a statutory right of residence in certain circumstances to ameliorate the situation for surviving spouses is proposed.

3.2 Fixed or Discretionary Rights on Death: A Choice

The relative merits and flaws of family provision regimes based on fixed rules and those based on discretionary justice have received considerable academic attention over the years. Shapo characterises discretionary justice as ‘one of the great divides in modern legal systems’,² while Culp Davis, referring to America, described the choice between fixed rules and discretion as ‘a central

¹ This chapter draws on a paper presented by the author at the Irish Association of Law Teachers Annual Conference 2011, Hodson Bay Hotel, Athlone, Co. Westmeath, ‘The Legal Right Share and the Surviving Spouse: A proposal for reform’ for which it won the Postgraduate Scholarship Award, 2011.
problem in our entire legal system’. The question arises: If it is accepted that the provisions of the Succession Act 1965 directed at the surviving spouse are principally based on a policy of financial support, how can a system of pre-defined, fixed rights be preferred to the flexibility inherent in a discretionary regime as is applied in British Columbia?

Despite Maine’s belief that rigidity is the mark of a primitive legal order, many leading academics have become firm advocates of systems based on fixed rules. Indeed, the importance of providing concrete protection to a surviving spouse was highlighted prior to the enactment of the Succession Act in 1965. Minister Lenihan admitted ‘that from the beginning I was myself satisfied that we should distinguish between the widow and the children’. Armed with this mindset, the legislature considered three different alternatives and chose an approach based broadly on the *legitima portio*

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3 Kenneth Culp Davis as referenced in Mary Ann Glendon, ‘Fixed Rules and Discretion in Contemporary Family Law and Succession Law’ (1985) 60 Tul L Rev 1165, 1165 (citation omitted).

4 A discretionary approach is particularly popular in the provision of protection against disinherition. It originated in New Zealand and has since spread throughout the common law world. In addition to its adoption in British Columbia, it is also applied in England and Wales, Australia and in many other Canadian states. For an analysis of the shortcomings associated with a system of succession based on discretionary justice, see Glendon, ‘Fixed Rules and Discretion in Contemporary Family Law and Succession Law’ (n 3); Michael C. Meston, ‘Succession Rights or Discretion’ (1987) Jur Rev 1.


6 In particular, see Glendon ‘Fixed Rules and Discretion in Contemporary Family Law and Succession Law’ (n 3).


The Law Commission for England and Wales noted the key attributes of effective rules of intestacy. They suggested such rules ‘should be certain, clear and simple both to understand and to operate. They do not lay down absolute entitlements, because the deceased is always free to make a will leaving his property as he chooses. They operate as a safety net for those who, for one reason or another, have not done this. If the rules can conform to what most people think should happen, so much the better. If they are simple and easy to understand, the more likely it is that people who want their property to go elsewhere will make a will. It is also important to enable estates to be administered quickly and cheaply.’ See Law Commission for England and Wales, *Family Law: Distribution on Intestacy* (Law Com No 187–1989) 7.

8 Dáil Deb 14 July 1965, vol 59, col 415. Under s 111 of the Succession Act 1965, spouses receive a fixed portion of an estate however under s 117 children are limited to discretionary provision, see above, 63.
applied in Scotland for spouses. In this choice, the perceived supreme ability of fixed rules to ensure the protection of the surviving spouse was to the fore.

Based on an enforceable right to capital assets from a deceased’s estate without the need to make a court application, the scheme adopted under section 111 of the Succession Act 1965 possesses several key strengths. Primary among these attributes is the provision of certainty and predictability to a surviving spouse. In this regard, the importance of predictability should not be underestimated. Thus, in complete contrast to the discretionary approach, the application of fixed rights minimises litigation and promotes settlement out of court. This, in turn, preserves the value of the estate, eliminates the need for an emotionally draining and stress inducing court action as well as minimising the likelihood of family conflict. Another central benefit is that the Irish regime has the virtue of simplicity. There is no need for an enquiry into the extent of the obligation owed by one spouse to the other. It is set out clearly and definitively, for all cases, what the minimum extent of the obligation is on death.

Despite these advantages, criticisms have been levelled at the ‘one size fits all’, fixed rule approach. The principal problem with fixed rules applied in a mechanical fashion is, undoubtedly, that they provide arbitrary, rough justice and, due to the rigid nature of such an approach, can give rise to unfairness in some cases. A fixed, pre-defined share has been described as ‘a crude instrument’ to provide support for a spouse as it ‘bears little relationship to actual support needs’. Oldham notes, ‘To the extent that this system provides the surviving spouse with reasonable support, the result is fortuitous’. It is possible to counter this argument by making two points. First, it is submitted that on intestacy, fixed shares will almost invariably be applied to deal with the estate in the common law world. Currently a surviving spouse in Ireland will receive two-thirds of an intestate estate where issue of the marriage also survive. While this will suffice in many cases to ensure adequate financial support for a surviving spouse, the preferential share approach which is also founded on fixed rules may more effectively achieve this objective if framed appropriately. For example, the adoption of a fixed preferential share based on a floor of support could mean, that depending on the level at which the floor is set, that surviving spouse will retain all the estate. This is most likely where the

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8 They also considered the *legitima portio* as applied in France and the discretionary approach applied in England. See Dáil Deb 2 December 1964, vol 213, col 340-345. Minister Lenihan noted at 344 that a regime akin to Scotland was ‘simple, cheap and effective’.

9 The Minister also referred to the ‘analogy’ which exists between testacy and intestacy and noted: ‘Anyone who knows Irish conditions must realise that 50% of cases at the moment are, in fact, cases of intestacy where there is in existence already a system of, if you like, fixed shares where the widow gets one-third and the children two-thirds. That in fact is a fixed share system and it arises in 50% of Irish successions.’ Dáil Deb 15 December 1964, vol 213, col 1066.

10 The benefit of fixed rights was recently highlighted in relation to the Civil Partnership and Certain Rights and Obligations of Cohabitants Bill 2009 (now the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010) by Professor Mee who observed, ‘The essential point of a rule creating a legal right share is to obviate the need for ... a difficult and value-laden inquiry by determining authoritatively, and for all cases, the minimum extent of the obligation of one civil partner to another upon death.’ See John Mee, ‘Succession and the Civil Partnership Bill 2009’ (2009) 14(4) CPLJ 86, 87.

11 Shapo (n 2) 711.

12 (n 6) 229.

13 See s 67(2) of the Succession Act 1965. S 67(1) provides where a spouse and no issue survive, the spouse will receive the entire estate.
estate is modest and the need for support is greatest.\textsuperscript{14} Second, where a will exists, the provision of an enforceable right to at least one-third of the estate ensures at least some provision for a surviving spouse who, in the absence of such a right, though in need of financial support, may be reluctant to instigate legal proceedings to demand a share, thereby receiving nothing.\textsuperscript{15} In modest estates which undoubtedly require the most protection, the cost of litigation will further reduce the share which a disinherited, surviving, spouse will eventually receive.

Two shortcomings associated with fixed share regimes have been dealt with successfully by the Irish legislature and judiciary. The first problem which has been eradicated is the suggestion that fixed share statutes are easy to circumvent. This difficulty has been dealt with through the inclusion of anti-avoidance provisions. Section 121 of the Succession Act 1965 provides protection for a non-owning spouse by ensuring that any dispositions of property,\textsuperscript{16} made up to three years before the donor’s death for the purpose of defeating or substantially diminishing the share to which the surviving spouse is entitled,\textsuperscript{17} may be declared to have no effect by the court.\textsuperscript{18} As a result, such preemptive measures may not be employed by a testator in order to reduce the surviving spouse’s entitlement.

A second weakness was the confusion which had arisen over the date of the valuation of the legal right share.\textsuperscript{19} While neither section 55 or 56 specify the appropriate valuation date of the assets of an estate subject to an appropriation, the difficulty was recently resolved by the judiciary in the decision of \textit{Strong v Holmes}.\textsuperscript{20} Murphy J noted, ‘The court must safeguard the definition which could expose surviving spouses to the vicissitudes of a fluctuating market between the date of death and the date of distribution of the estate.’\textsuperscript{21} Holding for the plaintiff, Murphy J noted, ‘The only operative

\begin{footnotes}
\item[14]The potential presented by this approach is discussed below from 96.
\item[15]It is considered, ‘In the context of testate succession, one-third of the estate is not an excessive fraction to ring-fence against the claim of anyone else, including children.’ See Mee ‘Succession and the Civil Partnership Bill 2009’ (n 10).
\item[16]Other than a testamentary disposition or a disposition to a purchaser.
\item[17]Or so affecting the intestate share of any of his children, or of leaving any of his children insufficiently provided for.
\item[18]See s 121(2) of the Succession Act 1965. S 121(3) provides, ‘the donee of the property, or any person representing or deriving title under him, shall be a debtor of the estate for such amount as the court may direct accordingly’. Moreover, under s 121(8), ‘If the donee disposes of the property to a purchaser, this section shall cease to apply to the property and shall apply instead to the consideration given by the purchaser’. ‘Disposition’ is defined in s 121 as including a \textit{donatio mortis causa}. See also Albert Keating, ‘Donationes Mortis Causa in Irish Law’ (2005) 10(3) CPLJ 62.
\item[19]In \textit{MPD v MD} [1981] 1 ILRM 179 the applications failed as they were not instituted within the time frame. Carroll J went on to note that, in any case, there was ‘no proof, either directly or by inference, that the dispositions were made by the deceased for the purpose of leaving his children by his wife insufficiently provided for’.
\item[20]See also \textit{Estate of Denis Kennedy v Breda Kennedy} (HC 26 January 2007).
\item[21]\textit{Strong v Holmes} (n 20) 5.2. Murphy J also acknowledged the ‘fluctuating market and, in particular ... the steep decline in property values from the date of the death to the date of the proposed appropriation’. He noted such problems associated with fluctuating markets did not prevail in the 1960s when the legislation was introduced.
\end{footnotes}
and practical date for valuation is the date of distribution, since it is the only date on which the true nature and extent of half the net estate of the deceased can be determined.”\(^ {22}\) He concluded:

‘While the ... defendant is correct in saying that her legal right under section 111 of the Succession Act arises on the moment of the death of the testator, where there is right of appropriation the valuation date is at the date of the exercise of that appropriation.’\(^ {23}\)

In contrast to the Irish regime of fixed rules, a system of discretionary justice, such as that applied in British Columbia, Canada, could alternatively be applied to protect surviving spouses against disinherirtance. Discussing the provisions of the Succession Bill in the Dáil in 1964, the then Minister for Justice, Mr. Lenihan, was particularly critical of discretionary systems applied in other jurisdictions:

‘It is the unanimous opinion of leading authorities ... that systems of family provision which are based on the exercise of judicial discretion are unsatisfactory and are least capable of achieving the protection of the family which should be the common aim of all civilised communities.’\(^ {24}\)

While legal opinion against judicial discretion may have been ‘unanimous’ in the 1960s, strong arguments have been made supporting discretionary regimes in the interim.\(^ {25}\) Principal among its virtues is the fact that a discretionary regime facilitates individualised justice. Provision and, as a result, protection can be tailor-made to particular situations thus recognising the diversity of families and the wide range of different circumstances which arise. Ultimately, discretionary decisions can ‘be moulded to fit the circumstances of the particular case in a way not possible in a system of fixed rights’.\(^ {26}\) Where a spouse is disinherited or not adequately provided for in a will, the court may make a range of orders to remedy the situation and save the applicant from financial hardship. Moreover, discretionary justice ensures no one, in theory, will be over-compensated.

However, while the ability to approach each case on an individualised basis is undoubtedly its trump card, it may also be its greatest weakness.\(^ {27}\) First, under a discretionary regime, the law merely imposes on the testator the duty to make provision for a spouse or child in his will in line with some

\(^{22}\) ibid 5.2. The court stated at 5.5, ‘It would be arbitrary and improper to permit a beneficiary to opt for a valuation date of their beneficial share or interest in the estate, how so ever arising, on a selective basis.’

\(^{23}\) ibid 5.7. By contrast, the defendant had claimed that the appropriate valuation date for the legal right share was the date the legal right share vested. In support of this argument, counsel for the defendant quoted Henchy J in H v O [1978] 1 IR 194 who stated: ‘In the general context of the Act, it must be assumed that legislative intention was that the legal right (where elected for) is to be discharged in the same manner as if one-half or one-third of the estate had been expressly given in the Will in priority over all devises and bequests.’ See Albert Keating, ‘The Valuation Date of an Appropriation by Personal Representatives’ (2011) 16(2) CPLJ 22. See below from 124 for more on the right to appropriation.

\(^{24}\) Dáil Deb (n 8) col 349.

\(^{25}\) See n 6. Moreover, in England, the Inheritance Act which applies a broadly similar regime has generated ‘very little criticism’ according to Shapo (n 2) 708. Cretney notes, ‘The advantages of allowing a measure of flexibility and discretion in the law of succession are now increasingly appreciated in many of those countries which have a system of fixed division on intestacy’. See Stephen M. Cretney, ‘Reform of Intestacy: The Best we can do?’ (1995) 111 LQR 77, 95.


\(^{27}\) For an analysis of the shortcomings associated with a system of succession based on discretionary justice, see Glendon, ‘Fixed Rules and Discretion in Contemporary Family Law and Succession Law’ (n 3); Meston (n 4).
broad, ill-defined, criterion such as ensuring it is proper, adequate, just or equitable. It does not give them any definite right of inheritance which gives rise to a lack of predictability and foreseeability. This, in turn, leads to unnecessary litigation where applicants with weak claims view no harm in taking a gamble to see if they can get anything from the estate. This is exacerbated by the fact that the cost of defending the claim will generally fall on the estate thus placing the personal representatives under pressure to settle, even where the claim may be unjustified. On the other hand, however, in light of the unpredictable nature of results and lack of foreseeability many potential litigants who are genuinely in need may be turned off or intimidated from making such an application and will not seek to bring upon themselves the stress, family disharmony and costs associated with the instigation of legal proceedings. Minister Lenihan stated, ‘It is generally agreed that the extent to which any law gives rise to litigation is a measure of the failure of that law’. In this regard, in 1999 the number of actions taken under the Wills Variation Act 1996 in British Columbia totalled more than the proceedings in the rest of Canada combined.

Second, the inherent unpredictability of not having fixed rules may be exacerbated if the interpretation of the legislative provisions varies between judges. Often insufficient guidance is given to the judiciary in how to exercise their discretion. Under the new Wills, Estates and Succession Act 2009 enacted in British Columbia, the courts are merely afforded the effectively meaningless direction to make ‘adequate, just and equitable’ provision. While more meaning may be attributed to this goal by the inclusion of statutory guidelines as the English and Welsh legislation...
shows, if unweighted, the guidelines or factors remain only of limited value. Moreover, in light of judicial pronouncements from the Supreme Court of Canada, consideration must also be had to the legal and moral obligations of a testator on succession. In light of this, Amighetti states:

‘The final result, in any given case, is completely at the discretion of the presiding judge as he or she alone considers the facts and makes a judgment, doubtless influenced by his or her own perception of what is fair or right. We are thus regressing to the unacceptable “time when Equity was interpreted by the length of the ‘Chancellor’s foot’”.’

Third, a discretionary regime, although fashioned on the basis of being less intrusive, arguably represents a more serious invasion of testamentary freedom. One of the original arguments in favour of a regime of discretionary justice was that it appeared to give greater effect to the principle of testamentary freedom. Consequently, discretionary relief legislation was strictly construed. However, over the years the courts have adopted a more liberal approach and expanded the circumstances in which they would interfere with a will. Indeed, it has been noted in relation to other jurisdictions based on discretionary provision that ‘the only thing that a testator can be sure of achieving by will is his choice of an executor’. Moreover, from a testator’s point of view, they will be the only party who does not get the opportunity to be heard at an application for equitable provision.

Finally, considerable time and expense will invariably result from the necessity to instigate litigation. The costs of defending legal proceedings will drain an estate and add serious complications to its administration. This also means that litigation will rarely be appropriate in small estates where protection is arguably most needed.

Thus, while the fixed share regime currently applied in Ireland does possess certain weaknesses, reform based on the introduction of further discretion akin to the approach in British Columbia is not recommended here. Ultimately, neither fixed rules nor discretionary rules are infallible and both have the potential to cause injustice. However, while systems founded on discretion are ultimately

36 See Walker v McDermott [1930] CanLII 1 (SC C), [1931] SCR 94. More recently, as noted above 71-72, it was held by the Supreme Court of Canada in Tataryn v Tataryn Estate [1994] CanLII 51 (SC C), [1994] 2 SCR 807 that in varying a will the court must consider what an applicant would have received under the Family Relations Act if the marriage had broken down inter vivos. This represents the testator’s legal obligations. Freedman and Berardino note Tataryn ‘creates more problems than it resolves’ and ‘means that many more families will end up in court over whether a testator’s last wishes will be varied by judicial order and, if so, how these wishes will be varied’. See Robert Freedman and Carolyn Berardino, ‘Case comment: Tataryn v Tataryn’ (1995) 15 ETJ 6, 7.
37 Leopold Amighetti, The Law of Dependants’ Relief in British Columbia (Carswell 1991), 56. This statement was criticized in Tataryn v Tataryn Estate (n 36).
38 As noted, the Supreme Court of Canada extended the interpretation of the legislation to include the power to enforce both legal and moral obligations on a testator. This has resulted in Harvey suggesting a ‘remedial characterization’ of the dependant’s relief legislation. See Harvey (n 32) 3.
39 As noted by Langbein & Waggoner (n 6) 314 quoting the late Hutley J of the New South Wales Supreme Court, referring to the Testator’s Family Maintenance legislation (citation omitted). Similarly, in relation to the English legislation, Brashier observes, ‘Although English courts have stated that theirs is not the prerogative to ignore or refashion the testator’s will in general, the testator can seldom if ever be certain that his last will and testament will be honoured upon his death’. See (n 6) 132.
capable of doing more harm than good it is does not mean that for all purposes discretion should be avoided. Recognising that discretion is not ‘an inherent evil’, Glendon notes:

‘In most cases what is required is not actually a choice but rather a search for the proper mix of discretion and fixed rules under each set of circumstances – the optimum degree of fine-tuning without losing coherence and predictability, of reasonable certainty without losing flexibility.’

Likewise, Shapo explains, ‘Even a superbly drafted inheritance statute canted towards fixed rules may produce undesirable results in an area of the law that by its nature demands at least some room for judicial discretion’. Nevertheless, it is submitted that despite Glendon and Shapo’s arguments in favour of a mixture of both fixed and discretionary rules, the effective introduction of such a combination is easier said than done. A provision could be introduced to the effect that a surviving spouse would receive a fixed share of the deceased’s estate but in the case of ‘extreme unfairness’, a reapportionment could be made. However, the shortcomings previously discussed in relation to discretionary regimes including the high level of costs falling on the estate, the subsequent pressure to settle and the unpredictability which would arise would once again come to the fore. In light of this, it is submitted that, in the realm of succession law at least, the choice between fixed and discretionary provision remains essentially an ‘either, or’ decision.

Overall, the Irish approach based on a predominantly fixed structure which forms the backbone of our scheme of succession works quite well and there are no loud voices calling for discretionary provision. However, while the adoption of rules of a fixed nature is accepted as successful, there are, nonetheless, weaknesses inherent in the succession regime which is applied in Ireland and there is considerable room for improvement. To this end, British Columbia presents an interesting alternative.

3.3 A Glaring Weakness Emerges

A preliminary analysis of the protection afforded to Mrs. Kelly in Chapter 2 shows the comparative levels of protection afforded to surviving spouses in British Columbia and Ireland vary considerably depending on whether the deceased died testate or intestate. In this regard, the Irish position is undoubtedly superior following a testate death. The provision of a fixed entitlement through the legal right share should not be underestimated and represents the single biggest difference between the jurisdictions. By contrast, on an initial analysis, the outcomes appear to vary very little between the two jurisdictions on intestacy. The overall effect of the respective provisions may be summarized as follows:

40 Glendon, ‘Fixed Rules and Discretion in Contemporary Family Law and Succession Law’ (n 3) 1167.
41 ibid 1166.
42 Shapo (n 2) 781.
43 The Irish regime does incorporate both fixed and discretionary rules under s 111 and s 117. However, as they are dealing exclusively with surviving spouses and children respectively, the provisions do not overlap and do not represent the type of ‘mix’ referred to by Shapo and Glendon.
44 Despite this, difficulties are identified in the application of the legal right share. These are discussed in greater detail below from 113.
Table 1: Scenario One - Estate valued at €451,280

<table>
<thead>
<tr>
<th>Testacy</th>
<th>Intestacy</th>
</tr>
</thead>
<tbody>
<tr>
<td>British Columbia</td>
<td>No automatic entitlement</td>
</tr>
<tr>
<td>Ireland</td>
<td>€150,426</td>
</tr>
</tbody>
</table>

The difference on intestacy in these circumstances between the share provided under the British Columbian regime and the Irish regime is €31,600. This means that a surviving spouse in British Columbia will receive an extra 7% of the total estate. It is submitted this is a relatively minor, though not insignificant, variation and the figures compare favourably. However, this will not always be the case. The reality is that the fixed fractional share approach adopted by the Irish legislature has serious shortcomings. A major weakness in the adoption of a fractional share is the fact that the size of the share depends on the size of the deceased’s overall estate. This poses a particular problem where the estate is modest, a situation where, it is submitted, the need for legislative protection is most acute. Simply put: the smaller the estate, the smaller the share.

If the case study above is adjusted slightly this weakness becomes apparent. Let us say that the Kellys are a family of more modest means. Mr. Kelly did not inherit the farm. Instead, his estate consists of the family home valued at €180,000 and savings of €20,000. Here, the effect of the differing succession law regimes in the two jurisdictions shows a marked divergence. The comparable effects of this change in situation may be illustrated as follows:

Table 2: Scenario Two - Estate valued at €200,000

<table>
<thead>
<tr>
<th>Testacy</th>
<th>Intestacy</th>
</tr>
</thead>
<tbody>
<tr>
<td>British Columbia</td>
<td>No automatic entitlement</td>
</tr>
<tr>
<td>Ireland</td>
<td>€66,666</td>
</tr>
</tbody>
</table>

The difference between the shares to which the surviving spouse is entitled has increased to €66,668. In effect, this means that a surviving spouse in British Columbia receives a whopping 33% extra of the total estate. And the disparity could be even greater. The smaller the estate, the greater the difference will be between the Irish and British Columbian share. Moreover, as the value of the share on intestacy to which the surviving spouse is entitled under the Irish regime is €46,668 less than the value of the home, it is possible a spouse in such circumstances could be forced to sell the family home in order to meet the entitlements of the children in relation to the intestate estate.\(^{45}\)

These shortcomings were alluded to by Spierin:

\(^{45}\) The provisions regarding the appropriation of the family home on death will be discussed below from 124.
'The major drawback with the fixed fraction system is that for those many households where the family home is the major asset of value, to give the surviving spouse ... only a percentage share may mean that he or she may not be able to remain in the family home if it belonged to the deceased spouse, and may be left with an inadequate capital sum to purchase other accommodation.'

Moreover, the use of deeds of family arrangement to resolve these issues proves that issues associated with the appropriation of the family home have the potential to cause serious problems in practice and viable solutions need to be considered.

In light of these shortcomings, two questions may be posed: Would an approach on intestacy based on a preferential share plus a fraction of the remainder represent a viable solution in Ireland as an alternative to the fractional share system currently applied? Should a system of financial provision based on a preferential share also be available following a testate death as an alternative to the legal right share?

3.4 Preferential Share – An Interesting Alternative on Intestacy

A glance through the annals of the Irish legislature shows a system based on a preferential share, similar to that applied in British Columbia, did formerly apply in Ireland under the Intestates' Estates Act 1954. Interestingly, however, the vast majority of discussion relating to the introduction of the Succession Bill 1964 concerned the limitations on testamentary freedom, while the change in the law governing intestacies received surprisingly little attention and appears to have stimulated very little debate. Nonetheless, the then Minister for Justice, Mr. Lenihan, did note his dislike for such an approach, having considered the application of a system based on a statutory legacy or preferential share in other jurisdictions including Northern Ireland, England and Scotland:

‘This device of giving the surviving spouse a minimum sum plus a fraction of the remainder of the estate is not being proposed in the Bill. In the first place, to give a wife with children a sufficient monetary sum in Irish circumstances would, in fact, mean giving her two-thirds or more of the average estate. Furthermore, monetary sums are not satisfactory, as they need to be revised from time to time to take account of changing money values.'

46 (n 29) 203.
47 See above, 80. Difficulties arising due to insufficient provision on death were noted in 2011 in England and Wales, albeit in relation to intestate succession and provision based on a statutory legacy: ‘The Office of the Official Solicitor noted that many problematic cases in the past were related to the low level of statutory legacy but these increases should mean that there are fewer problems in future.’ See Law Commission for England and Wales, Intestacy and family provision claims on death (Law Com No 331–2011) para 2.188.
48 See above, 62.
49 Dáil Deb (n 8) col 332 (emphasis added). However, it is clear that a fractional share, irrespective of its size, does not always provide a sufficient monetary sum for a surviving spouse since, by its nature, it is dependent on the overall value of the estate. Moreover, the apparent inconvenience of updating the monetary sum should not be sufficient reason to reject the importance of such a means of provision. In any event, the difficulties, such as they are, which could arise in such a revision would be minimized through the introduction of a detailed statutory review procedure. See below, 103.

The 1989, the Law Commission for England and Wales recommended that the surviving spouse should receive the entire estate on intestacy, making no provision for children. However, the proposal did not prove to be
In light of this distaste for a preferential share, the legislature instead opted for a fractional share system based on thirds. So where does this preference for thirds come from? The idea of adopting a system of thirds for the division of land on death has known a long history. Referred to as the ‘Custom of Ireland’, the ancient Irish laws provided that a property holder was restricted in their freedom to dispose of property and only entitled to dispose of one-third of his estate. Indeed, more recently, the preference for thirds has been described as a ‘hangover’ from the right of dower whereby a widow was entitled to a life estate in one-third of the fee simple or fee tail estate of the deceased. Likewise, under the Scottish regime to which the legislature had regard in formulating the Succession Act 1965, thirds prevailed. While the Irish legislature continued the trend of this historical favouritism for thirds, it is abundantly clear from the above case study that such a system is inherently flawed and can result in a serious lack of support where it is most needed. As a result, it is submitted that an alternative approach to financial provision following an intestate death is required.

3.4.1 A proposal for reform

The approach adopted in British Columbia based on a preferential share plus a fraction of the remainder presents a very attractive alternative. Due to its fixed nature, the system applied in the

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50 Minister Lenihan explains it thus: ‘If a man died leaving a wife and children, his estate was divided into three equal parts whereof one part belonged to the wife and another to the children. The remaining third was disposable by will. If the deceased left a wife only, or children only, his estate was divided into two parts whereof one part belonged to the wife or to the children, as the case might be. This excellent Custom of Ireland was abolished four years after the Treaty of Limerick and at the outset of the Penal Laws.’ See Dáil Deb (n 8) col 337. See above from 61 regarding the history of Irish succession law. See also James C. Brady, Succession Law in Ireland (2nd edn Butterworths 1995) 211; John C. W. Wylie, Irish Land Law (4th edn Tottel 2010) 919-920.

51 Langbein & Waggoner (n 6) 316. This figure of one-third excludes any part of the estate disposed of inter vivos or by will, see Chapter 2. Likewise, Shapo notes: ‘Because the spouse’s elective share has traditionally been one-third of the decedent’s estate, the elective share may merely continue the ecclesiastically based English medieval custom of providing the widow with one-third of the decedent’s personal property, and the widow’s common law dower right of a life estate in one-third of the decedent’s real property.’ See (n 2) 711.

52 Minister Lenihan explained the Scottish system: ‘If a man leaves both wife and children, his movable estate is divided into three parts. His wife is entitled to one part as her jus relictae (the wife’s part), and his children to one part as their legitim (the bairns’ part). The remaining third (the dead’s part) may be disposed of by the testator in his will.’ Dáil Deb (n 8) col 336. He added at col 341 that Irish Government officials in consulting with Scottish experts found ‘the system operates remarkably well and that the need to enforce legal rights seldom arises, precisely because the existence of the rights ensures justice for spouses and children.’ Although Nichols notes ‘much of the law on wills and legal rights remains based on the common law, considerable changes to intestate provision were provided by the Succession (Scotland) Act 1964. See David Nichols, ‘Reform of the Law of Succession: The Report in Outline’ (2010) 14(2) Edin LR 306, 306. Moreover, s 8 of the Succession (Scotland) Act 1964 includes a provision on intestacy by which a surviving spouse inherits the deceased’s interest in any dwelling house in which they were ‘ordinarily resident at the date of death’ up to a value of £300,000. Interestingly, under new proposals for the law governing testacy in Scotland, the traditional one-third share has been abandoned. For more details, see Scottish Law Commission, Report on succession (Scot Law Com No 215–2009) paras 3.5-3.6.
province contains the same strengths as the Irish approach allowing for foreseeability, clarity and certainty. However, unlike the Irish approach, the Wills, Estates and Succession Act 2009 ensures a floor of support for a surviving spouse where the deceased spouse dies intestate. While Minister Lenihan claimed that a ‘sufficient monetary sum’ would equate to two-thirds of the average estate, this is often not true. Indeed, the Minister himself recognised that two-thirds was the minimum appropriate fraction noting ‘two-thirds or more’ would be appropriate. As evident in the adjusted version of the case study above, and in many modest estates, the family home will often represent the primary family asset. The provision of two-thirds of such an estate will not suffice to protect the family home and could leave a surviving spouse in a precarious position.\footnote{Children could force the sale of the family home in order to receive their share of the intestate estate.}

By contrast, under the British Columbian regime, a surviving spouse in modest circumstances is in a much more secure position with a greater share of the estate preserved for them. Due to the level at which it is now set under the 2009 Act, this system ensures that, in modest or average estates, the entire estate will usually go to the spouse or, at least, it will often allow the family home to be protected. The relevance of such protection is highlighted by recent studies in the England and Wales which refer to trends which suggest that intestacy is more common in modest estates.\footnote{The Law Commission for England and Wales, \textit{Intestacy and family provision claims on death: a consultation paper} (Consultation Paper No 191–2009) suggest at para 1.5 that intestate estates tend to be smaller than estates where there is a will as property owners are more likely to make a will if they have ‘significant assets’ to dispose of. See also Law Commission for England and Wales, \textit{Intestacy and family provision claims on death} (n 47) para 1.3; Steve Brooker, ‘Finding the Will: A Report on Will Writing Behaviour in England and Wales’ (National Consumer Council 2007) \texttt{<www.simplywills.org/Portals/0/NCCReport_Ticking_Time_Bomb.pdf>} accessed 23 June 2012. The Scottish Law Commission, \textit{Report on Succession} (n 52) para 2.1 also notes that ‘persons who own significant assets are far more likely to have made a will than the rest of the population’ and, as a result, ‘the rules of intestate succession will generally be used to distribute estates which are of small to modest value although there will continue to be exceptional cases where the intestate estate is large’. See also Mary L. Fellows, Rita J. Simon and William Rau, ‘Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States’ (1978) 3(2) Am Bar Found Res J 319, 385.}

Moreover, where, as in British Columbia, this preferential share is used in conjunction with the right to appropriate, setting the legacy high enough to ensure that, on the basis of the average estate, it would cover the value of the family home, would also avoid some of the problems under the Succession Act 1965 associated with making up the shortfall where the provision is less than the value of the home.

As with all systems, however, there are difficulties with such an approach. First, it is clear that careful calculations would have to be made in order to fix the preferential share in Ireland at a fair level.\footnote{On proposing a similar system in Scotland, the Law Commission noted: ‘We are strongly of the view that fixing the size of the threshold sum is a matter for political judgment at the time when the legislation is before the Scottish Parliament.’ See \textit{Report on Succession} (n 52) para 2.14. For considerations of the factors at play in setting a statutory legacy, see New South Wales Law Reform Commission, \textit{Uniform succession laws: intestacy} (Report No 116–2007) paras 4.35-4.61.}\footnote{In England, it has been argued that since most homes are co-owned there is no need for a statutory legacy that is related to house prices. See Adrian Jack, ‘Intestacy and the Statutory Legacy’ (2005) 155 NLJ 993.} If the aim is to ensure, in so far as possible, that the family home remains with the surviving spouse, or as an alternative, that a family home may be purchased, real-world property valuations across the country must be considered based on a reliable house price index.\footnote{In England, it has been argued that since most homes are co-owned there is no need for a statutory legacy that is related to house prices. See Adrian Jack, ‘Intestacy and the Statutory Legacy’ (2005) 155 NLJ 993.}
In seeking to ascertain what level the preferential share should be established at, the national Residential Property Price Index (RPPI) which was recently launched by the Central Statistics Office must be considered. In order to obtain an approximation of the average selling prices of houses, the RPPI may be applied to the Permanent TSB/Economic and Social Research Institute House Price Index which formerly provided figures for average house prices nationally. From this calculation, an average selling price of €178,830 in November 2011 emerges. This figure is in line with a recent report published by Daft.ie which showed the average asking price for residential properties nationwide was just over €175,000 at the end of 2011.

In addition to these sources of data, planned future developments in property regulation under the Property Services (Regulation) Act 2011 should contribute to making this task easier. Introduced by the Government on foot of a recommendation by the Auctioneering/Estate Agency Review Group, the Act provides for the establishment of the Property Services Regulatory Authority. The Authority will have statutory responsibility for publishing property sales prices and plans to introduce a new property database reflecting market trends and house prices.

Nevertheless, despite the availability of house price indices, difficulties remain and the consideration of house prices will invariably give rise to complications. While the divergence between house prices in Ireland has narrowed in recent years with a more rapid fall in prices in the Dublin region as compared to the rest of Ireland, house prices in Dublin will still be higher than those in rural areas.

However, it is crucial for this proposal since the inclusion of set-off means that the full preferential share generally only becomes applicable in circumstances where the home is not co-owned. See below, 100. Moreover, the fact that the number of homes in sole-ownership has fallen does not devalue the merit of the proposal, see Cooke, ‘Wives, Widows and Wicked Step-Mothers: A Brief Examination of Spousal Entitlement on Intestacy’ (n 49) 433 quoted 2 and 67.

57 The RPPI series is based on transactions which are financed by residential mortgages and covers both houses and apartments. It is designed to measure the change in the average level of prices paid for residential properties sold in Ireland since 2005. The index is also mix-adjusted to allow for the fact that different types of property are sold in different periods. See Central Statistics Office, ‘Residential Property Price Index’ <www.cso.ie> accessed 3 January 2012.

58 This House Price Index was based on the agreed sale price and calculated using data from mortgage drawdowns. Unfortunately, the production of this index ceased in May 2011. See Permanent TSB/ESRI ‘House Price Index’ <www.permanenttsb.ie/aboutus/housepriceindex/> accessed 3 January 2012.

59 Taking the Permanent TSB/ESRI House Price Index for January 2005, the average house price was €255,107, ibid. Then, having adopted this figure, the RPPI for November 2011, which was 70.1, may be applied. See Central Statistics Office (CSO), ‘Residential Property Price Index’ (n 57). The adjusted selling price which emerges is €178,830. While this figure cannot be considered exact, it nonetheless provides a reasonably accurate measure of selling prices in Ireland at the time.


61 The then Minister for Justice and Law Reform, Minister Ahern, stated on 10 July 2010 that these proposals would give effect to a commitment in the renewed Programme for Government to facilitate publication of property price data in order to improve market transparency and early detection of market trends. See www.npsra.ie for more.

62 For instance, at the end of 2011, house prices in Dublin city centre had fallen by 61.2% from their peak on average while in Limerick city the fall was 41.3%. See ‘The Daft.ie House Price Report: 2011 in Review’ (n 60). It has been noted in England, ‘the statutory legacy may provide either more or less than the surviving spouse needs to purchase the deceased’s interest in the house, sometimes significantly so’, see Law Commission for England and Wales, Intestacy and family provision claims on death: a consultation paper (n 54) para 3.10.
However, the preferential share would, if introduced, apply equally across the board.\textsuperscript{63} Despite regional variations, it is submitted that it would still be possible to establish a preferential share (and share of the remainder) that is appropriate in the majority of cases and which would better protect surviving spouses right across the country than the current application of the fractional share approach imposed by section 67 of the 1965 Act.

As the focus of the protection delivered by this proposal is securing the family home or facilitating the purchase of alternative accommodation for a surviving spouse, on the basis of the foregoing indicators of house prices, a preferential share of €180,000 is proposed.\textsuperscript{64} In addition, a surviving spouse would receive a one-half share in the remainder. However, in light of anecdotal evidence which suggests that, nowadays, most Irish homes are in fact held in a joint tenancy, a limitation to reflect this reality must also be included.\textsuperscript{65} As a result, it is submitted the preferential share and share of the remainder ought to be offset by the value of the share in the home held by the surviving spouse following the owner or co-owner’s death.\textsuperscript{66} To disregard the effect of the right of survivorship while maintaining a preferential share and share of the remainder would be unacceptable and could result in a surviving spouse receiving an overly generous and/or disproportionate provision out of the estate of the deceased.

With this in mind, it is proposed that a surviving spouse would be allowed to choose between either these proposals based on a preferential share plus one-half of the remainder, or the fixed share of two-thirds which would be retained as it currently exists on intestacy. Thus, section 67 would survive as an alternative to the proposals based on a preferential share.\textsuperscript{67} Reform on this basis would eliminate the weakness of the fractional share system in smaller estate through the inclusion of a floor of support for those most in need, while ensuring that those protected by the right of survivorship are not adversely affected.

\textsuperscript{63} It was suggested in Australia that perhaps the statutory legacy would vary from jurisdiction to jurisdiction as noted in New South Wales Law Reform Commission, \textit{Uniform succession laws: intestacy} (n 55) para 4.50 (citations omitted). However, it is submitted that on an island the size of Ireland, such variations would not be appropriate. Likewise, the Law Commission for England and Wales noted in 2011 there was, ‘acceptance that the level of the statutory share could not be set on a regional basis’. See Law Commission for England and Wales, \textit{Intestacy and family provision claims on death} (n 47) para 2.120.

\textsuperscript{64} The surviving spouse would also be entitled to simple interest which would accrue on the sum in the period between the death and the payment of share. In order to ensure simplicity, the rate at which this interest would be charged could be based, perhaps, on European Central Bank interest rates. Moreover, where there are no children, it is submitted the situation ought to remain as present with the surviving spouse receiving the entire estate.

\textsuperscript{65} Provisions for offset were also recently made in Scotland where it was noted, ‘this is likely to be a sufficiently frequent occurrence, and the effect to be sufficiently pronounced when it occurs, for specific provision to be included’. See Scottish Law Commission, \textit{Report on succession} (n 52) para 1.14.

\textsuperscript{66} This limitation is not merely restricted to an interest acquired by the right of survivorship in a joint tenancy, it also includes an interest held under a tenancy-in-common.

\textsuperscript{67} The provision of different options from which the surviving spouse can choose depending on which provides the better protection is currently applied in Germany, see E. D. Graue, ‘German Law’ in Albert K.R. Kiralfy (ed), \textit{Comparative Law of Matrimonial Property} (Luitingh Sijthoff 1972); Kevin W. Ryan, \textit{An Introduction to Civil Law} (Law Book Company of Australasia 1962) chapter 6; W Wolfram Müller-Freienfels, ‘Family Law and the Law of Succession in Germany’ (1967) 16(2) Int’l & Comp LQ 409.
Similar proposals have recently been made in Scotland as well as England and Wales in relation to the law on intestate provision, drawing very different reactions. Referring to the recent Scottish Law Reform Commission Report in 2009, it was noted that proposals for the reduction of the share on intestacy by the value of the survivorship destination were ‘especially welcome’.\footnote{Alan Barr, ‘Reform of the law of succession: a view from practice’ (2010) 14(2) Edin LR 313, 315. For discussion of ‘survivorship destinations’, see Scottish Law Commission, Report on succession (n 52) para 2.19-2.24. Nevertheless, the Scottish proposals are not without difficulty. The threshold sum on intestacy is proposed to rest at £300,000 which, in light of the primary policy objective of retaining the family home, appears excessive. Reid points out the average value of homes in Scotland in December 2008 was £152,256 and notes, perhaps sceptically, that the recommended threshold sum ‘therefore provides a very generous margin to ensure acquisition of the family home’, see ‘Inheritance Rights of Children’ (2010) 14 Edin LR 318, 320.} Moreover, south of the border, Professor Kerridge has demonstrated his support for such a system in England and Wales.\footnote{See Roger Kerridge, ‘Reform of the Law of Succession: The Need for Change, not Piecemeal Tinkering’ (2007) 71 Conv & Prop Lawyer 47.} Essentially, Kerridge proposed that the statutory legacy ought to be reduced by a revised form of hotchpot which would include the value of property passing to the surviving spouse under the right of survivorship.\footnote{ibid 61. However, this differs from the proposal made in this paper as it merely reduces the statutory legacy by the value of the right of survivorship, not the entire interest held by the surviving spouse. In addition, Kerridge’s proposals do not reduce the statutory legacy by any share held under a tenancy-in-common. See also, Roger Kerridge, ‘A View from England’ (2010) 14 Edin L Rev 323 for a comparison between his proposals and those of the Scottish Law Commission.} Despite this positive endorsement, however, the Law Commission for England and Wales was less than enthusiastic about such proposals. In the 2011 Report on Intestacy and Family Provision, it noted that proposals included in the 2010 Consultation Paper based on the provision of the family home up to a certain value limit or requiring the surviving spouse to account for a share of the family home derived by virtue of the right of survivorship, perhaps in the context of a larger statutory share, received ‘little support’.\footnote{See Law Commission for England and Wales, Intestacy and family provision claims on death (n 47) para 2.46-2.47. See also Law Commission for England and Wales, Intestacy and family provision claims on death: a consultation paper (n 54) para 3.91-3.94.} Nevertheless, while the report cited claims that such a system would be ‘unwieldy in its application’\footnote{As suggested by the Chancery Bar Association, cited in Law Commission for England and Wales, Intestacy and family provision claims on death (n 47) para 2.47.} and would introduce ‘unwelcome complexity and discrepancies’,\footnote{As argued by the Law Society, cited ibid para 2.47.} it is contended that such a view is unduly negative and overstates the difficulties inherent in such a regime. While it is easy to over-complicate any legislative proposal, it is submitted that such a system would not be difficult to implement and, as such, such be afforded serious consideration in Ireland.\footnote{Despite alluding to the ‘attractions’ of the approach proposed by Kerridge, Cooke highlights certain theoretical difficulties in adopting such an approach. She explains: ‘It requires a spouse to account for something that is his or hers by right, which may be felt to be uncomfortable; and it may generate a very counter-intuitive result if the surviving spouse in fact paid the whole of the purchase price for the house, despite then holding it as beneficial joint tenant with the deceased. In such a case the survivor could well feel that the intestacy rules forced him or her to pay twice.’ See Cooke, ‘Wives, Widows and Wicked Step-Mothers: A Brief Examination of Spousal Entitlement on Intestacy’ (n 49) 441. However, as this proposal would operate as an alternative to the current application of the law under s 67, or as will be discussed below, the legal right share as applied under s 111, such a spouse would still be entitled to take the share to which they are entitled.}
The practical effect of this proposal may be summarised as follows:

1) Where the home is in the sole name of the deceased, no offset arises and the surviving spouse is entitled to the full preferential share of €180,000 plus half the remainder.

2) Where the home is held in a joint tenancy, the preferential share and share of the remainder are offset by the value of the home. If the value of the home is less than the €180,000, the surviving spouse is entitled to the balance and half the remainder. If, however, the value of the home exceeds the preferential share, the amount by which it exceeds it is deducted from the half share of the remainder to which the surviving spouse would be entitled. Where the deduction would result in a negative figure, the surviving spouse would not be compelled to pay into the estate but also would not take any share in the remainder. In many cases of joint tenancies, no benefit will accrue from the proposal and the surviving spouse may choose instead to rely on section 67.

3) Where the home is held by the spouses as tenants-in-common, the preferential share and share of the remainder are offset by the value of the share held by the survivor. Where the value of the share held by the survivor is less than the preferential share, the surviving spouse is entitled to the balance plus half the remainder of the estate. Where the value of the share held by the survivor exceeds the preferential share, the amount by which it exceeds it is again deducted from the half share of the remainder to which the surviving spouse would be entitled. Likewise, where the deduction would result in a negative figure, the surviving spouse would not be compelled to pay into the estate but also would not take any share in the remainder. Akin to joint tenancies, in many tenancies-in-common, no benefit will accrue from the proposal and the surviving spouse may choose instead to rely on section 67.

In circumstances where the spouses do not own a family home, it is proposed no deduction would arise and the full preferential share plus half the remainder would be available. The dangers of under the current regime. Therefore, while they would not benefit from the proposal, they would not be negatively affected either.

75 The decision to extend these proposals to include their application to joint tenancies and not limit their application to where the home was in the sole name of the deceased, despite the theoretical difficulties with such an extension, was a pragmatic one. It arose due to the anomaly which could otherwise result where the value of the family home was less than €180,000. See below 112 for more discussion of this point.

76 For practical examples of how this would work in practice see the Scottish Law Commission, Report on succession (n 52) para 2.23.

77 It is accepted that, on initial analysis, this may appear to go beyond meeting the primary objective of the proposal, namely the protection of a surviving spouse in the family home. However, it is contended such provision is warranted in order to protect the surviving spouse in such estates by attempting to ensure there would be something to live on once accommodation is secured. If a surviving spouse acquires a family home of average or greater than average value, where the finances of the family require it, it is possible that the family could sell the home, buy a below-average value house and thereby release cash which the family could then use to survive. However, where the family home is of less than average value, the possibility of releasing any liquidity in the property is a much more remote possibility. The ability of the surviving spouse to purchase alternative accommodation of a sufficiently low value which would allow them to retain some cash from the original sale may be severely limited. This, it is contended, could give rise to serious hardship and arguably jeopardize the continued survival of the family unnecessarily where additional resources exist in addition to the family home up to the value of the preferential share.
granting property specific rights are considerable and have been illustrated elsewhere in recent times.\textsuperscript{78} In particular, the 2011 report on succession in England and Wales expressed this concern succinctly:

‘[R]egardless of the sentimental value that a home can have, it was not appropriate to treat assets which were held in bricks and mortar differently to assets held in other forms, such as savings and investments. We felt that this could cause significant unfairness in a number of cases; an individual beneficiary should not be better off because their spouse kept property as opposed to stocks and shares.’\textsuperscript{79}

The provision of the preferential share and share of the remainder in such circumstances would ensure that the surviving spouse would be in a position to secure a family home if desired and would enjoy equal treatment with their home-owning counterparts.\textsuperscript{80}

Another practical issue which must be considered is that in order to keep pace with inflation and retain real value the preferential share must be updated. The fact that the share must be varied to keep in line with changes in currency values or the value of estates means that there is the possibility of constant lobbying for change from some members of the community. Similarly, due to the potential for public comment or backlash upon every increase or otherwise, such a system could be awkward for the Government to implement. Indeed, the lack of a statutory review procedure has been a major weakness in other jurisdictions which apply the preferential share on intestacy.\textsuperscript{81}

\textsuperscript{78} The importance of considering the vulnerability of non-owning couples when making provision for the family home was considered recently in Scotland and in England and Wales albeit in relation to intestacy. On intestacy, Scottish law currently entitles a surviving spouse to a housing prior right worth up to £300,000, as set in 2005. However, in the recent Scottish Law Commission, \textit{Report on succession} (n 52), the Commission recommended a move away from granting property-specific rights as, depending on the composition of the estate, the rights could be valueless and vulnerable members of the community could be left without protection.

Similarly, in the 2011 report on England and Wales in relation to intestacy it was noted ‘any reform which elevated the status of real property over other assets ... could produce unfortunate results in some cases; for example, where a couple sold their home and invested the proceeds to pay for residential care shortly before one of them died.’ See Law Commission for England and Wales, \textit{Intestacy and family provision claims on death}, (n 47) para 2.48.

\textsuperscript{79} ibid para 2.48 quoting the Norwich and Norfolk Law Society. It is for this reason that Reid’s suggestion that on intestacy the family home be allocated to the surviving spouse up to a specified value would not provide sufficient protection, see ‘Inheritance Rights of Children’ (n 68) 321.

\textsuperscript{80} While a family’s finances may not stretch to purchasing a family home, accommodation needs must then be met in some other manner. Most commonly, in the absence of ownership of a family home, accommodation is rented. However, the need to pay for rent is often also a considerable drain on resources. Thus, it is submitted, the provision of a preferential share would be merited to ensure adequate financial protection for all surviving spouses, irrespective of whether a family home is in fact owned. Moreover, non-owning spouses are incapable of benefitting from s56(10) to receive further provision from the intestate estate.

\textsuperscript{81} As noted in Chapter 2, in British Columbia, the Law Reform Commission recommended the preferential share of $65,000 be increased to $200,000 in 1983. Despite this, no alteration of the share was forthcoming until 2009 when it was increased to $300,000. The Law Commission also recommended that it be variable by regulation, however, this was not introduced either, see Law Reform Commission of British Columbia, \textit{Report on Statutory Succession Rights} (LRC 70–1983).

Under the equivalent legislation in England, the Lord Chancellor was empowered to vary the legacy by statutory instrument in 1966. This power was first applied in 1967 and has been invoked six times since then.
Moreover, Cretney notes ‘it is not satisfactory to proceed by using delegated legislation at irregular
and unpredictable intervals to vary the amount of a surviving spouse’s entitlement without any clear
statement of the principle upon which the variation is made.’

It is submitted these difficulties could easily be avoided through the inclusion of a detailed statutory
review procedure. Having regard to the procedures, both currently in place and proposed in many
jurisdictions, it would be highly advantageous to state at the outset the frequency with which such
reviews would take place. It is, therefore, recommended that the preferential share should be
reviewed biennially. A statement of principle as to the basis on which a variation should be made
should also be provided, namely a consideration of a reliable house price index. Finally, an

82 Cretney, ‘Reform of Intestacy’ (n 25) 99.
should aim for a process which is as nearly automatic as can be achieved, so as to avoid the potential for either
a waste of time and resources on frequent consultation or criticism for failure to consult’. See Law Commission
for England and Wales, Intestacy and family provision claims on death (n 47) para 2.121. While it may be said that the track-record for statutory reviews is poor in Ireland, our past failure in this regard
should not be used as a stick with which to knock the merits of such a proposal. Indeed, it is submitted, the
inclusion of such provisions for statutory review would be a positive addition to the Irish legislative regime.
84 The Law Commission for England and Wales Report recommends a review at least every five years, ibid para
2.128. By contrast, the Scottish Law Commission proposed reviewing their threshold sum of £300,000 on an
annual basis, see Report on succession (n 52) para 2.16. For a summary of the report, see Nichols (n 52).
85 Akin to proposals on intestacy in England and Wales, it is possible that a review of the preferential share
could be prescribed to take place ‘no less than once every two years’ to allow the flexibility to respond to
changes in property values if required. However, it is submitted it is unlikely such shorter time frame would, in
practice, be required.
86 In the Consultation Paper for England and Wales it was suggested that the statutory legacy might be raised
in line with the average rate of increase, if any, of house prices across England and Wales. However, in the
2011 report, Intestacy and family provision claims on death (n 47) para 2.123, the Law Commission for England
and Wales explains that it had been convinced that the statutory legacy should not be linked exclusively to
house price inflation. Instead, it proposed a ‘statutory indexation mechanism’. The level of statutory legacy
would be updated periodically by reference to the retail prices index (RPI) which is published on a monthly
basis by the Office for National Statistics and includes certain housing costs (council tax, mortgage interest
repayments, house depreciation, buildings insurance, ground rent and estate agents’ and conveyancing fees)
not included in the consumer prices index (CPI). As a result, they explained in para 2.124: ‘Using RPI means
that future increases in the statutory legacy will reflect house price inflation to some extent but also reflect
inflation in the rest of the economy and across the country as a whole.’ The report continues in para 2.127 to
state the Lord Chancellor would however be given discretion to substitute a different measure of inflation in
place of the RPI if required in order to ‘give sufficient flexibility to choose a measure of inflation that is
considered to be most appropriate or to cater for the possibility that the RPI is no longer published’. This approach certainly appears to be more attractive than a mere consideration of changes in house prices
and it is submitted would be an appropriate basis on which to make a variation of the preferential share.
Unfortunately, however, while in Ireland the CSO does publish a Consumer Price Index (CPI) which covers a
range of housing costs including mortgage interest repayments, private and public rental costs, home
insurance and local authority service charges, it does not include home depreciation values. It is submitted this

England and Wales currently have a lower level of £250,000 (where there are surviving children or other
descendants) and an upper level of £450,000 (where there are no surviving children or other descendants, but
the deceased left a parent or full sibling). The latest increase came under the Family Provision (Intestate
Succession) Order 2009, SI 2009 No 135, for deaths on or after 1 February 2009. However, due to the lack of
established review procedure to guide the Lord Chancellor on when to exercise his discretion and to what
extent the level should be varied, difficulties have also ensued. As a result, this most recent alteration of the
statutory legacy effectively doubled the previous floor of support. The lower level of £125,000 was doubled
and the higher level was more than doubled rising from £200,000 to £450,000.

By contrast, the Scottish Law Commission proposed reviewing their threshold sum of £300,000 on an
annual basis, see Report on succession (n 52) para 2.16. For a summary of the report, see Nichols (n 52).
explanation for each change in the figure or otherwise should be made available to the public upon the completion of each review. Moreover, any amendment to the preferential share should be rounded to the nearest €1,000.  

What about the case of partial intestacy? Currently, section 74 of the Succession Act 1965 states the part of the estate which is not disposed of shall be divided as if the deceased died wholly intestate and left no other estate. However, if such an approach were incorporated into the present proposals it could result in an overly generous provision for a surviving spouse. As a result, it is submitted that gifts or bequests made to a surviving spouse under a will shall be treated in the same manner as the benefit arising by virtue of the right of survivorship and, therefore, set-off should apply. However, as stated, a surviving spouse could alternatively choose the current regime as applied under section 67 if more beneficial.

Before proceeding to the application of the proposal, one final issue must be tackled – the impact of the proposal on children. Currently, on intestacy, a surviving spouse is entitled to two-thirds of the estate and the children take an equal share in one-third. Under these proposals, the surviving spouse would receive the first €180,000 and half the remainder. The children would be confined to receiving a share in the other half of the remainder. This would represent a considerable diminution of the share to which they are currently entitled in Ireland.

Therefore, the question arises: Is this a serious impediment to the proposal? It is submitted it is not. There is a clear hierarchy of successors in Ireland in which the surviving spouse reigns supreme. On

is a serious weakness in the index as it currently exists and should be eliminated before being invoked for the purpose of reviewing the preferential share.

Law Commission for England and Wales, *Intestacy and family provision claims on death* (n 47) para 2.126 proposes that index-linked updates of the statutory share on intestacy are intended to be ‘upwards-only’. No such recommendation is made in these proposals.

In the case of sole ownership.

By contrast, the original basis on which preferential shares were founded ensured, in most cases, that children received nothing. In England, under the Administration of Estates Act 1925, approximately 98% of all estates fall within its limit of £1,000. See Nicola Preston, ‘A Lasting Legacy’ (2005) 155 NLJ 1594. This also seems to be the approach adopted in all the recent reviews of succession law under discussion.

Fleming refers to the ‘de facto contraction of succession to the surviving spouse, usually the widow’. See John G. Fleming, ‘Changing functions of Succession Laws’ (1978) 26 Am J Comp L 233, 235. Moreover, the New South Wales Law Reform Commission, *Uniform succession laws: intestacy* (n 55) para 3.28 noted: ‘Some studies (albeit conducted a number of years ago and in other common law jurisdictions) have shown that the public thinks the surviving spouse should receive a larger share of the estate than can be justified by need alone. The Law Commission of England and Wales conducted a survey of members of the public which showed that 79% of respondents believed that the spouse should be entitled to the whole estate where there were dependent children of the relationship, and 72% believed that the spouse should be entitled to the whole estate where there were independent adult children of the intestate’.

Similar support for the surviving spouse inheriting the entire estate on intestacy in preference to the deceased’s issue was reported in Fellows, Simon and Rau, ‘Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States’ (n 54) and Mary L. Fellows, Rita J. Simon and William Rau, ‘Public Versus Statutory Choice of Heirs: A Study of Public Attitudes about Property Distribution at Death’ (1980) 58(4) Soc Forces 1263. See also Cooke, ‘Wives, Widows and Wicked Step-Mothers: A Brief Examination of Spousal Entitlement on Intestacy’ (n 49) 433, where, having noted the aging population in England, she states: ‘There are good reasons for keeping resources with the older generation rather than passing it downwards, in order to provide the older generation with what they need for their care in later life. Typically a
intestacy, they receive the largest portion and under the rules of testate succession they are the only one who possesses an entitlement to a fixed, legal right share. Indeed, the importance of providing concrete protection to a surviving spouse with the legal right share, as opposed to the discretionary nature of protection afforded to children, was stressed by the Minister for Justice, Mr. Lenihan in the Dáil upon the introduction of the Bill.\textsuperscript{91} Furthermore, the initial transfer of property between a husband and wife is generally considered an intermediate, transitional stage since, under the ‘conduit theory’, on the surviving spouse’s death the property will usually be passed on to the next generation.\textsuperscript{92} Thus, the child’s share is really only deferred or postponed, in many cases, rather than exhausted. Where the property is not passed on to the next generation, and, as a result, proper provision is not made for the children, a child may apply under section 117 of the Succession Act for such provision to be made for them, albeit at the discretion of the court. Alternatively, if the surviving parent dies intestate, the children are the only ones with entitlements.

However, potentially serious difficulties emerge in circumstances where the deceased’s children are not common to both spouses. In light of the changing face of Irish society and the emergence of mixed or blended families in a now multiple marriage society,\textsuperscript{93} it is clear that the ramifications of succession law for stepchildren is undoubtedly of great practical significance.\textsuperscript{94} In such circumstances, the deceased’s widow may not have had a parental relationship with, or felt any obligation towards, the children of the first marriage and will, therefore, be considered a less reliable ‘conduit’. The situation is exacerbated by the fact that section 117 restricts the application of the provision to ‘children of the testator’ and while this does include adopted and non-marital children, there is no legal requirement to make provision for stepchildren.\textsuperscript{95} Moreover, stepchildren are not entitled to a share of the intestate estate of a stepparent. In these circumstances, proposals based on ensuring a surviving spouse receives the vast majority of an intestate estate must be questioned. To overcome these difficulties, certain modifications to this proposal need to be considered to ensure adequate provision for stepchildren. After all, there is undoubtedly clear competition between the first family, as represented by the children of the first marriage, and the second family, parent dies in old age when their children are middle-aged and well established in life; it may well be that the surviving spouse’s needs are far more pressing than those of the younger generation.’

\textsuperscript{91} Dáil Deb (n 7) col 415. This is of even more relevance nowadays as an ever longer life-expectancy will often mean that the surviving spouse is in more need than adult, independent children, see above 105.

\textsuperscript{92} For more on the conduit theory, see Langbein & Waggoner (n 6) 310-312.

\textsuperscript{93} The most recent figures available from the CSO report on marriages published on 16\textsuperscript{th} September, 2011 show that in 2008, 1,657 divorced men remarried representing 7.5% of all grooms and 1,296 divorced women remarried representing 5.8% of all brides. See <www.cso.ie/releasespublications/documents/vitalstats/current/marriages.pdf> accessed on 27 September 2011. The previous report published on 23 May 2007 showed that in 2005, 1,399 divorced men remarried or 6.6% of all grooms while 1,133 divorced women remarried representing 5.3% of all brides. See <www.cso.ie/releasespublications/documents/vitalstats/2005/marriages2005.pdf> accessed 27 September 2011.

\textsuperscript{94} Mackie noted in relation to Australia, ‘the traditional family structure of two parents and associated progeny all living together in the one home can no longer be taken as the norm, and the modern family structure quite often includes children from other relationships, who may become stepchildren upon subsequent marriage of one or other of their biological parents’. See Ken Mackie, ‘Stepchildren and Succession’ (1997) 16 Uni Tasmania L Rev 22, 23. While traditional nuclear families are still the norm in Ireland, how long this will remain the case is unknown.

\textsuperscript{95} See below for an analysis of the law governing testate succession and stepchildren, 118.
as represented by the surviving spouse. For the purposes of this thesis, it is necessary to establish what impact these modifications will have on the share of the surviving spouse.

In order to understand the difficulties presented on succession for stepchildren and to appreciate the difference between the law as it currently stands and the effect of proposals based on a preferential share, it is necessary to consider the following scenario: H and W, a married couple, have two children, X and Y. Following W's death, H currently inherits two-thirds of W's estate under the Succession Act 1965, with the final one-third split between X and Y. Some years later, H marries W2 who has a son, Z, from a previous relationship. When H dies intestate, two-thirds of his property is then inherited by W2, with one-third again split between X and Y. When W2 dies intestate, her entire estate is inherited by her son, Z. The law applied in this manner ensures Z receives four times more of X and Y's parent’s total estates than either X or Y themselves, despite the fact Z has no biological link to their parents. While one sympathises with X and Y, such provision broadly reflects the findings of American research which indicated:

'A statute that provides a second or subsequent spouse with 60 to 70 percent of the deceased’s estate with the residue being shared equally by the deceased’s children or their issue would mirror most intestate decedent’s preferences and best accommodate societal needs.'

However, if protection for a surviving spouse based on a preferential share of the estate was applied to the situation, the difficulties would be even more serious for X and Y. In these circumstances, the children would merely receive half of the remainder over the limit of the preferential share, which is set here at €180,000, on the death of H and W. In such a scenario, there is even greater reliance on inheritance from the surviving parent as, depending on the relative size of the estate and the preferential share, it will mean that in some estates, the children’s entitlement to a half share in the remainder will effectively be meaningless. Moreover, irrespective of which fixed share regime is employed, the deceased’s children will not be entitled to a share of the deceased’s second spouse’s intestate estate upon their subsequent death, despite the fact that a substantial share of that estate may have been derived from their prior inheritance from the children's deceased parents.

96 The Law Commission for England and Wales reported the response to a consultation carried out by the Department for Constitutional Affairs in 2005: ‘Most respondents agreed with the suggestion that the interests of a surviving spouse should be the most important consideration when setting the level of statutory legacy. However, many added a caveat that the interests of a surviving spouse should only be paramount where the deceased did not leave any children or did not leave children from another relationship.’ See Intestacy and family provision claims on death: a consultation paper (n 54) para 3.51.

97 Moreover, if W2 died testate and left everything she owned to Z, s 117 wouldn’t apply for the benefit of X and Y to seek proper provision.

98 Applying a nominal value of €12 to the estates, for ease of explanation, the calculations may be made as follows: If W1 dies with an estate valued at €12, X and Y will receive €2 each while the remaining €8, in a worst case scenario and assuming the intestate inheritance is not dissipated, will eventually pass to Z via H and W2. When H dies with an estate similarly valued at €12, X and Y will receive a further €2 each with the remaining €8 passing to Z via W2. In total this means X and Y will each receive €4 of their parent’s estates while Z will ultimately receive €16.

Recognising the potential for injustice, the British Columbian legislature took evasive action and the Wills, Estates and Succession Act 2009 has amended the law relating to the preferential share in recognition of the prevalence of mixed families in British Columbia and the conduit theory.\footnote{100} The British Columbia Law Institute explained the issue thus:

‘In the case of a mixed family, it may be assumed the surviving spouse’s children will inherit ultimately from their own parent. If the full preferential share is paid to that spouse, there is a potential for benefitting stepchildren to a greater extent than the intestate’s biological children.’\footnote{101}

As a result, the preferential share of €213,626 ($300,000) only applies if all of the deceased’s descendents are common descendents of both the deceased and the surviving spouse.\footnote{102} In all other circumstances, section 21(4) provides the preferential share of the spouse will be €106,800 ($150,000).\footnote{103} Consequently, all children of the deceased will be entitled to a one-half share in the remainder, which will be considerably larger than the remainder left where the full preferential share is applied. This, it was felt, ‘would provide a better chance of achieving fairness between the intestate’s own issue and step-children’.\footnote{104}

While there are strong arguments in favour of adopting measures to protect the children of first marriage to the detriment of a surviving spouse from a second marriage\footnote{105}, law reformers are not unanimous in their support for such provisions. The problem was recently considered by the Scottish Law Commission who recognized the ‘scenario raises difficult issues’.\footnote{106} Despite proposing a preferential system of support for a surviving spouse, akin to that applied in British Columbia,\footnote{107} the

\footnote{100} One of the aims of the new legislation was to ‘modernize’ the law dealing with succession on death, see British Columbia Law Institute, \textit{Wills, Estates and Succession: A Modern Legal Framework} (BCLI Report No 45–2006) xiii.
\footnote{101} ibid 14.
\footnote{102} S 21(3) of the Wills, Estate and Succession Act 2009.
\footnote{103} See 74.
\footnote{104} British Columbia Law Institute, \textit{Wills, Estates and Succession: A Modern Legal Framework} (n 100) 14.
\footnote{105} A distinction is drawn between the rules which apply where the children of the spouses are all common descendents and situations of mixed families in many jurisdictions. Similar provisions to those applied in British Columbia are also incorporated into the Uniform Probate Code (UPC) applied in many states of the USA. The UPC has been adopted by 19 states, however, it is a modified version which applies in many states. On intestacy, where all the deceased’s children are common children of the deceased and the surviving spouse and the surviving spouse does not have any other children, the surviving spouse inherits the entire estate. By contrast however, where either the deceased is survived by children from another relationship or the surviving spouse has children of another relationship, the surviving spouse is entitled to a statutory legacy and a one-half share in the remainder of the estate. The other half of the remainder is divided between the deceased’s descendents. See Shapo (n 2) 716.
\footnote{106} Report on Succession (n 52) para 2.29.
\footnote{107} The Draft Succession (Scotland) Bill set out in the \textit{Report on Succession} ibid proposes at that a spouse or civil partner would have a right to the first £300,000 and any excess over the threshold sum would be divided equally, one-half to the spouse or civil partner and one-half to the issue, see ss 3(1) and 3(2) at para 2.16.
Scottish Commission nevertheless remained ‘convinced that no distinction should be made between different types of surviving spouse’. It explained the reasons for this stance as follows:

‘The succession rights of the surviving spouse or civil partner arise solely from their legal relationship with the deceased. Put another way, a spouse or civil partner does not have to “earn” the right to have part of the deceased’s estate: the right arises from their status. The rule that a surviving spouse or civil partner will inherit the whole estate unless it is more than the threshold sum will therefore apply regardless of whether the survivor is a second or subsequent spouse or civil partner and is not related to the deceased’s issue. This is not to deny the difficulties which may arise in reconstituted families. But it must always be remembered that the rules of intestate succession are default rules. They apply only when the deceased has not left a will. No one is better qualified than the deceased to decide whether in his particular circumstances he should provide for his first as well as his second or subsequent family. If he decides to do so, he simply makes a will to that effect. The fact that the rule on what will happen if he dies intestate is simple and easily understood should help him make that decision.’

Moreover, in their 1989 Report, the Law Commission for England and Wales recognised the risk that ‘children of former marriages could end up inheriting none of what was originally their parent’s property’. However, they also concluded that this was not sufficient reason to make special provision for the children of other relationships. This position was upheld more recently in the 2010 consultation paper and the 2011 report. The Commission explained:

‘It is doubtful whether conduit theory is relevant to the majority of estates. It is based on the idea that a surviving spouse will pass on to his or her children any surplus wealth from the inheritance. Yet there will often be no surplus … Even in those estates where there is something for a surviving spouse to pass on, we are not convinced that conduit theory provides a sound basis for reform. Conduit theory describes the proposition that stepparents will generally feel less obligation towards their step-children than their biological children; yet we are not persuaded that this is necessarily the case.’

Furthermore, it is widely considered that the issues arising where intestate succession and mixed families collide can only be resolved through complicated legislative enactments. To this end, Reid noted ‘the complex territory of reconstituted families may require complex law’. In a similar vein, Cretney noted, ‘One thing emerges without possibility of contradiction from any survey of this kind.

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108 This comment was also extended to encompass civil partners, ibid para 2.30.
109 ibid para 2.30.
110 Law Commission for England and Wales, Family Law: Distribution on Intestacy (n 6) paras 41 and 45.
111 Law Commission for England and Wales, Intestacy and family provision claims on death: a consultation paper (54) para 3.106. They added at para 3.111, ‘We therefore make no provisional proposals that would diminish the entitlement of a surviving spouse where the person who died intestate (or the surviving spouse) has children or other descendants from another relationship.’ This belief was once again reiterated in the Law Commission for England and Wales, Intestacy and family provision claims on death (n 47) paras 2.67-2.82.
It is that all systems of intestate succession which have tried to make provision taking account of the varied circumstances of second marriages are immensely complex.\textsuperscript{113}

Nevertheless, recognising the difference between nuclear families and mixed families, Professor Norrie noted that, arguably, in these situations, ‘the balance of interests ... needs to be struck differently from the balance in those intra-familial competitions which will presumably be the norm’.\textsuperscript{114} While it could be argued that to make provision for stepchildren goes against the primary social goal of the Succession Act 1965, namely the protection of a surviving spouse, and in spite of the clear lack of support in some quarters for the introduction of such measures, it is submitted that some protection should be put in place. To this end, the introduction of discretionary provision on the basis of need, or the level of responsibility accepted by a stepparent towards a stepchild, would not be appropriate. Similarly, an entitlement to a fixed share of the stepparent’s estate is not proposed. Instead, it is submitted sufficient protection could be provided through the reduction of the preferential share in the case of stepchildren, in line with the approach recently adopted in British Columbia, thereby allowing stepchildren, and any other children of the deceased, to participate in the division of a half share of the remainder. It is considered that reducing the figure to €90,000, equivalent to the ratio applied in British Columbia, would be unduly harsh on the surviving spouse and could leave them vulnerable where the home is in the sole name of the deceased spouse. As a result, it is provisionally proposed that where the issue of the deceased are not all common issue of the surviving spouse, the preferential share would be reduced to approximately €120,000.\textsuperscript{115}

### 3.4.2 Application of the proposal

The overall effect of the proposal above in contrast to the current application of section 67, may be summarized as follows:

<table>
<thead>
<tr>
<th></th>
<th>Scenario One: Estate valued at €451,280 (inc. home worth €180,000)</th>
<th>Scenario Two: Estate valued at €200,000 (inc. home worth €180,000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 67 (2/3 estate)</td>
<td>€300,853</td>
<td>€133,332</td>
</tr>
<tr>
<td>Preferential Share (€180,000 + ½ remainder)</td>
<td>€315,640 (€180,000 + €135,640)</td>
<td>€190,000 (€180,000 + €10,000)</td>
</tr>
</tbody>
</table>

\textsuperscript{113}Cretney, ‘Reform of Intestacy’ (n 25) 93.

\textsuperscript{114}Kenneth Norrie, ‘Reforming Succession Law: Intestate Succession’ (2008) 12 Edin LR 77, 79-80. However, he was ‘unable to identify a clear principle upon which a departure from its simple spouse-takes-virtually-everything rule might be based’.

\textsuperscript{115}This would represent two-thirds of the full preferential share. Indeed, as Miles alluded, it would not necessarily be unfair to treat a second spouse less favourably where the deceased has children from other relationships as, in most cases, that spouse will know that he or she is marrying someone with children from a previous relationship. This assertion was noted in Law Commission for England and Wales, \textit{Intestacy and family provision claims on death} (n 47) para 2.70.
On the basis of these proposals, in scenario one, Mrs. Kelly would receive €315,640 or 3.27% extra of the estate than is currently provided by section 67. The impact is, therefore, minimal where the estate is relatively large and the home is in sole-ownership. By contrast, however, in scenario two Mrs. Kelly would receive €56,668 or 28.33% extra of the estate. This would represent a dramatic increase in the share of the surviving spouse in circumstances where the estate is modest and the home is in the sole name of the deceased spouse.

Moreover, the effect of such proposals on a joint tenancy may be summarized as follows:

**Table 4: Comparative application of the current law on intestacy and proposals - Joint tenancy**

<table>
<thead>
<tr>
<th>Scenario One: Estate valued at €271,280 (excl. family home)</th>
<th>Scenario Two: Estate valued at €20,000 (excl. family home)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Section 67 (2/3 estate)</strong></td>
<td><strong>Home + €180,853</strong></td>
</tr>
<tr>
<td><strong>Home + €13,333</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Preferential Share (€180,000 + ½ remainder)</strong></td>
<td><strong>Home + €135,640</strong></td>
</tr>
<tr>
<td><strong>Home + €10,000</strong></td>
<td></td>
</tr>
</tbody>
</table>

On the other hand, the above table demonstrates that the proposal is of no benefit where the home is of average value and is held by both spouses as joint tenants. On this application of the proposals, the share to which Mrs. Kelly is entitled in scenario one would be €45,213 less of the estate than is currently provided by section 67. Moreover, in scenario two, Mrs. Kelly would receive €3,333 less of the estate than is currently the case. Due to the lack of provision resulting from the application of the preferential share and share of the remainder, in such circumstances, and where the home is worth more than average, surviving spouses would be advised to instead avail of section 67 which would ensure greater provision. This again fits with the overall goal of ensuring the most protection is provided to those most in need, namely non-owning spouses.

However, the introduction of a preferential share and share of the remainder could still be relevant in a joint tenancy if the family home is worth less than €180,000. In such circumstances, this proposal once again gains importance and may protect a surviving joint tenant better than the current legal right share. Adjusting the case study once more, this effect may be clearly perceived. If the family home was held in a joint tenancy and was worth €160,000 and the deceased also possessed savings worth €20,000, the following situation would arise:

As the family home passes to the surviving spouse due to the right of survivorship, it does not constitute part of the deceased’s estate. Thus, the figures are adjusted to reflect the actual value of the estate without the family home. However, the value of the home is relevant for the purposes of the proposals made based on the preferential share due to the inclusion of set-off. This aspect of the proposal would also apply to civil partners.
Table 5: Comparative application of current law on intestacy and proposal - Joint tenancy II

<table>
<thead>
<tr>
<th>Estate valued at €20,000 (excl. family home worth €160,000)</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Section 67 (2/3 estate)</th>
<th>Home + 13,333</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preferential Share (€180,000)</td>
<td>Home + €20,000</td>
</tr>
</tbody>
</table>

While the focus of the protection afforded by the preferential share and share of the remainder is undoubtedly directed towards surviving, non-owning, spouses, it is submitted the extension of the proposal to situations where a joint tenancy arises is a pragmatic one as evidenced in this application. The anomaly which could arise whereby, in such a scenario a surviving, non-owning, spouse would receive both the home and the €20,000 savings, while a surviving joint tenant would be limited to receiving the family home under the right of survivorship and the legal right share of €13,333, is avoided.

Illustrating the comparative effects of the proposal for a surviving tenant-in-common is more difficult as the share of the home held under a tenancy-in-common can vary considerably. However, at both ends of the spectrum of a tenancy-in-common, links can be drawn with the impact of the proposals on non-owning spouses and spouses gaining an interest under a joint tenancy respectively. To this end, it is clear that where a small share in the home is held by the surviving tenant-in-common, the situation arising under these proposals would be akin to that of sole ownership as the preferential share would merely be reduced by the limited interest in the home held. On the other hand, where a large share of the home, perhaps approaching full ownership, is held by the surviving co-owner, the outcome would more closely resemble a joint tenancy and the benefit, if any, presented by the proposal would be limited to situations where the home was worth less than the preferential share. However, in order to understand the impact of the proposal on a tenancy-in-common where the ownership is equally divided, it is again useful to consider the following table:

Table 6: Comparative application of current law and proposal - Tenancy-in-common I

<table>
<thead>
<tr>
<th>Scenario One: Estate valued at €361,280 (excl. 50% interest in family home worth €90,000)</th>
<th>Scenario Two: Estate valued at €110,000 (excl. 50% interest in family home worth €90,000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 67 (2/3 estate)</td>
<td>50% of home + €240,853 (100% of home + €150,853)</td>
</tr>
<tr>
<td>Preferential Share (€180,000 + ½ remainder)</td>
<td>50% of home + €225,640 (€90,000 + €135,640) (100% of home + €135,640)</td>
</tr>
</tbody>
</table>
It is clear that although in the larger estate in scenario one it would be more beneficial to a surviving tenant-in-common to avail of the two-third share currently afforded by section 67, the merits of this proposal once again come to the fore in the smaller estate in scenario two where the preferential share and share of the remainder affords more protection to the surviving tenant-in-common than the legal right share.

Finally, as in a joint tenancy, the advantages of the current proposal where the home is worth less than average are equally relevant with regard to a tenancy-in-common. A similar anomaly whereby a surviving spouse with no interest in the family home would be in a more advantageous situation than a co-owning surviving spouse who was a tenant-in-common is avoided by extending the proposal to situations where the family home is co-owned.

Table 7: Comparative application of current law and proposal - Tenancy-in-common II

<table>
<thead>
<tr>
<th>Estate valued at €100,000 (excl. 50 per cent interest in family home worth €80,000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 67 (2/3 estate)</td>
</tr>
<tr>
<td>Preferential Share (€180,000 + ½ remainder)</td>
</tr>
</tbody>
</table>

It is submitted that where the means of the testator are limited to less than €180,000 when the family home is included, it is not excessive to ring-fence such a figure for the financial protection of the surviving spouse whether the home is in the sole ownership of the deceased or is co-owned either through a joint tenancy or a tenancy-in-common.117

3.5 Preferential Share – A Viable Alternative to the Legal Right Share?

While a strong argument has been made for the application of the preferential share on intestacy in Ireland, it would be remiss not to consider the extension of such a regime in all circumstances where it is evident the application of a fractional share can give rise to injustice.118

Unlike the basis on which the rules of intestacy are founded, the principal reason and primary social objective of the inclusion of the legal right share is to ensure a minimum level of support, thereby preventing the deceased from either disinheriting or making an unacceptably small gift to the surviving spouse.119 However, as in the case of intestacy, a major weakness in the adoption of a fractional share as a basis for the legal right is again the fact that the size of the share will depend on the size of the deceased’s overall estate. As a result, akin to intestacy, the problem is most acute where the estate is modest and protection is most required. Moreover, as the legal right share to which a surviving spouse is entitled is considerably less than is available on intestacy, merely limited

117 See above n 77 for an explanation for this extension.
119 See above, 68.
to one-third, this shortcoming is even more acute.\(^{120}\) In light of this weakness, reform on the basis of a preferential share ought to be considered. Thus, the question must be posed: Could a preferential share present a viable alternative to the current legal right share in the protection of surviving spouses?

### 3.5.1 Theoretical difficulties with the extension of the proposal

In assessing the suitability of such reform which borrows from an approach commonly adopted in the case of intestacies, it is first of all important to note that there is a clear distinction between the basis upon which provisions governing intestacy, described as ‘intent-serving’, and provisions interfering on testacy, described as ‘intent-defeating’, are founded. One of the primary purposes of the law of intestacy is to produce, in effect, a default will or a substitute estate plan in order to reflect the distributive preferences of the deceased. Presumptions are therefore made about the deceased’s intentions as if they had completed the necessary formalities to make the testamentary dispositions themselves. In order to make these presumptions, the distribution patterns of those who die testate are considered.\(^{121}\) One of the principal presumptions made is that, in general, an average testator would want to make generous provision for their surviving spouse.\(^{122}\) As a result, the legislative provisions distributing a deceased’s intestate estate across the common law world reflect this belief with the rules of intestacy almost invariably placing the surviving spouse as the primary beneficiary of an intestate estate. However, it is not possible to make the same assumptions in adopting the preferential share to protect the surviving spouse from express disinherance.\(^{123}\) Thus, while the rules governing intestacies are widely accepted as necessary, interfering with the express wishes of a testator who has taken the positive action of making a will in order to clearly set out their intentions is a more contentious matter.

For instance, what if a deceased spouse had good reason to disinherit a surviving spouse, perhaps having already made substantial alternative provision for them inter vivos? Although it would be possible to introduce a system which would take such inter vivos provision into consideration by

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\(^{120}\) In fact, reform has already been suggested in Ireland. The *Report of the Second Commission on the Status of Women* (Stationary Office 1993) 39 recommended a legal right share of one-half of the estate where the other spouse dies testate. The Commission did not recommend a change to the provisions governing intestate estates. However, this proposal was primarily suggested in furtherance of a communitarian agenda and was not driven by a desire to remedy the weaknesses in the system as currently applied, from a practical perspective, in the provision of financial support for surviving spouses.

\(^{121}\) Although the Law Commission for England and Wales argued, ‘it seems odd to allow ... the half of the population who make wills to dictate what should happen to the property of the other half who do not’ in *Distribution on Intestacy* (Working Paper No 108–1988) 32, it was noted in Fellows, Simon and Rau, ‘Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States’ (n 54) 385 that the findings of the research undertaken therein ‘effectively validate the use of wills as evidence of intestate decedent’s distributive preferences’.

\(^{122}\) For a review of the data gathered in various jurisdictions supporting generous provision for a surviving spouse, see New South Wales Law Reform Commission, *Uniform succession laws: intestacy* (n 55) paras 3.27-3.33.

\(^{123}\) Technically speaking no one can be ‘disinherited’ since nobody possesses an indefeasible right to succeed in another’s estate. The term can, however, be used to describe how a will ‘disinherits’ someone who does not receive anything thereunder but would have been catered for under the rules of intestate succession had no will existed or the feeling of disinherance where an individual believes the deceased had a moral right to make provision for them.
reducing the preferential share through an extended version of hotchpot or offset, this would be inconsistent with the approach under the current legal right share which applies irrespective of any inter vivos provision. It would also be unnecessary as such a situation is likely to arise as the exception rather than the norm.

At an even more fundamental level, the question arises: Can the provision of a preferential share for a surviving spouse be justified where a will exists? Notwithstanding the vastly different contexts, it is submitted it can. To explain this conclusion, it is necessary to once again consider the central questions arising when formulating the appropriate legal response to the issue of disinheritance:

‘Does the law ... favour unfettered freedom of disposition as a necessary or desirable incident of the economic power inherent in the ownership of property? Or does it attach greater importance to the notion that family property ought to be preserved within the family to serve as an endowment to successive generations? How far is the state prepared to interfere with property rights, whether to promote democratic or egalitarian ideals or simply--perhaps in self-interest--to impose a duty to secure adequate provision for the support of an owner’s dependants?’

The Irish response indicates that the legislature ranks the need to make provision for a surviving spouse higher than the predilection for retaining complete testamentary freedom. Interference with testamentary autonomy through the legal right share is justified by the overriding social goal of protecting the financial position of a surviving spouse. It is submitted the provision of a preferential share designed to protect a surviving spouse vis-à-vis the family home where a will exists would be equally justified on this basis and would merely facilitate the more effective achievement of the underlying public policy goals on which protection of a surviving spouse against disinheritance is based when compared to the flawed fractional share provision currently afforded by section 111.

However, it appears that while the provision of a preferential share would, on initial analysis, be a theoretically acceptable alternative to protect against disinheritance, additional theoretical difficulties arise in considering the actual implementation of such a provision. A second difficulty associated with the proposed reform from a theoretical perspective is that while freedom of testation is already tempered in Ireland, the introduction of a preferential share would arguably

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124 As canvassed by Professor Kerridge on intestacy, see ‘Reform of the Law of Succession: The Need for Change, not Piecemeal Tinkering’ (n 69). However, even Kerridge’s proposal did not extend hotchpot to situations where provision was made inter vivos.

125 It should, however, be noted that s 116 of the Succession Act 1965 does provide that if a testator made permanent provision for a spouse prior to the commencement of the Act, this would be taken as being given in or towards satisfaction of the legal right share.

126 Cretney, ‘Reform of Intestacy’ (n 25) 77-78.

127 Upon the introduction of the Succession Bill to the Irish Parliament in 1965, Minister Lenihan explained: ‘We in Ireland pride ourselves on the fact that we recognise the very special position of the family “as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law”. Against such a background so-called freedom of testation is a paradox which cannot be defended on any ground.’ See Dáil Deb (n 7) col 414.
represent a further extension of the current interference in many cases. At its most extreme, reform based on this proposal would mean that where an estate falls below the threshold for the preferential share, the testator would have no power to dispose of his estate. This begs the following questions: Would the introduction of a preferential share replacing the legal right share represent too great an infraction on testamentary autonomy? Would such a measure represent an unjustified attack on the rights a testator who, simply by virtue of the limited size of his estate, is prevented from disposing of his property as he so wishes?

Two principal arguments may be made to address such fears. While the right to freedom of testation has generally gained acceptance over the centuries, as Minister Lenihan noted ‘there is no historical or moral basis for the view that freedom of testation is a fundamental right inherent in property.’ As a result, if the primary focus of the legislation is the provision of financial support for a surviving spouse, freedom of testation should not be considered a right but rather a luxury to be enjoyed once the estate is of sufficient size to meet the obligation to protect a surviving spouse. As will be discussed below, the implementation of a preferential share would have the greatest effect where the estate is modest and least effect where the estate is larger or protection already exists over the family home through the right of survivorship. In fact, in such circumstances, the interference with testamentary autonomy would often be even less than that currently applied under section 111, depending on the size of the estate.

In addition, where the share on intestacy, legal right share or gift under a will is insufficient to effect the appropriation of the family home, a surviving spouse can currently apply to the court under section 56(10)(b) to waive or reduce the balance between the share or gift and the value of the family home where the payment of the outstanding money into the estate would result in hardship to the surviving spouse. Albeit indirect, the effect of such an order following a testate death is nonetheless the extension of the legal right share on the basis of need, representing a further infraction on the testamentary autonomy of the deceased. Thus, section 56(10)(b) represents a

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128 Although depending on the size of the fractional share of the remainder, if any, it is possible that in large estates or where the family home is currently held in a joint tenancy, the proposal would actually be less than the share currently provided for.

129 In considering proposals for reform, the Scottish Law Reform Commission stated: ‘It is ... important that the size of the fixed share should attempt to reflect both the interests of the survivor and the deceased’s freedom to test on his own property.’ See Report on Succession (n 52) para 3.6. The provision of a preferential share on testacy, arguably does not afford due regard to the latter’s rights.

130 Dáil Deb (n 7) col 410. He added: ‘Indeed, it is one of the ironies of history that the right of testation was introduced into Roman law in order to enable a man to leave his property to the members of his family and so protect them from the injustice which resulted from the operation of the rules of intestate succession. A will was not regarded by the Romans as a means of disinheriting one’s family or of effecting an unequal distribution of a patrimony. Rather was it valued for the assistance it gave in making provision for a family and in securing a fairer and more even distribution of property than would have been obtained under the rules of intestate succession.’

131 The proposal for a preferential share on testacy could be compared in some respects to the attempted introduction of the Matrimonial Home Bill 1993 which would have substantially altered the property rights of spouses over the family home where it was held in sole-ownership thus seriously affecting the freedom of disposition enjoyed by the legal owner. However, while the 1993 Bill was found to be unconstitutional, it was so found on the basis of its retrospective effect and would possibly have succeeded if the effect was merely prospective. Thus, it is evidence of the willingness of the legislature to interfere with property rights in order to ensure protection for those most in need.
statutory precedent for the extended interference with the testamentary autonomy of the deceased beyond the legal right share on the basis of need.\textsuperscript{132}

A final issue which must be considered from a theoretical point of view is the impact on children.\textsuperscript{133} Currently, children can apply for ‘proper provision’ to be made for them from the two-thirds of the estate which the deceased parent is free to dispose of.\textsuperscript{134} This right to proper provision would be particularly weakened in small estates as there may be nothing left in excess of the preferential share from which such provision could be made. On the other hand, it is clear that children occupy an inferior position to a surviving spouse in the hierarchy of beneficiaries following both a testate and an intestate death, and will therefore always rank behind the surviving spouse. As Professor Fleming explains:

‘Each generation must look after itself. Just as children can no longer be relied upon to look after their widowed mother with respect and grace, so their expectation of succession must in general be postponed to what might be left to them after both parents have died. Children do have a limited claim to earlier attention—but only to assure their maintenance and education during infancy and adolescence.’\textsuperscript{135}

Indeed, rejecting the notion that children should be entitled to a legal share, Minister Lenihan again reiterated the supreme position of the surviving spouse explaining, ‘I accept that a married man should not be compelled to leave anything to his children where, in fact, he wants to leave all his property to his wife.’\textsuperscript{136}

Nevertheless, the balance which would be struck with this proposal based on a preferential share would be quite different to the current legal right share. As a result, the proposal must reflect the need to ensure ‘proper provision’ can be made for children. To this end, it is submitted that a child should be able to bring an application under section 117 against a parent’s estate and the court should be empowered to reduce the preferential share of a surviving parent in such circumstances. However, the court should not have the power to make an order which would reduce the preferential share below the level of the legal right share to which the surviving spouse would, as an alternative, be entitled.

As on intestacy, the impact of such proposals on stepchildren must also be considered. It is clear that the Irish legislature is not blind to the increasing importance of protecting stepchildren in this changing society. While the Succession Act 1965 focuses primarily on protecting the surviving spouse

\textsuperscript{132} It is arguable that in some circumstances, such as where the family home is of below-average value the proposals go beyond that of need as afforded by s 56(10)(b), however, as on intestacy, it is nevertheless contended such an extension is warranted, see 121 for further expansion of this point.

\textsuperscript{133} It is not proposed that a surviving spouse should be entitled to a greater share where there are no children as the main aim is to make adequate provision.

\textsuperscript{134} See s 117 of the Succession Act 1965. For more on s 117, see Spierin (n 29) 353-403. He notes at 339: ‘The standard of provision, which the court expects the testator to make, clearly depends to a very large degree upon the means of the testator.’ See also Emma Storan, ‘Section 117 of the Succession Act 1965: Another Means for the Courts to Rewrite a Will?’ (2006) 11(4) CPLJ 82; Mark Cooney, ‘Succession and Judicial Discretion in Ireland: The Section 117 Cases’ (1980) 15(1) IJ 62.

\textsuperscript{135} (n 90) 236.

\textsuperscript{136} Dáil Deb (n 7) col 417.
from disinheritance, certain changes have been introduced in light of remarriage and the need to cater for mixed families. Thus, although an order under section 117 in favour of a child may not affect any entitlement of a surviving spouse where that spouse is the parent of the applicant child, in circumstances where the surviving spouse is a stepparent of the child, an order in favour of the child may reduce a gift or share on intestacy to which the stepparent is entitled. However, in neither situation may an order under section 117 affect the legal right share to which the surviving spouse is entitled, irrespective of whether they are the parent or the stepparent of the applicant child.

While Professor Mee argues that a civil partner should be treated the same as a stepparent regarding the limits on the effect an application under section 117 might have on them, the legislature goes even further in the protection of stepchildren in these circumstances. To this end, section 86 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 amends section 117(3) to provide:

‘An order under this section shall not affect the legal right of a surviving civil partner unless the court, after consideration of all the circumstances, including the testator’s financial circumstances and his or her obligations to the surviving civil partner, is of the opinion that it would be unjust not to make the order.’

Considering the limited protection afforded by the legal right share, it is submitted, Professor Mee’s apparent distaste for extended interference with the survivor’s share is understandable. However, in light of the difference between the mechanics of a preferential share and the current legal right share, special provision is again merited to ensure the continued protection of stepchildren.

While it is not claimed that a stepparent or civil partner should be made responsible for a stepchild following a testate death, it is submitted that, as with other children, a stepchild ought to be able to bring an application under section 117 in relation to a parent’s estate and the court ought to be empowered to reduce the preferential share of a stepparent or civil partner in such circumstances. However, this reduction should not result in a preferential share which would be worth less than the provision to which the stepparent or civil partner would be entitled under the current regime based on the legal right share.

Given the theoretical acceptability of the preferential share approach as a viable alternative to the current legal right share, the practicalities of implementing such a proposal must now be addressed.

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137 See s 117(3) of the Succession Act 1965.
139 For a critical analysis of this provision, see Mee ibid. Arguably, this provision could be viewed as being focused more on protecting the position of the constitutional family rather than a fulsome support of the position of the stepchild.
140 While Mee’s comments were directed at civil partners, it is fair to assume he would be equally reticent to approve of such extended interference on other surviving classes of spouses.
141 If an estate is worth less than the preferential share, the proposals would, without amendment, ensure that there would be no residue from which provision could be made for a child under s 117 and the preferential share of the stepparent would be untouchable. Moreover, the stepchild would be less likely to receive any future inheritance from the stepparent.
142 Thus, the rules outlined above which govern applications under s 117 in relation to stepparents and civil partners would continue to exist and would represent the minimum provision available under these proposals.
3.5.2 How to set the preferential share which would operate following a testate death?

In determining what level of provision should be made following a testate death, different approaches have recently been advanced in Scotland and in Ireland. First, the Scottish Law Reform Commission recently published a report proposing a dramatic overhaul of the law of succession currently applied. In light of the similarities on intestacy between the proposals included in the report and the system introduced in British Columbia under the Wills, Estates and Succession Act 2009, as well as the innovative approach adopted in the Scottish report to testate succession, it is worth noting the recommendations.

On intestacy, the Scottish Law Commission proposed the introduction of a threshold sum of £300,000 coupled with a half share in the remainder applicable to the entire estate. By contrast, following a testate death, the Law Commission recommended the introduction of a share equivalent to one-quarter of the share that the spouse would have received under the new intestacy rules if the estate was wholly intestate. Some criticisms have already been levelled at this provision. Nichols points out that ‘Arguably, one-third might be better: after all, if the marriage had terminated by divorce rather than death, the spouse would generally have received about half the wealth built up during the marriage’. However, the Law Commission state:

‘A large majority of our consultees agreed that to link the survivor’s fixed share to her rights on intestacy was a welcome simplification of the law. Moreover, they also agreed that 25% was a reasonable proportion to provide the survivor with some protection while at the same time recognising the importance of the deceased’s freedom to test.’

While undoubtedly an interesting approach, the development of Irish law along such lines is not recommended. The provision of a fractional share on testacy, albeit linked directly to the threshold share on intestacy, brings with it the same problems which are inherent in the current application of section 111. Moreover, while it is not suggested that the same level of provision should apply following a testate death as on intestacy, it is nonetheless submitted that the discrepancy between

143 Report on Succession (n 52).
144 However, no mention is made of British Columbia in the report.
145 Under the current law, a surviving spouse has three types of prior rights on intestacy which are governed by s 8 of the Succession (Scotland) Act 1964. When added together, the value of these rights for a surviving spouse with issue is £366,000. The prior right to the dwelling is currently set at £300,000, the prior right to furniture is set at a maximum of £24,000 and the prior right to monetary estate is £42,000 where there are children or £75,000 where there are not. Thus, the ability to avail of these rights is dependent on the composition of the estate.

Referring to the 2009 Report, Barr points out: ‘Most discussion seems certain to centre on the proposal that protection from disinherition should affect the entirety of the deceased’s estate, rather than being restricted to moveables as under the current law on legal rights … This issue is the most political in the Report; and changes on the grounds of maintaining the viability of businesses (especially agricultural businesses) remain a possibility’. See Barr (n 68) 316.
146 (n 52) 310.
147 Report on Succession (n 52) para 3.6. Likewise, Barr points out the provision on testacy of a quarter share of that available on intestacy represents a ‘balanced approach’. See (n 68) 316.
the two situations, particularly in small estates, which the Scottish proposal would precipitate makes it an unacceptable alternative to the law as currently applied under the Succession Act 1965.\textsuperscript{148}

Second, a similar approach was recently proposed here in Ireland, albeit in relation to provision on intestacy for surviving cohabitants. Referring to the then Civil Partnership and Certain Rights and Obligations of Cohabitants Bill 2009, Mee made the following suggestion:

‘it is arguable that the Bill should develop the law in sympathy with the current intestacy rules and provide for a fixed share on intestacy for a qualifying cohabitant where the relationship ended in death, upon an application and proof by the cohabitant that he or she fits the relevant definition. The amount of the fixed share might be (say) half of the share to which a spouse or civil partner would be entitled in the circumstances’.\textsuperscript{149}

Professor Mee’s proposal again supports the adoption of a fractional approach to respond to different situations.

However, the focus of this proposal is premised on a move away from the fractional approach in light of the shortcomings which have been highlighted above. Thus, in order to ensure the protection of some of the most vulnerable members of society, namely non-owning spouses, it is submitted a preferential share of €180,000 should again be applied on testacy.\textsuperscript{150} Nevertheless, once the fundamental financial needs of a surviving spouse are met, due regard must be paid to testamentary freedom. Therefore, the surviving spouse would have no entitlement to a share of the remainder of the estate. In light of the more generous provision for a surviving spouse, particularly in smaller estates, it is not proposed that a greater share should be provided where there are no children as is currently the case with the legal right share.

Akin to intestacy, a provision for offset would apply in order to limit the protection afforded by this proposal to those most in need. Consequently, the proposal would apply as an alternative to the legal right share provided by section 111. The practical effect of this proposal may be summarised as follows:

1) Where the home is in the sole name of the deceased, no offset arises and the surviving spouse is entitled to the full preferential share of €180,000.

2) Where the home is held in a joint tenancy, the preferential share is offset by the value of the home. If the value of the home is less than the €180,000, the surviving spouse is entitled to the balance.\textsuperscript{151} If, however, the value of the home exceeds the preferential share, no benefit

\textsuperscript{148} The Scottish report does not include a right to appropriation of the family home. While, in light of the high threshold on intestacy, this may not be a problem in many cases, the lack of protection for the family home on testacy is glaring. Although the right to appropriate was included in the initial discussion paper, it was rejected in the report on the grounds that succession rights should not be asset specific. See Report on Succession (n 52) paras 1.13, 2.17, 2.18.

\textsuperscript{149} ‘Succession and the Civil Partnership Bill 2009’ (n 138). However, he adds, ‘the details of such a proposal would obviously need to be carefully considered’.

\textsuperscript{150} Subject to the review procedures laid out above, see 103-105.

\textsuperscript{151} See below, 121.
will accrue from the proposal and the surviving spouse may choose instead to rely on section 111.

3) Where the home is held by the spouses as tenants-in-common, the preferential share is offset by the value of the share held by the survivor. Where the value of the share held by the survivor is less than the preferential share, the surviving spouse is entitled to the balance.\textsuperscript{152} Where the value of the share held by the survivor exceeds the preferential share, no benefit accrues from the proposal and the surviving spouse may again choose instead to rely on section 111.

As the need to protect vulnerable, surviving, spouses is central to this thesis, it is submitted there is no meaningful difference between a testate or an intestate death in the provision of a minimal preferential share. Therefore, again, where the spouses do not own a family home, it is proposed no deduction would arise and the full preferential share would be available.\textsuperscript{153}

3.5.3 Application of the proposal

The effect of the proposal and the law as currently applied under section 111 may be summarised as follows.

**Table 8: Comparative application of current law on testacy and proposal - Sole ownership**

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Estate valued at</th>
<th>Scenario</th>
<th>Estate valued at</th>
</tr>
</thead>
<tbody>
<tr>
<td>One:</td>
<td>€451,280 (inc. home worth €180,000)</td>
<td>Two:</td>
<td>€200,000 (inc. home worth €180,000)</td>
</tr>
<tr>
<td>Section 111 (1/3 estate)</td>
<td>€150,426 (83.57% of home)</td>
<td></td>
<td>€66,666 (37.03% of home)</td>
</tr>
<tr>
<td>Preferential Share (€180,000)</td>
<td>€180,000 (100% of home)</td>
<td></td>
<td>€180,000 (100% of home)</td>
</tr>
</tbody>
</table>

The effect of this proposal is considerable. In the larger estate in scenario one, the share which a survivor takes is increased by €29,574 or 6.55% of the total estate. By contrast, in the smaller estate in scenario two, the share rises by a whopping €113,334 or 56.67%. This means that while under the current law, in the absence of an order under section 56(10) of the Succession Act 1965, the legal right share is the equivalent of 33% of the estate, with the introduction of a preferential share, the percentage share of the estate designated for the financial protection of a surviving spouse would vary considerably. In the larger estate in scenario one, the preferential share amounts to 39.88% of the whole estate. However, in the smaller estate in scenario two, the preferential share amounts to 90%.

\textsuperscript{152} See above, n 77.
\textsuperscript{153} See above, n 78.
Table 9: Comparative application of current law and proposal - Joint tenancy I

<table>
<thead>
<tr>
<th>Scenario One: Estate valued at €271,280 (excl. family home worth €180,000)</th>
<th>Scenario Two: Estate valued at €20,000 (excl. family home worth €180,000)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Section 111 (1/3 estate)</strong></td>
<td><strong>Preferential Share (€180,000)</strong></td>
</tr>
<tr>
<td>Home + €90,426</td>
<td>Home + €6,666</td>
</tr>
</tbody>
</table>

By contrast, the above table demonstrates that the effect of the preferential share is less beneficial where the home is of average value and is held by both spouses as joint tenants.\textsuperscript{154} In such circumstances, and where the home is worth more than average, surviving spouses would be advised to instead avail of the legal right share provided by section 111 which would ensure much greater provision.

However, as on intestacy, the introduction of a preferential share could still be relevant in a joint tenancy if the family home is worth less than €180,000. In such circumstances, this proposal once again gains importance and may protect a surviving joint tenant better than the current legal right share. Adjusting the case study once more, this effect may be clearly perceived. If the family home was held by the spouses as joint tenants and was worth €160,000 and the deceased also possessed savings worth €20,000, the following situation would arise:

Table 10: Comparative application of current law and proposal - Joint tenancy II

<table>
<thead>
<tr>
<th>Estate valued at €20,000 (excl. family home worth €160,000)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Section 111 (1/3 estate)</strong></td>
</tr>
<tr>
<td>Home + €6,666</td>
</tr>
</tbody>
</table>

While the focus of the protection afforded by the preferential share is undoubtedly directed towards surviving, non-owning, spouses, it is submitted the extension of the proposal to situations where a joint tenancy arises is a pragmatic one as evidenced in this application. The anomaly which could arise whereby, in such a scenario a surviving, non-owning, spouse would receive both the home and the €20,000 savings, while a surviving joint tenant would be limited to receiving the family home under the right of survivorship and the legal right share of €6,666, is avoided.

Again, the application of this proposal for a tenancy-in-common where the surviving tenant-in-common has a small interest and a large interest can be seen by considering the impact of the

\textsuperscript{154} As the family home passes to the surviving spouse due to the right of survivorship, it does not constitute part of the deceased’s estate. See above, n 116.
proposals on non-owning spouses and spouses gaining an interest under a joint tenancy, respectively. However, the application of the proposal to a situation arising where a surviving, non-owning, spouse possesses an interest of approximately 50% may be illustrated as follows:

Table 11: Comparative application of current law and proposal - Tenancy-in-common I

<table>
<thead>
<tr>
<th>Scenario One: Estate valued at €361,280 (excl. 50% interest in family home worth €90,000)</th>
<th>Scenario Two: Estate valued at €110,000 (excl. 50% interest in family home worth €90,000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 111 (1/3 estate)</td>
<td>50% of home + €120,426 (100% of home + €30,426)</td>
</tr>
<tr>
<td>Preferential Share (€180,000)</td>
<td>50% of home + €90,000 (100% of home)</td>
</tr>
</tbody>
</table>

It is clear that while in the larger estate in scenario one it would be more beneficial to a surviving tenant-in-common to avail of the one-third share currently afforded by section 111, the merits of this proposal once again come to the fore in the smaller estate in scenario two where the preferential share affords vastly more protection to the surviving tenant-in-common than the legal right share.

Finally, as in a joint tenancy, the advantages of the current proposal where the home is worth less than average are equally relevant with regard to a tenancy-in-common. A similar anomaly whereby a surviving spouse with no interest in the family home would be in a more advantageous situation than a co-owning surviving spouse who was a tenant-in-common is avoided by extending the preferential share to situations where the family home is held in this form of co-ownership.

Table 12: Comparative application of current law and proposal - Tenancy-in-common II

<table>
<thead>
<tr>
<th>Estate valued at €100,000 (excl. 50% interest in family home worth €80,000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 111 (1/3 estate)</td>
</tr>
<tr>
<td>Preferential Share (€180,000)</td>
</tr>
</tbody>
</table>

Moreover, as on intestacy, it is submitted that where the means of the testator are limited to less than €180,000 when the family home is included, it is not excessive to ring-fence such a figure for the financial protection of the surviving spouse whether the home is in the sole ownership of the deceased or is co-owned either through a joint tenancy or a tenancy-in-common.155

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155 See above, n 77.
3.6 Constitutional Impediments, a Volatile Property Market and the Likelihood of Change

It is clear from the foregoing that the merits of this proposal based on a preferential share following both testate and intestate deaths are considerable, providing enhanced protection for those most in need vis-à-vis the family home than is currently afforded by the Succession Act 1965. Nevertheless, it would be remiss not to comment on two further issues which must be considered in implementing any such proposal: first, the constitutional implications, if any, which could arise in the introduction of a preferential share; second, the appropriateness, or otherwise, of adopting a preferential share in the midst of a property crisis.

In response to the former issue, it is submitted that despite the comprehensive nature of the measure and the considerable impact it would have where the family home is in the sole name of the deceased spouse, the implementation of a preferential share would not be repugnant to the Irish Constitution. Unlike the Matrimonial Home Bill 1993 which sought to introduce an automatic beneficial joint tenancy of the family home inter vivos and was subsequently found to be unconstitutional, the preferential share would have no effect inter vivos and would fundamentally be based on the existing interference in the property matters of spouses on death as currently applied under sections 67, 56(10) and 111 of the Succession Act 1965. As the current interference is constitutionally acceptable, this proposal would also be acceptable.

With regard to the latter issue concerning the introduction of a preferential share during a period of crisis in the property market, it is submitted that rather than being the worst possible time for such reform, the correction of the market which is currently taking place actually presents the perfect opportunity for such reform to flourish. In light of the dramatic fall in house prices since 2007, property prices now arguably reflect more accurately the true value of property on the island of Ireland. Moreover, having learned from the mistakes of the past, it is widely considered the Government will focus on ensuring stability in the property market in the coming years. In such an environment, it is submitted the conditions are ripe for the implementation of a preferential share in order to cure one of the most serious defects in the Succession Act as it currently stands, specifically the lack of a floor of support for those most in need.

3.7 A Critique of the Right to Appropriated the Family Home

The Succession Act 1965 provides surviving spouses with important protections specifically directed at the family home. Primary among these is the right to require the appropriation of the family

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156 Re Article 26 of the Constitution & in the matter of the Matrimonial Home Bill, 1993 [1994] 1 ILRM 241. The retrospective effect of the provision and its infringement on the constitutionally protected authority of the family were the principal factors in the finding of unconstitutionality.

157 As Ronan Lyons points out, 'It is somewhat ingrained in Irish commentary to see larger falls as a bad thing ... However, if you think of the fall in house prices as a necessary correction, whose size is determined by fundamental factors, then it is better for the prices to race to the finishing line than to crawl there.' See Daft.ie, ‘The Daft.ie House Price Report: 2011 in Review’ (2012) <www.daft.ie/report/Daft-House-Price-Report-Q4-2011.pdf> accessed 3 January 2012, 2. Lyons also explains at 3 that attaining stability in the market, rather than rising prices, is the key to success: ‘The golden rule of house prices is that over the long run, they don’t increase any faster than inflation. We can see this everywhere: in Ireland up to 1995, in the US over the last fifty years or over the Netherlands over the last four hundred years. So, if we’re seeing house prices rising any faster than about 2% a year, as we did during our bubble, something has gone wrong. What the market needs is stable prices, not rising ones.’
home in fulfilment of the legal right share, share on intestacy or gift under the will to which they are entitled.\textsuperscript{158} The rationale for this protection was explained by the Supreme Court in \textit{H v O}:

\begin{quote}
‘If the house and all the lands were to be sold, it would mean that the plaintiff would be ousted from the matrimonial home where she has spent all her married life … The appropriation … will ensure that the plaintiff, who is widowed and without children, will not be condemned to the harsh fate of having to leave the dwelling and seek a new home.’\textsuperscript{159}
\end{quote}

This protection is bolstered by the fact that the right to appropriation is not affected by specific devises or bequests disposing of the family home to a third party in the will but may still be invoked even if prejudicial to them.\textsuperscript{160} Indeed, it is clear that the Irish provisions governing the family home on death are vastly superior to those applicable in British Columbia. As Coughlan notes, sections 55 and 56 regarding appropriation confer ‘valuable rights on a spouse irrespective of whether the deceased dies testate or intestate.’\textsuperscript{161} By contrast, the weakness of the British Columbian regime is especially pronounced following a testate death where the non-owning spouse has not registered their interest under the Land (Spouse Protection) Act 1996.\textsuperscript{162}

On the other hand, where registration is made, considerable protection is provided by the 1996 Act with the provision of a life estate irrespective of any testamentary disposition of the home to a third party. In light of this protection the question is posed: Should the equivalent Irish legislation, namely the Family Home Protection Act 1976, be extended to include testamentary dispositions, replacing the legal right share with the automatic application of the 1976 Act which would be amended to allow the provision of a life estate on death? It is submitted it is not necessary or desirable to do so. First, provisions already exist to protect the family home from testamentary dispositions on death. This protection of the family home from its disposition to a third party is effectively achieved through the provision of priority to the right of appropriation. Thus, where a family home is devised or bequeathed to a third party, this transfer will be subject to the surviving spouse’s right to appropriate the home in satisfaction of her legal right share or share on intestacy. However, as this is...

\textsuperscript{158} S 56 of the Succession Act 1965.
\textsuperscript{159} \textit{H v O} (n 23) at 209, 210 per Henchy J.
\textsuperscript{160} S 55(2) of the Succession Act 1965.
\textsuperscript{161} Paul Coughlan, \textit{Property Law} (2nd edn Gill and Macmillan 1998) 408 referring to s 56 of the Succession Act 1965. Interestingly, the Scottish Law Commission recently rowed back on former proposals in their discussion paper that a right of appropriation be introduced in the jurisdiction. They noted: ‘The threshold sum has been set at £300,000 to ensure that in all but the most exceptional cases it will more than cover the net value of the deceased’s right in the family home. Indeed, it will ensure that in the vast majority of cases the surviving spouse or civil partner will inherit the whole of the estate.’ The concluded: ‘In these circumstances we have taken the view that a statutory system under which a surviving spouse or civil partner can purchase the family home and its contents would be disproportionate to the mischief that it would be designed to address. Moreover, such a scheme runs counter to the principle that intestate succession rights should not be property-specific.’ See \textit{Report on Succession} (n 52) paras 2.17-2.18. Rather than being a slight on the usefulness of the right to appropriation, this approach should be viewed in the context of the entire report which was dominated by a desire to move away from asset specific provisions. In addition, the high threshold of the preferential share also renders the benefit on intestacy of a right to appropriation of minimal relevance in most cases. However, on testacy, it is submitted the advantages of a right to appropriation are especially missed under the Scottish proposals.
\textsuperscript{162} The difficulties in the 1996 legislation inter vivos have been discussed in Chapter 1. However, it is clear from the application to this case study that they apply equally to the protection of the family home on death.
the principal protection afforded to the family home on death, it again emphasises the need to ensure the legal right share or preferential share is fixed at an appropriate level to ensure sufficient protection of the family home. Second, the 1976 Act does not give a spouse a right to an interest in the property but merely represents a right of veto. The method employed in British Columbia involves the provision of a deferred life estate in the property which arises where registration has been made and the owner has died. The amendment of Irish law to provide for such a life estate would, it is submitted, represent a backward step from the current situation with the provision of a legal share in the home and would generate more problems than is desirable. The current provisions of the Succession Act 1965, in this regard, remain superior.

3.7.1 The family home on agricultural land – A proposal for reform

In spite of the strengths of the Irish approach, the application of the right to appropriate the family home is not without its difficulties. Particular points of weakness are evident where the family home is located on agricultural land. Brady suggests, ‘It is arguably the case that the legislature and parliamentary draughtsmen simply failed to address the many ramifications of the legal right to require appropriation as it applies to dwellings on agricultural land.’ While legislative provisions specifically pertaining to appropriation in relation to agricultural land do not appear to exist in the Wills, Estates and Succession Act 2009, Ireland is not alone in enacting such restrictive provisions. It is not recommended that this limitation should be removed as the appropriation of the family home could, on occasion, considerably affect the value of the farm as a whole and could certainly render it more difficult to dispose of. It is submitted this could lead to a disproportionate interference with the entitlements of those who have an interest in the land, excluding the family home. Nevertheless, it is clear that an outright prohibition on the appropriation of the family home in such circumstances, with no provision for any alternative arrangements, is an undoubted weakness in the legislation. Moreover, it is submitted that the need to make an application to the court in all such cases represents a further shortcoming in the legislation.

It is proposed that a multifaceted approach could be adopted to cater for the various situations where difficulties may arise, thereby avoiding, where possible, the need for court applications. A distinction may be drawn between situations where an immediate sale of the property is planned and circumstances where no such sale is envisioned. It is proposed that where an immediate sale of

163 Indeed, in recommending the replacement of the statutory life estate on intestacy with a right to appropriate spousal share against the spousal home, the British Columbia Law Institute noted, ‘Obtaining an appraisal of the market value of a house is far simpler and more defensible than having to place a value on an unmarketable life estate and factor it into the other calculations involved in an estate administration.’ See Wills, Estates and Succession: A Modern Legal Framework (n 100) 14. However, while the blanket application of a life estate is not recommended, provisions akin to a life estate such as a right of residence may be necessary in Ireland in some limited circumstances as discussed below, 127.

164 Brady (n 50) 226. He adds that in the Senate during the second stage of the Succession Bill, Minister Lenihan stated that s 56 would apply ‘mainly’ to properties in urban areas, see Dáil Deb (n 7) col 405. No explanation was given as to why the Minister felt this would be the case.

165 S 2 of the Second Schedule of England’s Intestate Estate’s Act 1952 and s 39B(1) and sub-s (5) of Queensland’s Succession Amendment Act 1997 include essentially identical restrictions on appropriation of the family home where it is located on agricultural land.

166 This is exacerbated by the considerable delays in the hearing of probate cases.
the property is planned, perhaps in the course of administration, and an appropriation of the family home would result in a depreciation of the value of the assets only, without rendering the land more difficult to dispose of, the surviving spouse ought to be entitled to compensate the beneficiary of the agricultural land to the value of the depreciation in order to off-set the loss and thereby retain the family home.\textsuperscript{167} However, where agricultural land is being sold immediately and the appropriation of the family home would render the land more difficult to dispose of, or where the depreciation in the value of the assets could not be off-set by the surviving spouse, the appropriation of the family home ought not to be allowed.

Alternatively, where no immediate sale of the property is sought a different solution may be adopted to provide some measure of protection for a surviving spouse. Again, where the appropriation of the family home would diminish the value of the other assets, the surviving spouse ought to be entitled to compensate the beneficiary of the land for this loss and the appropriation of the family home ought to be allowed. However, where no such off-set is possible or the appropriation would render the agricultural land more difficult to dispose of, it is submitted that a statutory right of residence should be employed to provide some protection to a surviving spouse. This would be in line with the current practice employed by many rural testators to vest ownership of the farm in a child, usually a son, subject to a right of residence in the home for the benefit of the surviving spouse.\textsuperscript{168} Where such provisions are not in place, or the farmer dies intestate, the surviving spouse is in a precarious position. However, under these proposals, the statutory right of residence would allow the agricultural land and the family home to be enjoyed by the beneficiaries subject to a right in the surviving spouse to occupy the home for the remainder of their life or for as long as they wish to live there, whether or not such a provision is included in the will.\textsuperscript{169} To this end, the right of residence would be considered to be in full or partial satisfaction of the legal right share.

In order to determine to what extent the right of residence satisfies the legal right share to which a surviving spouse is entitled, careful actuarial calculations would have to take place. If the agricultural land and the family home were subsequently sold, the surviving spouse would then be fully compensated for the loss of the right. However, the ability to avail of a right of residence would be subject to an important caveat. The surviving spouse may only benefit from a right of residence where the consent of the beneficiary is obtained. To provide otherwise, could result in an intolerable situation whereby two parties would be forced to live together against their will.

It is submitted the effect of these proposals would be to reduce the need for recourse to the courts. While court action could be taken to determine a dispute as to whether there was a diminishment of the value or the land would be more difficult to dispose of if an appropriation was made, the inclusion of these proposals would ensure more transparent and practical solutions to the difficulties posed by the appropriation of the family home on agricultural land than the current broad discretion.

\textsuperscript{167} The possibility inherent in such a proposal is also recognised by Spierin (n 29) 171.

\textsuperscript{168} The Explanatory Memorandum of the Land and Conveyancing Law Reform Act 2009 notes at 6 a right of residence is ‘commonly granted to the spouse of a farmer who has left the farm to a child’.\textsuperscript{171} Although, Wylie notes that a right of residence does not confer a life interest and adds, ‘At most the right seems to create a form of licence to occupy the land, though one which may bind successors in title’. See Irish Land Law (n 50) 515. S 81 of the Registration of Title Act 1964 provides that a general right of residence, or an exclusive right of residence in or on part of registered land, is to be deemed personal to the person beneficially entitled thereto and not to create an equitable estate in the land or to confer any right thereto. Nevertheless, such a right is a burden on the land protected by registration and, therefore, may affect successors in title.
afforded to the judiciary. Furthermore, the introduction of such a regime would not be a new innovation in Irish law. Anecdotal evidence suggests that deeds of family arrangement are often availed of to provide a surviving spouse with a right of residence where such difficulties arise regarding the appropriation of the home on agricultural land. Described by Lyall as ‘a right peculiar to Irish land law’, introducing a right of residence on a legislative basis to alleviate the difficulties caused by the appropriation of a farmhouse would build upon the current implementation of such rights in other aspects of family law. To this end, Professor Wylie notes rights of residence are ‘extremely common’ in Ireland for wills and family settlements, while the Family Law Act 1995 and the Family Law (Divorce) Act 1996 provide a judicial power to make an order conferring a right of residence upon judicial separation or divorce which, as will be seen in Chapter 4, is often availed of by the courts.

Prior to the introduction of the Land and Conveyancing Law Reform Act 2009 there was some ‘conceptual uncertainty’ regarding the legal nature of rights of residence. Indeed, even since its introduction, it is suggested that the law on this subject is ‘far from clear’. As Lyall notes:

‘There appears to be a need in land law for a form of right which confers on the recipient, usually an elderly member of a family, a right to reside in a house for the rest of their life, or until incapacity requires other arrangements, which is personal to the recipient in the sense that he or she cannot alienate it, but which is secure against third parties. The uncertainty of the rights conferred by a right of residence in Ireland mean that it does not fulfil that requirement.’

In light of those difficulties, he suggests:

‘The legislature might ... consider creating a statutory form of right which could be conferred in such cases. There is no doubt a concern that such a right should not withdraw land from the market for an unduly long time, but that could be met by restricting it in some way, perhaps by providing that it could only be conferred on recipients above a certain age.’

Although Lyall dodges the issue as to what age limit should be applied, and the establishment of a cut-off age would indeed be arbitrary and liable to give rise to injustice, it is clear that his proposal seeks to ensure that the home does not become unmarketable for an inordinate period of time. Nevertheless, despite these concerns, it is submitted that much of the confusion surrounding rights

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173 *Irish Land Law* (n 50) 1104. For more on these difficulties, see 1104-1111.
174 Lyall (n 170) 531-532. He explains, ‘Licences ... may be insecure against third parties, while life estates, if created expressly are now liable to be overreached under the Land and Conveyancing Law Reform Act 2009.’
175 ibid 532.
of residence has been removed by the Land and Conveyancing Law Reform Act 2009.\textsuperscript{177} As a result, it is contended that the modification of the current law could confer a new lease of life on such rights.

Nevertheless, certain ambiguities remain. Lavan J recognised in \textit{Johnston v Horace} that neither case law nor statute definitively stated whether the holder of the right of residence or the owner of the property could insist upon the right being converted into money’s worth.\textsuperscript{178} However, the court granted the plaintiff injunctions restraining the defendant from preventing her from exercising her right to residence.\textsuperscript{179} Lyall notes the judgment could be indicative of ‘a growing willingness to use the discretion of court ... even in the case of a general right of residence, to secure the occupation of the donee’.\textsuperscript{180} However, in the recent case of \textit{Bracken v Byrne} it was accepted that while, in general, a right of residence is enforced through the use of an injunction to prevent the land owner disregarding it, situations will arise where it is neither practical or reasonable to force parties to continue with the arrangement.\textsuperscript{181} This is particularly so where a relationship breaks down. As a result, having regard to the landowners’ ability to pay, Clarke J converted the right into a monetary value. In reaching this conclusion, he held:

‘[I]n addition to satisfying the court that it has become unreasonable in all the circumstances of the case to require the beneficiary to be content with the exercise of the right, it is also necessary for the beneficiary to satisfy the court that the balance of the responsibility for that situation lies upon the owner of the right.’\textsuperscript{182}

\textsuperscript{177} The Land and Conveyancing Law Reform Act 2009, in replacing the Settled Land Acts, has ‘largely’ resolved the problems posed where the holder of a right of residence could sell the land over the heads of other interested parties. See Wylie, \textit{Irish Land Law} (n 50) 1106. As a result, pursuant to s 11, where the holder of a right of residence enjoys the right to the exclusion of others, a trust of the land comes into effect. The power to deal with the land will rest with trustees who are compelled to exercise them in the interests of all the persons interested in the land, not only the holder of the right of residence. Moreover, a right arising over only part of the land will not give rise to a trust, see \textit{Irish Land Law} 559-560. See also the Explanatory Memorandum of the Land and Conveyancing Law Reform Act 2009, 6.

\textsuperscript{178} [1993] IRM 594. Lavan J added at 8: ‘I have no doubt but that there are circumstances in which a court could enter by agreement of the parties into a valuation of their respective interests. There are also circumstances where a court might compel such a valuation in the general interest of the administration of justice or under its equitable jurisdiction. The court in valuing the right should carry out an objective valuation independent of the alleged circumstances in which the valuation is sought.’ Coughlan notes: ‘Lavan J seems to have left open the question whether the owner could insist upon the sale and free the land from the right of residence. Conventional charges and annuities can be cleared off the title by tendering their capital value with the sanction of the court. It would certainly be anomalous if something which is far short of a right of ownership could hinder a person in the disposition of his land when one co-owner can force a sale on another’. See Coughlan, ‘Enforcing Rights of Residence’ (n 173).

\textsuperscript{179} The court moreover, ordered the defendant to supply a key of the cottage and awarded £7,500 damages in recognition of the interference with the right to date.

\textsuperscript{180} Lyall (n 170) 531.

\textsuperscript{181} [2005] IEHC 180, [2006] 1 IRM 91.

\textsuperscript{182} ibid. Clarke J awarded €236,020 as the value of the right, however, he held that rights which frequently accompany a right of residence including rights of maintenance and support, could not be separated from the right of residence and, therefore, included them in the total sum awarded. See Wylie, \textit{Irish Land Law} (n 50) 1107-1109.

Coughlan analysed the decision in \textit{Johnston v Horace} [1993] IRM 594 and the confusion over the right to conversion. He noted, ‘it is regrettable that when the [Irish legislature] chose to legislate in this area it did not place these rights on surer footing and provide for the resolution of disputes which are very understandable
This, it is submitted, appears to be a practical approach. As a result, it is contended that the legislation should clarify that at any point either party could choose to convert the right of residence into money’s worth.

All in all, while the formulation of a statutory right of residence, which would apply where a spouse sought to exercise the right to appropriate a family home on agricultural land would need to respect the right of the owner to sell the property at any point in the future provided the spouse was compensated, it would, in the meantime, improve the position of many surviving spouses vis-à-vis such family homes.

3.8 Conclusion

There is a phrase in Irish ‘Tús maith, leath na h-oibre’ or ‘A good start is half the work’. The provisions of the Succession Act 1965 conferring rights on the surviving spouse certainly represent a ‘good start’. The Irish legislature succeeded in providing a solid framework of protection for the family home and surviving spouses with the legal right share and the right to appropriation. Indeed, in applying such a comprehensive system of forced heirship for spouses, Ireland is quite unusual in the common law world. As a result, it is submitted the legislature should be lauded for their courage in enacting such a regime in the face of the then widespread application of discretionary provision on testacy. The combined effect of the rights afforded to surviving spouses is far superior to the protection provided in many other jurisdictions, particularly following a testate death, and represents a key attribute of Irish matrimonial property law.

Nevertheless, it is contended that, despite the obvious strengths of the Succession Act 1965, there is clear room for improvement. Professor Cooke notes in relation to intestate situations, ‘we need to find a method of sharing that is not merely simple to calculate or to administer, but also is targeted at the people we really want to protect.’ It is contended, such a goal is equally relevant to testate deaths and the proposals included in this chapter, seek to achieve this aim. In particular, it is submitted that the provision of a preferential share, as an alternative to the current legal right share and share on intestacy represents an improvement.

The benefits inherent in the application of a preferential share, based on that applied in British Columbia, particularly in small and modest estates where the family home is not co-owned, are unquestionable in ensuring the protection of a surviving spouse. Moreover, the proposals presented in this chapter do not slavishly replicate the system applied in the Canadian province on intestacy. Instead, in an important departure from the scheme applied in British Columbia, while focusing on improving the position of those who are most vulnerable, these proposals ensure that the possibility of overly generous provision for a co-owning spouse is eradicated through the inclusion of set-off in the case of co-ownership. Furthermore, in a novel development, a strong argument has been mounted for the extension of the preferential share to situations where a will exits.

given human nature ... This uncertainty should be resolved by legislation covering both registered and unregistered land which would make these rights convertible into money at the election of either party and indicate how they should be valued.’ Coughlan, ‘Enforcing Rights of Residence’ (n 173).

183 Or a home forming part of a building or business premises.

184 ‘Wives, Widows and Wicked Step-Mothers: A Brief Examination of Spousal Entitlement on Intestacy’ (n 49) 442.
It is submitted that while the commitment to testamentary freedom was seriously challenged in 1965 with the introduction of the legal right share, now, nearly 50 years later, very few would argue that the measure should be rowed back on. Instead, the application of a fixed rule should be modified to ensure more effective protection for the surviving spouse following a testate death. Although it is acknowledged that there is a high degree of familiarity with the current legislation which will weigh in favour of retaining the status quo, it is argued that since the need to provide protection for a surviving spouse is the principal driving force behind the provision of the legal right share, where this does not fulfil the objective, namely in modest estates, re-evaluation of the *modus apparandi* needs to take place. It is further suggested that the issues arising where an appropriation of a family home on agricultural land is sought must be addressed. It is suggested, that conferring a statutory right of residence on the surviving spouse in certain circumstances represents a simple yet effective solution to the problems presented by section 56 of the 1965 Act.

Ultimately, the Succession Act introduced radical reform of the law in 1965 and remains a fine piece of legislation in 2012. However, the time is now ripe for a fundamental review of the legislation in order to eradicate the weaknesses that have emerged and to further strengthen the considerable protections it provides.
Chapter Four
4.1 Introduction

In 1984, Walsh J aptly referred to the ‘troublesome’ nature of family law in Ireland.\(^1\) In the intervening years, with the introduction of judicial separation and divorce, this area of law has grown increasingly more complex and, arguably, ever more bothersome. Indeed, quite unlike succession legislation, legislation governing marital breakdown, and more particularly divorce, is a relatively new innovation in Irish matrimonial property law. Today, thanks to the Family Law (Divorce) Act 1996, marriage is no longer a perpetual state but may be terminated by a divorce decree.\(^2\) However, the development of the law regulating the legal dissolution of marriage has been somewhat laboured. As a result, it has been noted, ‘Ireland is ... a late and hesitant entrant into the club of countries with liberal divorce laws, though Irish divorce law still remains a good deal less liberal than in most other western countries.’\(^3\)

The reason for this is simple: In order to increase the attractiveness of the constitutional amendment to the general public in 1995, the Irish legislature developed a Divorce Bill which was quite restrictive in nature.\(^4\) Unfortunately, it is clear that, as regards the ancillary relief orders which may be made, this restrictive approach in drafting has had a considerable impact. As a result, there are obvious shortcomings in the current approach which need to be addressed. Not least of these is the unpredictability which is the hallmark of the system due to the nature of the legislation which is based on equitable redistribution and the lack of a clear philosophical basis for granting relief.\(^5\) Instead, as Martin explained, an intricate web of considerations applies:

‘In Ireland specifically, several policy goals may come into consideration. These include support for marriage, protection of the economically disadvantaged spouse, promotion of sex equality, respect for the individual autonomy of the spouses, protection of third parties including creditors and reducing legal complexities resulting from connections between the spouses and the property laws of different countries.’\(^6\)

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\(^1\) Foreword to Professor Binchy’s *A Casebook on Irish Family Law* (Professional Books 1984) vi.

\(^2\) A decree of nullity may also be granted in certain circumstances, although no ancillary relief is available following such an order as it recognises that the marriage was invalid. See Alan J. Shatter, *Shatter’s Family Law* (4th edn Butterworths 1997) 181-255. A judicial separation does not terminate a marriage or legally dissolve it. It merely recognises the right of the parties to live apart. Ancillary relief may, nevertheless, be available.


\(^4\) For example, couples had to be separated for four of the previous five years before they could apply for divorce. See below, 135 and 214-219, for more discussion of the divorce referendum.


Alternative approaches need to be considered. Representing a compromise between the current regime applied in Ireland and more extreme versions of community of property elsewhere, the approach adopted in British Columbia again presents an appropriate regime for comparative analysis.

This chapter examines how the provisions of the Irish legislation which impact on the treatment of the family home following a judicial separation or divorce are being implemented in practice and considers an alternative approach which operates in British Columbia pursuant to the Family Relations Act 1996. First, the chapter outlines the historical development of judicial separation and divorce in Ireland. The respective legal regimes of Ireland and British Columbia are then applied to the case study, drawing on the legislative provisions and the case law which has developed around these provisions in both jurisdictions. In the Irish context, the author also draws on the findings of recent empirical research, as well as the trends emerging from statistics provided by the Courts Service.


4.2.1 Historical development of marital breakdown legislation in Ireland

Following the formation of the Free State, a ban on divorce was introduced by the Second Constitution of Ireland published in 1937, specifically by Article 41. Attempting to ensure the firm foundation of a Roman Catholic state for a predominantly Roman Catholic population, the ban represented a clear ideological and social divergence from the English position. Indeed Senator Butler Yeats noted in 1925, ‘I have no doubt whatever that there will be no divorce in this country for some time.’ In fact, no such legislation was introduced for a further 70 years. As Crowley notes:

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7 See Elizabeth Cooke, Anne Barlow and Thérèse Callus, Community of Property: A regime for England and Wales? (Nuffield Foundation 2006) 4-6 which details the scope of different community regimes such as the more extreme Dutch system of immediate universal community.

8 Although the Family Relations Act 1996 is soon to be repealed and replaced by the Family Law Act 2011, the current legislation is applied in this chapter. This decision is explained below, 152. However, the changes introduced by the new legislation are discussed from 191.


11 Such a ban did not form part of the First Constitution of the Irish Free State in 1922.

12 Mr. de Valera noted in 1937 with reference to Article 41 of the Constitution: ‘We pledge to protect the family in its constitution and its rights generally. This is not merely a question of religious teaching; even from the purely social side, apart altogether from that, we would propose here that we should not sanction divorce. Therefore no law can be passed providing for divorce.’ See Dáil Deb 11 May 1937, vol 67, col 63. In 1967 an All Party Dáil Committee on the Constitution considered the ban and recommended the replacement of Article 41.3.2 with a provision which allowed for divorce if it was on grounds acceptable to the individual’s religion. This was criticised by Shatter who noted the amendments ‘would have created more problems than they would have resolved’, see (n 2) 374.

13 Seanad Deb 11 June 1925, vol 5, col 435.
‘This distinctive constitutional recognition and protection of the marital family, as created and compounded by judicial pronouncements, has greatly influenced state policy as regards maintaining and supporting the marital union and historically acted as almost an insurmountable obstacle to the introduction of the remedy of divorce.’

After minimal interference for many years, in the mid-1970s the Irish legislature chose to legislate for certain family law issues which were deemed of great importance. As a result, in 1976, it oversaw the introduction of the Family Law (Maintenance of Spouses and Children) Act, the Family Law (Protection of Spouses and Children) Act and the Family Home Protection Act. Nevertheless, difficulties remained.

In 1983, the Irish Government commissioned an investigation into the growing incidence of marital breakdown and a Joint Oireachtas Committee was assigned the task of reporting on the issue. The focus of the Committee’s investigation was ‘to consider the protection of marriage and of family life and to examine the problems which followed the breakdown of marriage’. Presenting its conclusions in April 1985, the Committee pointed out that many people in the country were affected by the problem of marital breakdown. The options for such spouses were, however, quite limited, essentially restricted to two possibilities: entering into a separation agreement which constituted a private arrangement or availing of a divorce a mensa et thoro. The latter, however, was only available on the grounds of adultery, cruelty or unnatural practices and did not effect a dissolution of the marriage or allow the parties to remarry, merely relieving the parties of the obligation to cohabit. Moreover, maintenance represented the only ancillary relief open to the court. The Committee thus recommended the holding of a referendum to abolish the ban on divorce noting the law was ‘not comprehensive nor … reactive to the current changes in society and in personal attitudes to the family and marriage’. However, the resulting referendum on the 10th Amendment to the Constitution Bill 1986 was rejected by two-thirds of the population. While it was unsuccessful, the essential difficulties presented by marital breakdown remained.

Notwithstanding the problems which the Government were encountering in seeking to introduce divorce, certain progress was made in legislating for marital breakdown with the successful enactment of the Judicial Separation and Family Law Reform Act 1989 marking a ‘watershed in Irish family law’. Abolishing divorce a mensa et thoro, the legislation brought together and codified the wide range of legislation which had until then governed marital breakdown. In addition to establishing the grounds for the award of a decree of judicial separation, the 1989 Act empowered the court to make a wide range of ancillary relief orders including some relating to property.

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16 However, divorce a mensa et thoro was not regularly availed of, see Crowley, *Family Law* (n 14) 30.
17 *Report of the Joint Oireachtas Committee on Marriage Breakdown* (n 15) 30.
18 Shatter (n 2) 383. Crowley described it as ‘a hugely significant development in Irish family law’, see *Family Law* (n 14) 35.
19 Various pieces of legislation governed maintenance, domestic violence, custody of and access to children.
20 As Shatter notes, ‘The 1989 Act essentially provided the legislative precedent for the ancillary relief measures that would have also to be contained in any future Divorce Act in the event of a constitutional change permitting the enactment of divorce legislation.’ See (n 2) 384. Provisions with regard to property adjustments were included in s 15 of the 1989 Act. The power of the court to grant ancillary relief was
Indeed, as O’Toole SC commented, the property adjustment measures included therein represented ‘by far the most radical provisions of the Act’. The Judicial Separation and Family Law Reform Act 1989 was subsequently repealed and replaced by the Family Law 1995 which now governs judicial separation.

However, the need for effective divorce legislation remained pressing. By the early 1990s, the incidence of marital breakdown and its associated complications was growing even more acute. While 37,245 ‘separated’ individuals were recorded in the 1986 census, this number had swelled by almost 50% to 55,143 persons by 1991. The Government again considered its options with regard to divorce and adopted a ‘more pro-active’ approach. Following the publication of the ‘comprehensive proposals’ of the White Paper on Marital Breakdown in September 1992, the Government held a second referendum in 1995. This time, the referendum was passed by a tiny majority of 9,114 votes, with 50.28% of the electorate supporting the amendment and 49.72% opposing it. The referendum resulted in the amendment of Article 41.3.2° of the Irish Constitution to provide for divorce and enumerating the basic criteria to be fulfilled to successfully obtain such a decree. The Family Law (Divorce) Act 1996 subsequently came into effect on February 27, 1997, supplementing the new constitutional provision and empowering the judiciary to order a decree of divorce and ancillary provision.

In an unexpected twist, however, judicial separation has retained considerable importance. Originally introduced to fill a gap when divorce was not legal in Ireland, it was not expected to...

subsequently further extended through the Family Law Act 1995. The specific origins of the 1989 Act, in which Shatter himself was central, are discussed below from 214.

21 Mary O’Toole, ‘An Introduction to the Judicial Separation and Family Law Reform Act 1989’ (1990) 6 Fam LJ.
22 The approach of the judiciary applied in cases under Part II of the 1989 Act ‘can properly be regarded as a reliable indicator in the manner in which the courts will apply the law to both preliminary and ancillary relief under the later Acts’, see Shatter (n 2) 885.
25 Crowley, Family Law (n 14) 37. She notes there was cross party support for the acceptance of the referendum in 1995, there was greater dissemination of information to the public and a draft Divorce Bill was published for public perusal. See below from 214.
26 Ward (n 24).
27 It has been noted: ‘Family law reform in Ireland has ... been significantly different from other western societies ... the constitutional ban on divorce in Ireland made reforms a matter for referendum rather than change coming by way of legislation. Even so, nearly 30 years after similar reforms were commonplace in other countries and in spite of widespread marital breakdown, the Irish population remained reluctant in 1995 to change their Constitution to allow divorce’. See Jenny Burley and Francis Regan, ‘Divorce in Ireland: The Fear, The Floodgates and The Reality’ (2002) 16(2) Int’l JL Pol & Fam 202.
28 Article 41.3.2° provides: ‘A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the five years; ii. there is no reasonable prospect of a reconciliation between the spouses; iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law; and iv. any further conditions prescribed by law are complied with.’
29 For a more on the historical development of divorce in Ireland, see Shatter (n 2) 369-390.
survive the introduction of the Family Law (Divorce) Act 1996, but predicted to fall somewhat into irrelevance. Instead, it has become ‘an integral part of the legal armoury of family lawyers, adding to stress and expense for litigants’. As a result, many of the contentious issues which are of immediate practical importance in the wake of a marital breakdown such as how to deal with the family home, are dealt with at this stage. To remedy this arguably unnecessary double stage process, Coulter proposes that legislation may be amended to permit a divorce to be sought, and to grant certain ancillary reliefs, with the proviso that the final decree of divorce could only be granted after four years. She maintains that such reform could be implemented without the need for a constitutional referendum. This approach would correspond more closely with the British system of two decrees, however, ancillary relief provision would be made at the initial stage of the process.

4.2.2 The Family Law Acts 1995 & 1996 – Main provisions

Today, Part II of the Family Law Act 1995 and Part III of the Family Law (Divorce) Act 1996 provide the courts with ‘groundbreaking redistributive power’. Adopting an approach based on equitable redistribution, the judiciary are empowered to grant a wide range of financial and property orders to ensure ‘proper provision’ is made for a dependent spouse and children. The requirement to make ‘proper provision’ is both legislative and constitutional in nature and a pre-condition to the award of a decree of divorce. Strangely, however, the phrase used in the equivalent legislative provisions governing judicial separation is to ensure ‘adequate and reasonable’ provision. The difference in terminology was noted by the court in

\[MP v \text{ AP}\]

The function and responsibility of the court is to determine what is “proper provision” in the circumstances of the case. Proper provision is not necessarily the same as “adequate and reasonable” which was the criteria in relation to the provisions made under \section{section 21 of the Judicial Separation and Family Law Reform Act, 1989}. However, in the facts of any particular case it is open to a court to hold that provisions which were adequate and reasonable having

\begin{footnotesize}
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\item\textsuperscript{30} Coulter (n 9) 123.
\item\textsuperscript{31} This can lead to a slight distortion of the figures on divorce in relation to orders affecting the family home as in many cases it will have been dealt with on judicial separation, see below, 163.
\item\textsuperscript{32} (n 9) 123.
\item\textsuperscript{33} Buckley, ‘Irish Matrimonial Property Division in Practice’ (n 9). It is important to remember that although the ability to grant ancillary relief, particularly property adjustment orders, provides a considerable protection for spouses with an inferior property portfolio, such orders may not be sought upon the death or bankruptcy of either spouse or in circumstances where due to reasons, religious or otherwise, a judicial separation or divorce is not obtained upon the breakdown of the relationship. In such cases, the property rights of spouses may be determined through an application of the rules of equity, specifically through the doctrine of proprietary estoppel or the purchase money resulting trust, see s 36 of the Family Law Act 1995 regarding the latter. However, the purchase money resulting trust is quite limited in scope, see Chapter 1. Ancillary orders such as property adjustment orders are also unavailable in circumstances where a judgment mortgage is registered against the legal owner. However, as was illustrated by the decision in \textit{AS v GS [1994] 1 IR 407, [1994] 2 ILRM 68} the timing of the judgment mortgage is critical in this regard.
\item\textsuperscript{34} Shatter describes the legislation as ‘all-embracing’, see (n 2) 886. Crowley states, ‘It appears that the reasoning that underpinned such extensive discretion was grounded in a legislative desire to protect and guarantee as much as possible, the rights of dependent spouses and children.’ See \textit{Family Law} (n 14) 37.
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regard to all the circumstances of the case as were constituted proper provision for the purposes of the *Family Law (Divorce) Act, 1996*.

The meaning of ‘proper’ was also considered in *WA v MA* where Hardiman J observed:

‘This term is not defined in the statute and counsel did not refer me to any particular preferred meaning of it. I therefore interpret the word in its natural and ordinary meaning. This in itself is not an entirely straightforward exercise since the term has many meanings: the Oxford English Dictionary identifies some 14 meanings with a number of subgroups. It is in fact a word of peculiar difficulty ... It will be seen that the dictionary definition leaves a good deal of scope for discretion in the interpretation of the word. That discretion is trenching upon by the need to consider the various matters set out in s. 20(2) and to “have regard to the terms of any separation agreement”.

Referring to the definitions, he concluded, ‘I do not consider it proper, that is “fit, apt or suitable”, much less “correct or in conformity with rule” to make any ancillary order against the husband in the circumstances of this case.’

While the judiciary are afforded considerable discretionary power in determining whether or not to grant ancillary relief to an applicant spouse, the legislation does set out statutory factors to be considered by the court. Originally included in the 1989 Act, these statutory factors are now found in section 16 of the 1995 Act and section 20 of the 1996 Act. Crucially, the legislation does not attach any specific weight to any of the factors enumerated in the legislation but rather allows the judiciary the freedom to exercise their discretion in evaluating the importance or otherwise of each of the factors listed. As Shatter explains:

‘[I]t should be noted that none of [the factors] stand alone nor should any one factor, of itself, determine the outcome of any particular application. They are all factors to be globally taken into account by the court as forming part of the circumstances which must be considered in determining the ancillary relief, if any, to order.’

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35 [2005] IEHC 326 (emphasis original).
37 ibid. Martin considers these differences in wording in ‘Judicial Discretion in Family Law’ (1998) 16 ILT 168. He notes ‘adequacy’ and ‘reasonableness’ are ‘far more flexible, subjective and malleable concepts than is the more restrained – almost objective – ambit of “proper consideration”’. In addition, the 1995 Act states the court ‘shall endeavour to ensure’ such provision is made for each spouse concerned and for any dependent member of the family ‘as is adequate and reasonable having regard to all the circumstances of the case’. This standard is expressed in a slightly more definitive manner in the 1996 Act which specifies that in deciding whether to make an order and in determining the provisions of such an order, the court ‘shall ensure’ (emphasis added) that such provision as the court considers proper will be made. While Shatter notes that the duty in divorce proceedings ‘appears more onerous’, he suggests, ‘it is unlikely this difference in phraseology will have any substantive impact’. See (n 2) 930.
38 In addition, s 16(4)(a)-(g) of the 1995 Act and s 20(4)(a)-(g) of the 1996 Act enumerate seven factors to be considered by the court when considering whether to make any ancillary orders in favour of dependent members of the family other than the spouse. For more information on all factors, see Shatter (n 2) 950-953.
39 (n 2) 932.
Moreover, the list of factors appears to be non-exhaustive. As Crowley observes, while the courts are required to ‘in particular have regard’ to the factors, this suggests that they are ‘one possible source of influence’ in reaching a decision and ‘there is no express mandatory obligation’ to ensure that each factor is applied to the circumstances of each case.\(^\text{40}\) She adds, ‘it is arguable that the courts are permitted to exercise a significant discretion in dividing the assets of the parties before the court and are merely guided by these factors, as relevant.’\(^\text{41}\)

The factors include:

\[a)\] ‘The income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future’\(^\text{42}\)

The court must consider all wealth both earned and received, coupled with all the available assets of the spouses thereby ensuring any property purchased, inherited or acquired through other means, prior or subsequent to the marriage, which are consequently vested in a spouse may be subject to a property adjustment order. As Shannon notes, ‘All property owned by the spouses, both before and after the marriage, is ... highly relevant to the issue of ancillary orders.’\(^\text{43}\) In this regard, the court is especially reliant on receiving accurate documentation in order to gain a clear picture of the financial situation of the parties.\(^\text{44}\) Moreover, akin to the provisions on death, section 37 of the 1996 Act and section 35 of the 1995 Act empower the court to review and possibly make a quia timet order to prevent a proposed disposition or set aside a disposition already completed which is intended to prevent or reduce relief to an applicant spouse.\(^\text{45}\) All assets and financial resources are valued at the date of the divorce or judicial separation.\(^\text{46}\) Where the valuation of the family home is in question, it is the function of the court to resolve any disparities.\(^\text{47}\)

Interestingly, although it is not necessary to have regard to the origins of an asset under the legislation, how the asset was acquired may be taken into consideration. In *C v C*, O’ Higgins J in the High Court held that ‘proper provision’ could be made for a spouse while having ‘significant regard’ to the provenance of the property.\(^\text{48}\) Similarly, in *SD v BD*, the ‘inherited nature of much of the marital assets on the husband’s side’ was also noted by the court.\(^\text{49}\)

\(^{40}\) Crowley, *Family Law* (n 14) 48.

\(^{41}\) ibid.

\(^{42}\) S 16(2)(a) of the 1995 Act and s 20(2)(a) of the 1996 Act.

\(^{43}\) Geoffrey Shannon, *Divorce Law and Practice* (Roundhall 2007) 81. To ensure ‘adequate and reasonable’ or ‘proper’ provision upon judicial separation or divorce, assets held legally or equitably by one or both spouses, may be redistributed by the court.


\(^{45}\) See Lucy-Ann Buckley, ‘The Conveyancing Conundrum: Reviewable Dispositions and the In Camera Rule’ (2003) 6(3) IJFL 13 where this power was described as a ‘key feature’ of the marital breakdown legislation.


\(^{47}\) See *F v F* (HC, 11 June 2002).

\(^{48}\) [2005] IEHC 276.

\(^{49}\) [2007] IEHC 492. The court justified the less generous provision than might be expected in light of *T v T* (n 46) on four principal grounds including the origins of the assets. See also Buckley, ‘Irish Matrimonial Property Division in Practice’ (n 9) 73 where she notes a case in her study in which the courts considered the fact that a site was derived as a gift from one party’s parents as a factor influencing its decision. However, as was pointed
b) ‘The financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise)’

In considering this factor, clear divergences sometimes arise between spouses. Although the needs, obligations and responsibilities for many wives often relate to childcare, for many husbands, the principle need may well be business related. The residual responsibilities of a spouse to continue providing for a child who although no longer legally dependant continues to live with them and is in full time education, is unemployed or is in the formative stages of their career may also be considered. Moreover, the needs of spouses may require a consideration of any medical ailments or conditions from which they suffer.

c) ‘The standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses separated, as the case may be’

It is submitted that decisions to date demonstrate ‘quite a high degree of judicial realism’ in assessing this factor. In XY v YX, the court noted of the wife who, along with her husband, had lived a quite extravagant lifestyle during the Celtic Tiger, that ‘there is no question about meeting the standard to which she was accustomed prior to the collapse of Lehman Brothers’. Furthermore, in HD v ED, Costello J noted, ‘A broken marriage inevitably means a lowering of the living standards of both parties which can be very considerable in some instances’. However, where ample resources remain within the couple, this criterion may be of greater importance in strengthening the claims of the spouse in a weaker financial position.

d) ‘The age of each of the spouses, (the duration of their marriage) and the length of time during which the spouses lived with one another’

It appears the longer the couple is together the more likely the court will support a claim for an interest in the property of the other spouse. By corollary, O’ Donovan J in CO’R v MO’R refused to out in G v G [2011] IESC 40 [22], ‘Assets which are inherited will not be treated as assets obtained by both parties in a marriage. The distinction in the event of separation or divorce will all depend on the circumstances.’

50 S 16(2) of the 1995 Act and s 20(2) of the 1996 Act.
51 See Lucy-Ann Buckley, ‘Matrimonial Property and Irish Law: A Case for Community’ (2002) 53 NILQ 39, 60. This was especially clear in JD v DD [1997] 3 IR 64 where the need for considerable working capital to remain in the husband’s business was accepted by the court.
53 For a discussion of the effect of the obligations and responsibilities created by remarriage on the provision of ancillary orders, see Shatter (n 2) 938-940.
54 S 16(2)(c) of the 1995 Act and s 20(2)(c) of the 1996 Act.
56 [2010] IEHC 440
57 (HC, January 1994).
58 S 16(2)(d) of the 1995 Act and s 20(2)(d) of the 1996 Act. It is important to note that the duration of the marriage is only considered on divorce and is not included in the criteria to which the court must have regard on judicial separation.
order the transfer of the family home to the wife recognising the relative youth of the couple and the short duration of the marriage. 59

e) ‘Any physical or mental disability of either of the spouses’ 60

Where either spouse suffers a physical or mental disability, the legislation recognises that this may give rise to a need for greater financial provision.

f) ‘The contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family’ 61

The requirement to consider spousal contributions including non-financial contributions by the homemaker was originally set out by section 20(2) of the Judicial Separation and Law Reform Act 1989 and was considered ‘a major development in the area of family law’. 62 Through the inclusion of this factor, the legislature sought to consolidate the constitutional protection afforded to housewives by Article 41.2.1° 63 Nevertheless, although McGuinness J noted in MK v JP (Orse SK) that Irish courts give ‘full credit’ to work provided in the home, to supporting the other spouse’s career and to minding children, 64 such fulsome recognition may not always be paid to such contributions. Moore conducted a study aimed at assessing whether women were adequately compensated for such domestic contributions. 65 On the basis of her analysis, she concluded that ‘judicial encouragement and preference for participation in the labour force suggests a judicial preference for work within the labour force. Domestic contributions and caring are undervalued when compared to economic contributions.’ 66

g) ‘The effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another 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’ 67

59 [2000] IEHC 66
60 S 16(2)(e) of the 1995 Act and s 20(2)(e) of the 1996 Act.
61 S 16(2)(f) of the 1995 Act and s 20(2)(f) of the 1996 Act. Martin states: ‘The homemaker criteria within the Irish context are ... designed to ensure that in ascertaining a spouse’s right to some order, the court would look not only at the contribution made by a wife working in the home in caring for the family but it would have some regard for and pay attention to the contribution housewives make to each other’s success in the business world: in earning income, and to the back up and help which they provided, ie welfare of the family.’ See ‘Judicial Discretion in Family Law’ (n 37).
62 Shannon, Divorce Law and Practice (n 43) 85.
63 See above, 26.
66 ibid, 17.
67 S 16(2)(g) of the 1995 Act and s 20(2)(g) of the 1996 Act.
Although Shannon suggests ‘This provision, in conjunction with the court’s obligation to take account of the standard of living previously enjoyed by the family is likely to introduce a slight bias in favour of the financially weaker spouse’, whether this translates into reality is far from clear. The career which is sacrificed appears be influential in determining the weight which is attributed to this factor. It was noted in SD v BD that one of the reasons why the wife received a lump sum in the region of 25% of the net disposable assets as compared to the lump sum worth 37% of the net disposable assets provided in T v T was the ‘greater sacrifice of career prospects of the doctor wife in the T v T case than was the case with the wife in this case’ as this wife had simply held a secretarial qualification. Similarly, Moore observed:

‘Highly educated women, who had careers, were treated more favourably than those women with fewer educational advantages. This seems to imply that although the judiciary recognises the role of the women in the home, this recognition has different implications for women with different levels of education. The beneficiaries were women who were in a position to adopt a professional working life. However, women with fewer educational advantages, who will remain in the home after marital breakdown, are not rewarded equally by the judiciary.’

h) ‘Any income or benefits to which either of the spouses is entitled by or under statute’

This primarily concerns the presence of any social welfare payments to which either spouse may be entitled, including those which may be lost due to the breakdown of the relationship.

i) ‘The conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it’

Unlike the Judicial Separation and Law Reform Act 1989 which required the court to consider conduct where it would be ‘repugnant to justice to disregard it’, Shatter notes ‘This broader provision [in the 1995 and 1996 Acts] appears to give the court greater discretion to entertain considerations of conduct than was vested in the court by the original provisions contained in Part II of the 1989 Act.’ However, in practice, the courts have been ‘loathe’ to enter into any analysis of whether one spouse was guilty of greater misconduct then the other.

It is clear that the threshold of misconduct required by the court in order to be considered under this section is high. In T v T Keane J accepted with approval the judgment of Denning MR in the English case of Wachtel v Wachtel:

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68 Shannon, *Divorce Law and Practice* (n 43) 113.
69 (n 49).
70 (n 65) 20.
71 S 16(2)(h) of the 1995 Act and s 20(2)(h) of the 1996 Act.
72 S 16(2)(i) of the 1995 Act and s 20(2)(i) of the 1996 Act.
73 (n 2) 945. Buckley points out, “Conduct” would presumably include adultery and cruelty so that this stipulation sits strangely with the “no-fault” concept of divorce enshrined in the legislation and the Constitution’. See ‘Matrimonial Property and Irish Law: A Case for Community?’ (n 51) 63.
74 Shatter (n 2) 945.
‘There will no doubt be a residue of cases where the conduct of one of the parties is ... “both obvious and gross”, so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone’s sense of justice ... But short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame.’

However, conduct has been considered in some limited cases. Where it is considered, McMahon J noted:

‘The finding of “obvious and gross” conduct does not mean that a person against whom such a finding is made has no rights, or that he or she is to be punished in some analogous fashion as a criminal is treated in our criminal justice system. If it is established, all it means is that it is another factor for the court to have regard to, in determining what, in the circumstances, is adequate and reasonable provision under the section.’

j) ‘The accommodation needs of either of the spouses’

The courts frequently adopt a pragmatic approach to this factor. The need to ensure some stability for dependent children is often an overriding consideration. However, this does not mean that the presence of dependent children will always be determinative in deciding the outcome for the family home. Coulter highlights a judicial separation case which arose in the Eastern Circuit Court. The family home, worth €690,000, was occupied by the wife and the youngest child of the marriage, a 16 year old son. The husband lived in rented accommodation and desired a sale of the home and a division of the proceeds. McCartan J held:

‘When the main asset is the family home it should be sold to enable the parties to live separately and with dignity. The objective put forward by Mrs ... is for the house to stay undisturbed until the end of the education of the son. This is likely to be seven years. I believe this is not an unreasonable objection in normal circumstances, but not here. The house has considerable value ... It has three bedrooms, above and beyond the needs of her and the son ... The house has the capacity to deliver an unencumbered home to Mrs ... and allow Mr ... to secure a home with a small mortgage. To say he should have nothing from it at the moment is unreasonable. I propose the family home be sold and that Mrs ... receive €400,000 and the balance go to Mr ... after the expenses of the sale.’

76 See R v R [2006] 2 IRLR 467; SB v RB (n 52).
77 R v R (n 76) (emphasis original). Financial misconduct may be considered by the courts, see EM v WM [1996] IFLR 155 (CC), [1994] 3 FamLJ 93 (CC).
79 (n 9) 98 (Case Study 9).
80 ibid.
k) ‘The value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring.’

The inclusion of this factor was a new innovation in the Family Law Acts 1995 and 1996 and was not originally included under the 1989 Act. It may relate to benefits arising due to private ordering or under statute.

l) ‘The rights of any person other than the spouses but including a person to whom either spouse is remarried’

The court must consider, where present, the rights of mortgagees of the family home, any creditors of the spouses or judgment mortgagees who have registered a judgment against a property held by either or both of the spouses. With regard to the rights of persons to whom either spouse is remarried, Shatter points out:

‘Whilst this factor may be of relevance where there is an application to vary an order for ancillary relief previously made after divorce proceedings have been determined, it can be of no relevance to a court determination as to what ancillary orders, if any, it should make when granting a decree of judicial separation or at the time of the granting of a decree of divorce.’

In addition to the above factors, section 20(3) of the Family Law (Divorce) Act 1996 provides the court must consider the terms of any separation agreement which has been entered into by the spouses and is still in force. However, while the court will have regard to the family arrangements agreed by the spouses and the parties to the agreement may be contractually bound to its terms, it is open to the court to vary, or indeed disregard, some or all of the provisions contained therein. This ‘allows the court to override fundamental principles of contract law and is likely to result in continuing comment and controversy’.

Finally, the court is prohibited from making any order for Mrs. Kelly unless ‘it would be in the interests of justice to do so.’ Mr. Taylor, the then Minister for Equality and Law Reform, explained the inclusion of this criterion stating, ‘While this Amendment might be regarded as unnecessary it

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81 S 16(2)(k) of the 1995 Act and s 20(2)(k) of the 1996 Act.
83 See s 15(5) of the 1995 Act and s 19(5) of the 1996 Act which state that where a spouse has a beneficial interest in any property, or in the proceeds of the sale of any property, and a person (not being the other spouse) also has a beneficial interest in that property or those proceeds, then, in considering whether to make an order under ss 9, 10 (1) (a) (ii) or 15 of the 1995 Act or ss 14, 15 (1) (a) or 19 of the 1996 Act in relation to that property or those proceeds, the court shall give to that person an opportunity to make representations with respect to the making of the order and the contents thereof. Any representations made by such a person shall be deemed to be included among the matters to which the court is required to have regard under s 16 of the 1995 Act or s 20 of the 1996 Act in any relevant proceedings under a provision referred to in that section after the making of those representations.
84 (n 2) 950.
85 Shannon, Divorce Law and Practice (n 43) 121. For more, see Louise Crowley, ‘Divorce Law in Ireland—Facilitating or Frustrating the Process’ (2004) 16(1) CFLQ 49. See also G v G (n 49).
does help to set the various matters in context and to underpin the principle on which the order will be based. Nevertheless, despite this apparent logic, it has given rise to some confusion. In WA v MA, Hardiman J considered that section 20(5) of the Family Law (Divorce) Act 1996 operated in a negative and restrictive manner and could not be applied in a positive sense to support an action seeking relief. Furthermore, Crowley observes in relation to the 1996 Act:

‘Whilst the express inclusion of 12 specific factors in section 20(2), is perhaps an attempt to limit the courts’ consideration of influential factors, the decision of the legislature to also include this requirement for justice to be achieved, although admirable in its aim, serves to permit the court to make whatever orders for whatever reason it sees fit. Thus although the specific criteria set out in section 20(2) may have somewhat placed limits on the scope of the discretion of the courts in these matters, section 20(5) ultimately negates such limits.’

Once these factors are considered, the court is afforded ‘ground breaking redistributive power’ and a ‘flexible toolkit’ with which to adjust the property rights of spouses. In addition to preliminary orders such as barring orders which are made available by the Acts, the legislation also empowers the court to award a comprehensive range of ancillary orders in certain circumstances.

When making a property adjustment order, the court may utilise provisions in sections 9 and 10 of the Family Law Act 1995 and sections 14 and 15 of the Family Law (Divorce) Act 1996. The court is empowered to order the settlement of specified property to which either spouse is entitled. It may also order the transfer of the proprietary interest which one spouse is entitled either in possession or reversion to the other spouse. Where the family home is concerned, such an order must be

88 [n 36]. See also K v K [2008] IEHC 341 [19].
89 Family Law (n 14) 57-58. She described s 20(5) as ‘perhaps the most vague aspect’ of s 20.
90 Buckley, ‘Irish Matrimonial Property Division in Practice’ (n 9).
91 Sonia Harris-Short and Jo Miles, Family Law: Text, Cases and Materials (2nd edn OUP 2011) 434. Although this description was used to describe the armoury of the English and Welsh courts under the Matrimonial Causes Act 1973, it is equally appropriate here.
92 See s 5 of the 1995 Act and s 11 of the 1996 Act. Before deciding whether to grant or refuse the decree, the court may make a safety order, a barring order, an interim barring order or a protection order ‘if it appears to the court to be proper to do so’. With regard to the family home, sub-s (c) also allows the court to make an order under s 5 or s 9 of the Family Home Protection Act 1976 in order to protect the home, the household chattels or any money realised due to the conveyance of an interest therein. See Chapter 1.
93 This order may be made for a spouse and/or any dependent member of the family, see s 9(1)(b) Family Law Act 1995 and s 14(1)(b) Family Law (Divorce) Act 1996. While this section could also encompass the family home, where the settlement of the family home is concerned, the court will often instead avail of s 10 of the 1995 Act and s 15 of the 1996 Act, see below.
94 Or the transfer could be made to any dependent member of the family or other specified person for the benefit of the dependent, see s 9(1)(a) Family Law Act 1995 and s 14(1)(a) of the 1996 Act. With regard to transfer of property orders, the court may order the transfer of one spouse’s entire interest in a property such as the family home to the other spouse or may award a transfer of a part interest. Referring to the 1996 Act, Shannon notes the ‘majority’ of orders made under s 14 will fall into this category. See Divorce Law and Practice (n 43) 122.
95 Where a property adjustment order is made by the court, the Acts require a copy of the order to be lodged in the Land Registry for registration pursuant to s 69(1)(h) of the Registration of Title Act 1964, or to be registered in the Registry of Deeds as appropriate, see s 9 of the 1995 Act and s 14 of the 1996 Act. Both Acts also provide for the refusal of one spouse to comply with the procedures required for the transfer of property. In such a scenario, the court may order another person to execute the deed or instrument in their place.
accompanied by an order establishing which spouse gains exclusive occupation if there is no outright transfer of the property ordered. Furthermore, specific provisions empower the court to make an order for the sale of the family home and the division of the proceeds. However, the court are not empowered to make a property adjustment order, order for the exclusive occupation or sale of the family home where following the grant of a decree of divorce, either of the spouses concerned, having remarried, ordinarily resides with his or her spouse.

In what was described as ‘the most relevant change from the position under the 1989 Act’, the absence of a ‘clean break’ in both the Family Law Act 1995 and Family Law (Divorce) Act 1996 ensures either spouse may apply for ancillary relief, including a property adjustment order, not only at the application for a decree of judicial separation or divorce, but anytime thereafter. However, this will only apply provided the applicant has not remarried. An application for variation may be taken, not only by either of the spouses concerned, but in the case of the death of either of the spouses, by any other person who has, in the opinion of the court, a sufficient interest in the matter or by a person on behalf of a dependent member of the family concerned. To effect such an alteration the court may vary the settlement to which the order relates in any person’s favour or extinguish or reduce any person’s interest under that settlement and make such supplemental

In reference to property adjustment orders, Eekelaar says this order ‘creates a right in personam for some kind of compensating payment’, see John Eekelaar, ‘Asset Distribution on Divorce–Time and Property’ [2003] Fam Law 828. He explains the situation thus: ‘[P]roperty adjustment orders do not, in themselves, create property interests, but mandate the transfer of specific assets that, together with any lump-sum (monetary) payment ordered to be made, represent the share in the value of the other’s assets to which the court has decided the claimant is entitled.’

It was held in *National Irish Bank v Graham* [1995] 2 IR 244 that the term ‘family home’, for the purposes of the 1995 Act and 1996 Act is that which is defined in s 2(1) Family Home Protection Act 1976 ie ‘primarily a dwelling in which a married couple ordinarily reside. The expression comprises, in addition, a dwelling in which a spouse whose protection is in issue ordinarily resides, or if that spouse has left the other spouse ordinarily resided before so leaving.’


In *G v G* (n 49) [22], the Supreme Court noted, ‘Irish law does not establish a right to a “clean break”. However, it is a legitimate aspiration.’ Thus, it appears that ‘clean break’ may not be, in every situation and for all cases, impossible. See below 208 for more discussion on the need for some element of ‘clean break’.

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provision (including a further property adjustment order or a lump sum order) as the court thinks appropriate. However, orders for the sale of the family home may only be varied if the sale has not yet taken place and the contracts to purchase remain unsigned.  

4.3 General Outline of Matrimonial Property Division in British Columbia

Part V of the Family Relations Act 1996 governs the law of matrimonial property in British Columbia and, while it mirrors some important aspects of the Irish regime, the scheme includes one key difference. Upon the legal affirmation of the separation, an occurrence known as a triggering event, irrespective of their ownership, both spouses are entitled to an undivided half share as a tenant-in-common in all family assets. In other words, upon the occurrence of a triggering event, as defined under section 56(1), a deferred community of property regime applies. There are four triggering events which are each based on a legal affirmation of the separation. They are: the making of a separation agreement; the making of a declaratory judgment under section 57 that the spouses have no reasonable prospect of reconciliation with each other; the making of an order for dissolution of marriage or judicial separation; or the making of an order declaring the marriage null and void.

What constitutes the community of property subject to division? First, section 58(2) defines a ‘family asset’ as including property owned by one or both spouses and ‘ordinarily used by a spouse or a minor child of either spouse for a family purpose’. Second, family assets include the ‘money of a spouse in an account with a savings institution if that account is ordinarily used for a family

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103 Pursuant to s 18(5) of the 1995 Act and s 22(5) of the 1996 Act, the court may not make an order ‘unless it appears to it that the order will not prejudice the interests of any person who (a) has acquired any right or interest in consequence of the order referred to in subsection (1) (e), and (b) is not a party to the marriage concerned or a dependent member of the family concerned.’

104 The proprietary interest acquired under the Family Relations Act 1996 by the non-owning spouse does not vest until the occurrence of a triggering event. However, once it does vest both spouses clearly have a prima facie interest in all family assets, including those owned exclusively by the other spouse. As Bailey explained, ‘The enactment of modern marital property statutes means that the choice to marry is a choice to accept the default statutory property regime.’ See Martha Bailey, ‘Marriage a la carte: A comment on Hartshorne v Hartshorne’ (2004) 20 Can J Fam L 249. This aspect of marriage and the contractual nature of the institution were fundamental to the Supreme Court of Canada's ruling in Nova Scotia (Attorney General) v Walsh [2002] CanLII 83 (SC C). Here, it was held that it was constitutional to limit marital property regimes to those who have demonstrated their consent by getting married.

105 The legislation does not provide a concise definition of what constitutes a family asset or identify the date on which an asset ought to be characterised. On the basis of the case law, however, the characterisation of assets occurs on the triggering event. See Newson v Newson [1986] CanLII 166 (BC CA) at 9 per Anderson J: ‘The proper date for determining the character of assets as family assets, business assets, or other assets, is the date of the triggering event’. He continued, ‘the date for determining their value is the date that is appropriate, having regard to the asset and what has happened to it, but not earlier than the date of the triggering event.’ See NMM v NSM [2004] CanLII 346 (BC SC) for ‘a useful précis of the major decisions in this area’ as noted in Dale v Dale [2006] CanLII 1683 (BC SC). Moreover, the decision was also described in Wale v Wale [2008] CanLII 1562 (BC SC) as an ‘excellent distillation’ of the principles involved in the determination of the valuation date. It appears the date of trial is the appropriate valuation date but another date may be chosen at the discretion of the court if necessary in the interests of fairness. This date cannot, however, be prior to the date of the triggering event.

In addition, if property is acquired from the proceeds of sale of a family asset, the property may be traced back to the original family asset and, as a result, may be classified as a family asset itself, see Tratch v Tratch [1981] CanLII 774 (BC SC). Both property acquired before and after separation may be traced in this manner and it applies to property acquired in whole or in part by means of a family asset.
purpose’. Third, family assets also include ‘business assets’ or ‘ventures’ to which money or money’s worth was, directly or indirectly, contributed by or on behalf of the other spouse. Pursuant to section 59(2), an indirect contribution includes ‘savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property’. Moreover, unlike other provincial regimes in Canada, the Family Relations Act does not limit matrimonial property claims exclusively to property acquired during the marriage.

While, in theory, under such a regime the courts should be reluctant to depart from an equal division unless the facts in a case represent a significant departure from the ordinary, this presumptive entitlement to a fifty percent interest in the family assets can sometimes merely constitute a ‘starting point’. This is because section 65 provides that the court may vary any division where it considers an equal division would be unfair having regard to the unweighted criteria for reapportionment. In *SBM v NM*, the Court of Appeal for British Columbia analysed the approach for assessing a claim under section 65 of the Family Relations Act 1996. Delivering the court’s judgment, Donald J held:

‘The question is not whether an unequal division would be fair; that is not the obverse of the test in section 65(1). The Legislature created a presumption of equality — a presumption

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106 S 58(3)(c) of the Family Relations Act 1996.
107 S 59(1) of the Family Relations Act 1996.
108 In *Bowman v Bowman* [2009] CanLII 1435 (BC SC) it was noted the ‘leading case’ on indirect contributions is *Elsom v Elsom* [1983] CanLII 692 (BC CA). It was noted in *Elsom* at [5]: ‘A business asset in the name of one spouse is not a family asset unless the other spouse makes a direct or indirect contribution to it. If the spouse has been effective as a wife and mother it is to be inferred that savings have accrued to the benefit of her husband because he has not had to arrange for and pay someone else to provide those services. Those savings are assumed to have advanced the business interests of the husband because more time and money may be devoted to the business. In that sense, there is a nexus between the role of an effective wife and mother and the acquisition or operation of the husband’s business.’ This presumption is rebuttable.
109 However, the reforms which will be implemented by the Family Law Act 2011 alter the position in this respect, see below from 191.
110 British Columbia Law Reform Commission, *Property Rights on Marriage Breakdown* (Working Paper No. 63–1989) 7. However, as Southin J remarked in *Barker v Barker* [2002] CanLII 345 (BC CA) [8] ‘in broad terms the Act contemplates an equal division of family assets unless good reason as of the triggering event requires some other division.’ Despite this, the apparent frequency of reapportionments has resulted in the reforms which will be imposed by the 2011 Act which attempt to place limitations on the discretion of the court. These reforms are discussed below from 191.
111 It is also notable that where equal sharing is considered unfair, the court may not only make an order for unequal division of the community assets, but may also order that property which does not form part of the community is vested in the other spouse, see s 65(2) of the Family Relations Act 1996.
112 The use of the term ‘unfair’ has long generated controversy. As the British Columbia Law Reform Commission, *Report on Spousal Agreements* (LRC 87–1986) noted in Chapter II, Part E, what constitutes unfairness ‘is open to question’. Indeed, the Commission noted in relation to spousal agreements, ‘Some courts interpret “unfair” to mean improvident from the perspective of one party to the agreement. Others apply a more restrictive approach ... The Act provides little guidance on the meaning of “unfair”.’
113 These are detailed below. Similarly, while s 61 of the Family Relations Act explicitly permits spouses to contract out of the legislative regime through any marriage agreement and spouses may substitute the statutory regime to which they would otherwise be subjected, with a consensual agreement, this agreement may be altered pursuant to s 65 of the Family Relations Act which also vests judicial discretion in the court to make a matrimonial property order which distributes property in a manner which contradicts that provided in the agreement.
that can only be displaced by a demonstration that an equal division would be unfair. So the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair. He must decide, in accordance with the language of section 65(1), that an equal division would be unfair before he considers apportionment. Otherwise, although an equal division would be fair, a reapportionment could be ordered on the basis that it is more fair and that, in my opinion, is not what the statute intends.\(^{114}\)

The factors to which the court must have regard are:

a) Duration of the marriage\(^{115}\)

It is clear that the longer the marriage survives, the more likely equal sharing will result. In \(D\)avison, despite the fact that the husband owned the house before the marriage, equal division was not considered to be unfair after a marriage of 18 years.\(^{116}\) Similarly, in \(PGN\) v \(B\)AN the court noted, ‘Clearly, in a 30-year marriage, an equal division of assets would normally be fair absent any other factors.’\(^{117}\)

b) Duration of the period during which the spouses have lived apart\(^{118}\)

It appears that the longer the spouses have lived apart, the more likely an unequal division of assets may be. In \(McPhee\) v \(McPhee\) the court considered an application for the division of property following a 20 year separation after a 20 year marriage.\(^{119}\) In the Court of Appeal, McEachern JA speaking for the court held the delay was ‘sufficient without more, to justify a substantially unequal distribution’.\(^{120}\)

c) Date the asset was acquired\(^{121}\)

On the basis of the case law, it seems recently acquired assets will be less likely to be considered as ordinarily used for a family purpose.\(^{122}\) By contrast, the longer an asset is held by spouses, the greater the chance that it may be considered to fall into the community for equal division.

\(^{114}\) ibid [23]. The British Columbia Court of Appeal also held in \(Kaur\) v \(Ram\) [2005] CanLII 1536 (BC SC), rev’d in part [2006] CanLII 527 (BC CA) [19] citing the decision in \(Murchie\) v \(Murchie\) (1984) CanLII 754 (BC CA), ‘it is proper for the courts to look at each individual asset and decide whether that asset should remain in equal ownership or whether that would be unfair within the meaning of s 65’. Thus, as the Supreme Court of British Columbia explained in \(Ruscheinski\) v \(Schmold\) [2001] CanLII 96 (BC SC) [2]: ‘The factual matrix respecting the marriage and the decisions that were made during the marriage must be considered in determining whether a particular asset is a family asset and whether judicial fairness requires a reapportionment in favour of either party respecting that asset.’

\(^{115}\) S 65(1)(a) of the Family Relations Act 1996.

\(^{116}\) \(D\)avison v \(D\)avison [2006] CanLII 777 (BC SC). See also \(J\)arvis v \(J\)arvis [1995] CanLII 1432 (BC SC).

\(^{117}\) CanLII 1807 (BC SC) [41]. However, with regard to shorter marriages, see \(Z\)aurrini v \(Z\)aurrini (1981) CanLII 484 (BC CA); \(W\)allace v \(W\)allace [1999] CanLII 5803 (BC SC); \(M\)acdougall v \(G\)elin [2008] CanLII 1786 (BC SC).

\(^{118}\) S 65(1)(b) of the Family Relations Act 1996.

\(^{119}\) CanLII 3266 (BC CA).

\(^{120}\) ibid [14]. See also \(K\)arreman v \(K\)arreman [2001] CanLII 1327 (BC SC).

\(^{121}\) S 65(1)(c) of the Family Relations Act 1996.
d) Extent to which the property was acquired by inheritance or gift

While under the Irish regime, regard may be had to the provenance of assets, under the Family Relations Act the courts are compelled to have regard to the extent to which property was acquired by one spouse through inheritance or gift in deciding whether or not to depart from equal sharing. However, it was noted in Lodge v Lodge, “The significance of an inheritance as a factor in a reapportionment diminishes according to the length of time that the marriage subsists following the receipt of the inheritance.”


e) Needs of each spouse to become or remain economically independent and self-sufficient

This factor requires the court to have regard to economic advantages or disadvantages arising from the marriage and reflects an element of compensation. As was noted in PGN v BAN ‘This factor recognises that, when a marriage breaks down, it is desirable that each spouse be as economically independent as possible.’ In Toth v Toth, Taylor JA acknowledged:

‘that the allocation of child-raising and housekeeping functions more heavily, or wholly, to one spouse has in the particular case resulted in that spouse being less financially “independent” and “self-supporting” on the breakup of the marriage than would be the case had those tasks been wholly undertaken by the other, or equally shared between them.’

He laid out the test as follows:

‘Only to the extent that it can be said to be likely that the more domestically-burdened spouse would, but for the unequal sharing of that burden, have acquired employment advantages no longer available can this factor play a part in the allocation or apportionment of family assets. It cannot in my view be enough to show that there was a possibility that the spouse burdened unequally by housekeeping and child-raising responsibilities might, but for that burden, have improved their earning potential by the time of separation. If that were the standard, then compensation would be due under this heading, either by way of unequal asset distribution or compensatory maintenance, in the breakup of every, or almost

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122 In Wolowidnyk v Wolowidnyk [2008] CanLII 135 (BC CA), Kirkpatrick JA for the Court of Appeal held that in omitting to consider the date on which the property was acquired, the trial judge erred in law by failing to apply a relevant factor.
123 S 65(1)(d) of the Family Relations Act 1996.
125 S 65(1)(e) of the Family Relations Act 1996.
126 (n 117) [58].
127 [1995] CanLII 1917 (BC CA) [39]-[40]. In Toth, the British Columbia Court of Appeal considered a case where during 23 years of marriage which produced four children, the wife stayed at home and worked part time. Meanwhile, her husband continued his education and obtained a BA, MBA and worked as a teacher. Ultimately, the court was satisfied at [47] that the wife had suffered economic hardship since the separation and bore a ‘disproportionate share of its financial consequences especially with respect to the cost of caring for the children’. The court consequently reapportioned the assets in her favour. The assets included a home which was bought post separation to serve the needs of the wife and children. This property was held to constitute a ‘family asset’ and was reapportioned 80/20 to the wife. It is important to remember that it cannot always be assumed that a housewife will be impaired in such a manner, although this is often the case. This case is also noteworthy for clarifying that the division of assets must take place before the issue of spousal support is considered.
every, marriage of this sort, and I do not understand the cases to say that ... Where the question I have posed is answered affirmatively, the compensatory aspect may then be considered with all factors listed in section 51 [now section 65] in deciding whether reapportionment should be ordered, and if so, on what basis.\textsuperscript{128}

f) Any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse\textsuperscript{129}

Finally, it is clear that in reapportioning family assets, the list of considerations set out above is not exhaustive.\textsuperscript{130} In effect, the court may take into account such other factors as it considers relevant. However, in \textit{McPhee v McPhee}, the Court noted ‘As to (f), apart from preserving and maintaining this property for over 20 years, the most significant factor to be considered is the “use” of the property. No good reason has been shown why that “use” should be disturbed at this late date, it would be unfair, in my view, to do so.’\textsuperscript{131}

Once the community of property for division is established, the Family Relations Act 1996 affords the British Columbian courts many of the same powers as the Family Law Acts in Ireland. Section 66 is pivotal in this regard and provides the court with ‘wide powers to effect the division of family assets, whether that division be equal or unequal.’\textsuperscript{132} The court may make an interim order for temporary property relief pending determination of the rights to the property.\textsuperscript{133} To this end, the court is empowered to order the exclusive occupation and use of the family home.\textsuperscript{134} Moreover, where such an order is made, the court may also postpone the rights of a spouse to apply for partition and sale or to sell or otherwise dispose of or encumber the property subject to the right of exclusive occupancy or use.\textsuperscript{135}

\textsuperscript{128} \textit{ibid} [39]-[40].

\textsuperscript{129} S 65(1)(f) of the Family Relations Act 1996.


\textsuperscript{131} (n 119) [16].

\textsuperscript{132} Keith B. Farquhar, ‘Matrimonial Property and the British Columbia Court of Appeal’ (1988) 23(1) Uni of BCL Rev 31, 33. He also noted at 58 the ‘largely technical and adjunctive nature’ of the section.

\textsuperscript{133} S 124 of the Family Relations Act 1996.

\textsuperscript{134} S 124(3) of the Family Relations Act 1996. S 124(2) states: ‘A court may make an order under this section respecting property that is owned or leased by one or both spouses and is or has been (a) occupied by the spouses as their family residence, or (b) personal property used or stored at the family residence.’ However, s 124(5) clearly states that a spouse does not acquire a proprietary interest under such an order.

\textsuperscript{135} S 125 of the Family Relations Act 1996. The court in \textit{Kaur v Ram} (n 114) stated that it cannot order the postponement of the sale of property for a fixed period of time in a manner that would bar unforeseen developments. However, in \textit{PAJ v RDJ} [2007] CanLII 653 (BCSC) Ralph J considered at [26] ‘this restriction does not bar the parties from agreeing to a postponement arrangement in this case so long as the court’s ultimate jurisdiction to consider the matter is not removed’. See also \textit{Tsonis v Tsonis} [1985] CanLII 800 (BC SC) at 363-364 and see \textit{Manhas v Manhas} [2008] CanLII 1175 (BC SC) where at [31] the court noted ‘the need for the children to remain in the home can ... be addressed by delaying the sale, rather than adjusting the percentages on division of the assets, although such delay is, in itself, a form of re-apportionment.’ See also \textit{BW L v JB} [2006] CanLII 557 (BC SC); \textit{Wall v Eeles} [2006] CanLII 115 (BC SC); \textit{Barker v Barker} (n 110).

In addition, a spouse may also protect the family home by obtaining an ex-parte restraining order available under s 67 to protect the assets from disposition. The legislation provides for a mandatory order unless the respondent proves that there are sufficient assets to ensure the applicant’s claim to the property will not be frustrated should the respondent dispose of some of the assets.
More substantive powers are also available to the court pursuant to section 66(2). The court is empowered to declare the ownership of or right of possession to property; to order that, on a division of property, title to a specified property be granted or transferred to, or held in trust for, or vested in a particular spouse either absolutely, for life or for a term of years; to order one spouse to pay compensation to the other if property has been disposed of, or for the purpose of adjusting the division; or order the partition or sale of property and payment to be made out of the proceeds of sale to either spouse or both in specified proportions or amounts.

4.4 Marital Breakdown: A Case Study

To assess the effectiveness or otherwise of the Family Law Acts in protecting a spouse whose name does not appear on the title to the family home, and compare the nuances of the Irish approach with those of the British Columbian approach governed by the Family Relations Act 1996, the use of a case study will once again be employed. Akin to the situation following the death of a spouse, it is important to note that reforms of the British Columbian law are imminent. The new Family Law Act 2011, which repeals and replaces the Family Relations Act 1996, received Royal Assent on November 24, 2011 and is due to come into force on March 18, 2013. Nevertheless, the 1996 Act is applied to the case study. Two pragmatic factors influenced this decision. First, in developing a proposal for reform, in Chapter 5, this thesis draws heavily from both the 1996 Act and the 2011 Act; therefore a discussion of both is necessary. Second, in comparison to the 2011 Act, the Family Relations Act 1996 affords more discretion to the court and a considerable body of case law has developed around it. A discussion of the case law which has developed around the Family Relations Act is necessary to inform the proposal delivered.

In addition, in applying the respective Irish and British Columbian legislation to the case study it is necessary to consider the actual mechanics and interpretation of the legislative enactments in both jurisdictions. Consequently, reference to case law will be central to the discussion. However, due to

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Protections are also afforded to matrimonial property where such issues are dealt with in a marriage or separation agreement. Pursuant to s 63, a spouse who is a party to such an agreement may sign and file a notice in the land title office thereby allowing the registrar to register the notice, in the same manner as a charge is registered, against the land described in the notice. Where such a notice is registered, s 63(3) states: ‘the registrar must not allow registration of a transfer, mortgage, agreement for sale or conveyance of the fee simple in the land, or lease of the land, unless each spouse or former spouse who is a party to the marriage agreement or separation agreement signs and files in the land title office a cancellation or postponement notice in the prescribed form.’ Under s 63(4) if a spouse or former spouse cannot, after a reasonable search be located, unreasonably refuses to sign or file a cancellation notice under sub-s (3) or is a mentally incompetent person, the Supreme Court may, on application, order the appropriate registrar to cancel or postpone the notice of marriage agreement or separation agreement.

Where a reappportionment is awarded, the court may provide the holder of the majority share the opportunity to purchase the minority share held by their spouse within a specified time frame. If this opportunity is not availed of the property is generally sold and the parties will have joint conduct of the sale. The proceeds of sale will then be split in proportion to the interest held by both.

See also s 66(3) which states: ‘If the Supreme Court, on application, is satisfied that a spouse has made or intends to make a gift of property to a third person, or has transferred or intends to transfer property to a third person who is not a purchaser in good faith for value, for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have under this Part, the Supreme Court may make an order under this section to restrain the making of the gift or transfer, or vest all or a portion of the property in, or in trust for, the other spouse.’
the vesting of considerable discretionary power in the judiciary, particularly in Ireland but to a lesser extent also in British Columbia, the outcome and relative weight attached to the different factors at play is purely speculative.

4.4.1 The Kelly Family

Mr. and Mrs. Kelly were married in 1987. They have four children ranging in age from 12 to 20 years old. While the two eldest children are in college, the younger two children are engaged full time in secondary school education and are living at home. Mrs. Kelly, a once promising photographer employed full-time with a local newspaper, gave up work after the birth of her first child and has dedicated herself to her life in the home ever since. Mr. Kelly has a successful career as a senior sales assistant in a second hand car dealership in rural Ireland. He also inherited a small family farm of approximately 20 acres from his father who passed away in 1985 which was worth approximately €80,000 at the time of his marriage to Mrs. Kelly. Mr. Kelly continues to farm the land on a part-time basis. Mr. Kelly’s earns on average €35,000 net income per annum from these two sources. In 1988, Mr. Kelly constructed the family home on a site adjoining the farm yard. The house was completed in 1990. The home is currently worth approximately €180,000 and title to the property is held exclusively in Mr. Kelly’s name. The mortgage was redeemed a number of years ago and Mr. Kelly made all the mortgage repayments.

The couple have recently started to feel that their marriage is falling apart. Mrs. Kelly is particularly worried that she could be left destitute and without secure accommodation if they do split up since she is financially dependent on Mr. Kelly.

Summary of Mr. Kelly’s Assets:

<table>
<thead>
<tr>
<th>Asset</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>20 Acres @ €10,064</td>
<td>€201,280</td>
</tr>
<tr>
<td>Farm equipment</td>
<td>€50,000</td>
</tr>
<tr>
<td>Family Home</td>
<td>€180,000</td>
</tr>
<tr>
<td>Personal savings (available for family use)</td>
<td>€25,000</td>
</tr>
<tr>
<td><strong>Total Value of Estate</strong></td>
<td><strong>€456,280</strong></td>
</tr>
</tbody>
</table>

4.4.2 Mr. & Mrs. Kelly, Galway, Ireland

The process of legally ending a marital relationship in Ireland begins with separation. The requisite period of separation to obtain a judicial separation is one year, while a couple must be living separate and apart for four out of the previous five years to obtain a divorce. Although the Kellys

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could separate with or without a judicial separation by entering into a separation agreement, it is possible that Mr. and Mrs. Kelly will obtain a judicial separation under the Family Law Act 1995 prior to obtaining a divorce under the Family Law (Divorce) Act 1996.  

Mrs. Kelly is not entitled by statute to a specified share of the family assets in general or the family home in particular. However, in granting an order for judicial separation or divorce, the court is enjoined to ensure that ‘adequate and reasonable’ or ‘proper’ provision is made for a dependent spouse and children. To this end, both Family Law Acts empower the courts to grant a wide range of financial and property orders at their discretion. However, it is true that some fetters on this discretion do exist and the judiciary do not have a carte blanche. Thus, while the court must have ‘regard to all the circumstances of the case’ in determining whether or not to grant ancillary relief to an applicant spouse, specific factors which the courts are required to consider are enumerated in the legislation. As a result, the individual facts of the Kelly family’s situation and the discretion of the presiding judge will be critical in assessing whether to grant any order in relation to the family home.

The court must have regard to the following factors:

a) ‘The income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future’

Mrs. Kelly does not have an income at present, while Mr. Kelly’s stands at €35,000 net per annum including income earned from farming. Although Mrs. Kelly’s earning capacity is quite hypothetical, and would presumably be considered more thoroughly under a later heading, Mr. Kelly’s is arguably precarious in light of the current economic turmoil. Although prima facie all assets owned by both spouses fall to be considered by the court, how relevant is it that the family home is built on a farm which was inherited? Despite the fact that it is not necessary to have regard to the origins of an asset under the legislation, it appears this may be taken into consideration, albeit at the discretion of the judge. Furthermore, from Mrs. Kelly’s perspective, she is unlikely to possess an

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139 If no judicial separation or divorce is sought for reasons religious or otherwise, Mrs. Kelly will be limited to a declaration of the beneficial interest she possesses in the family home under the purchase money resulting trust or possibly a remedy pursuant to the doctrine of proprietary estoppel.

140 See above from 137 regarding the difference in terminology guiding provision on judicial separation and divorce.

141 Thus, Eekelaar claims, albeit in relation to England and Wales, ‘It is important to avoid the extremes of thinking either that the spouses have pre-existing property rights awaiting quantification, or that they have no “entitlements” at all’. See ‘Asset Distribution on Divorce – Time and Property’ (n 95). However, such a distinction, though correct, does not perhaps do justice to the true vulnerability of a non-owning spouse. Essentially, a spouse does not possess a right to a share of matrimonial property, unless and until, such a right is granted at the discretion of the court. As Buckley states, ‘no spouse can be sure of his or her rights until the court has spoken’. See ‘Matrimonial Property and Irish Law: A Case for Community’ (n 51) 58. All that a spouse actually possesses is a right to be considered for such share in the matrimonial assets as the court in its wisdom deems appropriate.

142 S 16(2)(a) of the 1995 Act and s 20(2)(a) of the 1996 Act.

143 See s 16(2)(g) of the 1995 Act and s 20(2)(g) of the 1996 Act below.

144 See C v C (n 48) and SD v BD (n 49) above.
equitable interest in the family home,\textsuperscript{145} she does not possess any other property resources and her savings are presumably limited following twenty years of work in the home.

b) ‘The financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise)’\textsuperscript{146}

Mrs Kelly’s financial needs will be central to determining the provision that is made for her. In light of the fact that all four Kelly children are still in full-time education, with two continuing to live at home, and the presumption that Mrs. Kelly will remain their full-time carer, the financial burden is likely to be considerable. Moreover, while Mrs. Kelly’s needs, obligations and responsibilities are primarily focused on caring for the children, Mr. Kelly also has financial needs as he will need to maintain his farm and farm machinery.

c) ‘The standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses separated, as the case may be’\textsuperscript{147}

Although considerably less important than the issue of needs, the standard of living formerly enjoyed by the Kelly family will also be considered by the court. It is to be expected that the standard of living of both Mr. and Mrs. Kelly will fall as adequate resources are not present to maintain the standard previously enjoyed when the family is split into two separate households. However, in this regard, the farm could arguably be tapped as a resource from which provision could be made by mortgage or sale which would offset the fall in the standard of living.

d) ‘The age of each of the spouses, (the duration of their marriage) and the length of time during which the spouses lived with one another’\textsuperscript{148}

Mr. Kelly is 57 and Mrs. Kelly is 52. They were married for 25 years. Arguably, the length of the marriage will strengthen an application by Mrs. Kelly for a property adjustment order in relation to the family home as it appears the longer the couple is together the more likely the court will support a claim for an interest in the property of the other spouse.\textsuperscript{149}

e) ‘Any physical or mental disability of either of the spouses’\textsuperscript{150}

Neither spouse suffers a physical or mental disability.

f) ‘The contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to

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\textsuperscript{145} See Chapter 1.
\textsuperscript{146} S 16(2) of the 1995 Act and s 20(2) of the 1996.
\textsuperscript{147} S 16(2)(c) of the 1995 Act and s 20(2)(c) of the 1996 Act.
\textsuperscript{148} S 16(2)(d) of the 1995 Act and s 20(2)(d) of the 1996 Act. It is important to note that the duration of the marriage will only be considered if Mr. and Mrs. Kelly seek a divorce.
\textsuperscript{149} See CO’R v MO’R (n 59).
\textsuperscript{150} S 16(2)(e) of the 1995 Act and s 20(2)(e) of the 1996 Act.
\end{flushleft}
the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family.\textsuperscript{151}

Along with a consideration of needs, the contributions of the spouses to the welfare of the family are often of great importance in an application for ancillary relief. While Mr. Kelly has made financial contributions to the welfare of the family and presumably will continue to do so in the future, the inclusion of this factor is of particular relevance to Mrs. Kelly as, unlike the law governing the purchase money resulting trust, the legislation governing judicial separation and divorce recognises the non-financial contributions of spouses in caring for the home or the family.\textsuperscript{152}

While it is open to a court to make an equal division of assets on the basis of work done in the home,\textsuperscript{153} and it has been asserted that the role of the dependent homemaker and child carer, usually the wife should not be disadvantaged in the distribution of assets by reason of its non-economic nature,\textsuperscript{154} it is clear that the weight attributed to non-financial contributions is at the discretion of the relevant court and will vary considerably.\textsuperscript{155} Therefore, while Mrs. Kelly has made substantial domestic contributions and will presumably continue to provide such for at least a further six years until the youngest child reaches the age of majority, the value that is placed on these contributions is at the discretion of the court.

\textbf{g) ‘The effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another 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’}\textsuperscript{156}

Mr. Kelly has benefited considerably from the freedom he enjoyed due to his lack of domestic responsibilities and was able to focus on his career as both a salesman and farmer. Consequently, this factor appears, on the face of it, to weigh in Mrs. Kelly’s favour suggesting a compensatory element. However, whether this is the effect, in reality, is difficult to say. It appears that the weight attached to this factor in considering the effect on earning capacity to date depends on the career

\textsuperscript{151} S 16(2)(f) of the 1995 Act and s 20(2)(f) of the 1996 Act.

\textsuperscript{152} Note that such contributions do not generate a beneficial interest under the purchase money resulting trust, see \textit{L v L} [1992] 2 IR 77 discussed in Chapter 1.

\textsuperscript{153} In \textit{JD v DD} (n 51) McGuinness J granted a wife ‘a reasonably equal division of the accumulated assets’ on the basis of her contributions during 30 years of marriage in providing for her children and husband within the home.

\textsuperscript{154} \textit{MK v JP (Orse SK)} (n 64) 349. Coulter noted that cases which arose in the Circuit Courts which she attended demonstrate that the courts did give recognition to the contribution of both spouses, both inside and outside the home, even when such contributions were made many years before the case came to court, see (n 9) 92-93. At 93 Coulter notes a case study where Buttiner J awarded the wife €25,000 for her interest in the home on the basis of raising five children of the marriage before leaving her husband for another man when the youngest child was 16 years old. The judge held, ‘Whether working or not, your wife raised five children and therefore contributed to the house.’

\textsuperscript{155} See Moore (n 65).

\textsuperscript{156} S 16(2)(g) of the 1995 Act and s 20(2)(g) of the 1996 Act.
which is sacrificed.\textsuperscript{157} This could operate to the detriment of Mrs. Kelly who \textit{merely} sacrificed a career as a photographer.

Nevertheless, the responsibilities assumed by Mrs. Kelly have certainly had a seriously detrimental effect on her future earning capacity due to the length of time that she has been out of work. On this basis it is possible that a court would seek to restore her to a position similar to that which she was likely to have achieved had she not sacrificed such opportunities.\textsuperscript{158} On the other hand, however, it is also possible a court could find that despite a considerable break from the workforce, no serious impairment of her earning capacity has arisen.\textsuperscript{159} Which approach would be adopted is far from clear.

h) \textit{‘Any income or benefits to which either of the spouses is entitled by or under statute’}\textsuperscript{160}

From Mrs. Kelly’s perspective, it appears child welfare payments will be the only statutory income or benefit considered. Mr. Kelly does not appear to be entitled to any statutory income or benefit other than those derived from farming which are included in his estimate of net income provided.

i) \textit{‘The conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it’}\textsuperscript{161}

There is no suggestion that the conduct of either Mr. or Mrs. Kelly could be called into question in this case.\textsuperscript{162}

j) \textit{‘The accommodation needs of either of the spouses’}\textsuperscript{163}

It is clear that ensuring secure and stable accommodation for a spouse and any dependent children is often of particular importance to the court and frequently gives rise to a pragmatic approach. For the Kelly family, accommodation needs are a key issue in light of the size of the family and the limited immediate resources to supply alternative accommodation. However, even though the need to ensure some stability for dependent children still residing at home and in full-time education will be a criterion to be considered, it is not determinative.\textsuperscript{164} Nevertheless, the court may be persuaded in the circumstances to grant an order for the exclusive occupation of the family home by Mrs. Kelly either for her life or for a specified period of time or to order the transfer of the home or a share in it into her name.

\begin{itemize}
  \item \textsuperscript{157} See \textit{SD v BD} (n 49). See also \textit{Moore} (n 65).
  \item \textsuperscript{158} This was essentially the view \textit{O’ Neill} J took in \textit{MK v JP (orse SK)} (n 64).
  \item \textsuperscript{159} In \textit{D v D} [2006] IEHC 100, the court considered the position of an applicant wife who gave up her employment as a legal secretary in 1995 when she started a family. In passing judgment in 2006, \textit{O’ Higgins} J held: ‘I am not satisfied ... that, should she return to the workforce her earning capacity is likely to be significantly impaired, although it is probable that should she return to work her income would be diminished during the period she would have to bring her skill up to date... No doubt should she return to the workplace it would take her some time and training to update the necessary skills. However, there is no evidence that her earning capacity in the future has been impaired by reason of her break from the workforce.’
  \item \textsuperscript{160} S 16(2)(h) of the 1995 Act and s 20(2)(h) of the 1996 Act.
  \item \textsuperscript{161} S 16(2)(i) of the 1995 Act and s 20(2)(i) of the 1996 Act.
  \item \textsuperscript{162} The threshold of misconduct required by the court is quite high, see above, 142.
  \item \textsuperscript{163} S 16(2)(j) of the 1995 Act and s 20(2)(j) of the 1996 Act.
  \item \textsuperscript{164} See \textit{Coulter} (n9) 98 discussed above, 143.
\end{itemize}
While it is unlikely that an order for an immediate sale of the family home would be made in a time of falling house prices, such an order is not outside the realms of possibility where a court seeks to minimize the chance of further loss in value. The extent of the share of the proceeds of sale which Mrs. Kelly would receive to secure accommodation for her and the family is difficult to estimate. Likewise, if the sale of the family home is required but is postponed to a more appropriate time in the future, the division of proceeds demanded by the court would be difficult to foretell.\footnote{In \textit{JL v JL} (n 44), the wife was granted exclusive occupation of the family home until the youngest child reached the age of 18. The court further ordered that at the expiration of this period the home be then sold and the proceeds of sale be equally divided between both spouses. In \textit{O'L v O'L} [1996] 2 FamLJ 63, McGuinness J held: ‘In all the circumstances I am satisfied that common sense and justice require that the family home be sold and that the proceeds of sale be divided so as to provide as far as possible for the purchase by the wife of a smaller house ... and to provide for the husband something towards a deposit on the purchase by him of suitable accommodation for himself.’ The flexibility of the court towards accommodation needs was also evident in the decision of \textit{ES v DS} (HC, 12 July 2010). The issue of accommodation needs of spouses availing of social welfare, was recently considered in some detail in \textit{K v K} (n 88).}

k) ‘The value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring’\footnote{S 16(2)(k) of the 1995 Act and s 20(2)(k) of the 1996 Act.}

This does not appear to be an issue for the Kellys.

l) ‘The rights of any person other than the spouses but including a person to whom either spouse is remarried’\footnote{S 16(2)(l) of the 1995 Act and s 20(2)(l) of the 1996 Act.}

There is no mortgage over the family home, Mr. Kelly has no creditors or judgment mortgagees and neither party is remarried.\footnote{See above regarding s 15(5) of the 1995 Act and s 19(5) of the 1996 Act.} Therefore, this factor is irrelevant in the case.

m) ‘The terms of any separation agreement which has been entered into by the spouses and is still in force’\footnote{S 20(3) of the 1996 Act.}

If it is assumed that Mr. and Mrs. Kelly will obtain a judicial separation, no separation agreement will be in place. Therefore, this factor will not be an issue when the couple seeks a divorce.

Furthermore, notwithstanding the above statutory factors, the court is prohibited from making any order for Mrs. Kelly unless ‘it would be in the interests of justice to do so.’\footnote{S 16(5) of the 1995 Act and s 20(5) of the 1996 Act.} Presumably, on the basis of the above factors, Mrs. Kelly would succeed in receiving some form of order in relation to the family home. However, what form this would take is highly dependent on the discretion of the court. Therefore, any analysis of the possible outcomes is purely speculative.\footnote{Although apparently irrelevant to Mrs. Kelly, it is important to note that upon the institution of judicial separation or divorce proceedings, s 5 of the 1995 Act and s 11 of the 1996 Act empower the court to make preliminary orders where necessary, see above, 145.}
When making a property adjustment order, the court is empowered to order the transfer of the proprietary interest which Mr. Kelly is entitled either in possession or reversion to Mrs. Kelly, or may order the settlement of such specified property for the benefit of Mrs. Kelly. While it is possible a transfer may be uni-directional, it is often the case that such transfers involve a bi-directional element. Moreover, from Mrs. Kelly’s point of view, where the family home is concerned, such order(s) must be accompanied by an order establishing which spouse gains exclusive occupation if there is no outright transfer of the property ordered.

The legislature recognised that, in exercising this discretion, the court must take into consideration that where a decree of divorce or judicial separation is granted, it is not possible for the spouses concerned to reside together, and added 'proper and secure accommodation should, where practicable, be provided for a spouse who is wholly or mainly dependent on the other spouse and for any dependent member of the family'. Thus, on granting a decree of judicial separation or divorce, the court may confer on Mrs. Kelly a right of occupation in the family home to the exclusion of Mr. Kelly. Alternatively, the court may order the sale of the family home subject to such conditions (if any) as the court considers proper and provide for the distribution of the proceeds of the sale between the spouses.

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172 With regard to transfer of property orders, the court may order the transfer of Mr. Kelly’s entire interest in a property such as the family home to Mrs. Kelly or may award a transfer of a part interest. This order may be made for Mrs. Kelly and/or any dependent member of the family, see s 9(1)(b) of the 1995 Act and s 14(1)(b) of the 1996 Act.

173 Coulter (n 9) 64 notes: ‘Where the family home was disposed of, the most likely outcome was that it was transferred to the wife, usually on payment of a sum to the husband and/or with the wife taking on the mortgage. Occasionally the family home was transferred to the wife in lieu, in whole or in part, of past or future maintenance, or against her giving up an interest in other marital property.’ This was also observed by Coggans and Jackson who noted: ‘In practice orders under section 14 are most frequently made by way of a simple transfer of the property, usually the family home and contents from one spouse to the other in consideration of a lump sum payment by the other spouse to the value of their [ie, the transferor’s] interest in the property, or a portion thereof depending on the transferee’s ability to pay’. See Nuala Coggins and Stephanie Jackson, Family Law (Divorce) Act, 1996 (Sweet and Maxwell 1998) 37.


175 S 10(2)(b) of the 1995 Act and s 15(2)(b) of the 1996 Act. Shannon points out this represents a change in approach from that adopted in the Judicial Separation and Family Law Reform Act 1989 which had required the court to consider the welfare of the family as a whole. See Divorce Law and Practice (n 43) 113. Moreover in T v T (n 52), McGuinness J held at 7 that the court could have regard to children of the family who, although no longer ‘dependent’ within the meaning of the 1989 Act, were still ‘either in full-time education or merely starting on their careers’.

176 Shannon notes this right of residence is ‘well established’ having been initially provided for by s 16(a) of the Judicial Separation and Family Law Reform Act 1989. See Divorce Law and Practice (n 43) 115. The constitutionality of the power to award exclusive occupation of the family home under the 1989 Act was unsuccessfully contested in F v F [1994] 2 ILRM 401. Murphy J in the High Court held at 417-8: ‘In the area of family law, the family home has ... two important functions. First it provides the ordinary residence for the family, and secondly, it represents or may represent an asset of significant value. In addition to the immediate and practical value of the right to reside in a family home – particularly for a non-income earning spouse – and the possible asset value of the family home, the courts have long identified the psychological value of the family home providing a point of unity around which the children of a broken marriage may preserve or rebuild some of the psychological or personal relationships on which the development of the family would depend.’
With regard to the right to residence, the court may order the exclusive occupation of the family home by Mrs. Kelly for her lifetime,\textsuperscript{178} for a shorter period\textsuperscript{179} or pending a further order of the court.\textsuperscript{180} However, such orders are rarely stand-alone provisions but are often part of an overall package which is provided on a welfare basis.\textsuperscript{181} While the circumstances appear to favour the grant of such an order to Mrs. Kelly, such an order only remains binding until the court considers it necessary to alter the order and are, it is submitted, merely a band-aid.\textsuperscript{182} Consequently, an order may be made for a specified period and subject to review or variation at the expiration of such a period.\textsuperscript{183}

An alternative order ‘applied regularly’ by our courts\textsuperscript{184} and ‘frequently’ applied in association with other ancillary orders,\textsuperscript{185} is an order for the sale of the home. Although purely speculative, this writer submits that in light of the presence of additional assets, namely the family farm, the necessity for a sale of the home may be reduced.\textsuperscript{186} Moreover, it has been noted that such orders for sale ‘will normally be provided where both spouses have some interest in the property.’\textsuperscript{187} In this case, both spouses do not have an interest in the property. If, however, a sale is ordered, the proceeds of sale subsequently generated may be divided between Mr. And Mrs. Kelly,\textsuperscript{188} in a manner which makes...

\textsuperscript{178} See \textit{JC v CC} [1994] 1 FLJ 22.
\textsuperscript{179} See \textit{AK v PK} [2000] IEHC 24 where Murphy J awarded the respondent husband exclusive occupation of the family home and surgery attached, until he ceased to practice or reached the age of 65, whichever came first. See also \textit{JL v JL} (n 44).
\textsuperscript{180} See \textit{VS v RS} [1992] 2 FamLJ 52 (HC).
\textsuperscript{181} Shannon notes the decision to make such an order ‘is often based on a desire to provide stability and continuity for the children of the marriage.’ See \textit{Divorce Law and Practice} (n 43) 115. See also Fiona de Londras, \textit{Principles of Irish Property Law} (2nd edn Clarus Press 2011) 199. In \textit{MK v PK} [1991] 9 FamLJ 12 (HC) at 13 Barron J granted the wife exclusive occupation of the family home. He considered the sale of the family home was unwarranted explaining that ‘the youngest child of the family goes to school in the area and the wife has interests in the community nor do the family finances require the family home to be sold ... it would be unreasonable to require the family home to be sold’.
\textsuperscript{182} As was noted in the 1994 case of \textit{F v F} (n 177) at 418 by Murphy J, an exclusive right of residence ‘may be an immediate practical necessity but in general it is unlikely to be a permanent solution to the problem for either spouse’.
\textsuperscript{183} Alternatively, an order may be subject to review upon the occurrence of an event, often when the youngest child of the family reaches the age of majority. This is 18 or, if the dependent child remains in full-time education, 23. See \textit{CO’R v MO’R} (n 59) where O’ Donovan J ordered the exclusive occupation of the family home pending the completion of the full time education of the children. Moreover, despite the often temporary nature of such an order, the importance of the right to exclusive occupation should not be underestimated and was recently underlined by Abbott J in \textit{K v K} (n 86) [13] who noted: ‘The effective barring of a right of sale where a life residence in the family home is granted shows the weight the [Irish legislature] attached to an order granting residence, which I consider to be at the upper end of the scale.’
\textsuperscript{184} Shannon, \textit{Divorce Law and Practice} (n 43) 117.
\textsuperscript{185} Shatter (n 2) 904.
\textsuperscript{186} On the basis of her research, Buckley suggests: ‘Where assets are insufficient to provide for both parties, [courts] may be more likely to sell the home than to transfer it to one party only.’ See, ‘Irish Matrimonial Property Division in Practice: A Case Study’ (n 9) 66.
\textsuperscript{187} De Londras (n 181) 199. See also Shatter (n 2) 907.
\textsuperscript{188} And any interested third parties with valid claims.
provision for Mrs. Kelly, thereby effecting a redistribution. Finally, where an order such as a property adjustment order, exclusive occupation order or order for the sale of the family home has already been made, Mrs. Kelly may apply to have it varied, discharged, suspended or revived.

Ultimately, while the above discussion illustrates the factors which the courts are directed to consider and the powers they may avail of, due to the high level of discretion vested in the courts, it is not possible to make an accurate prediction regarding what order(s) the court might make. Indeed, regional variations have been noted and it is possible that any orders made would depend on the predilections of the presiding judge. According to Buckley, ‘family property provisions are not being applied uniformly on a national basis. It seems clear that judges have different views on the provision that is “proper” in family situations, and that there are prevailing local trends.’

Nevertheless, irrespective of which court hears her case, it is probable on the basis of the statutory factors enumerated above that a property order of some nature would be made in Mrs. Kelly’s favour. Whether this would be an exclusive right of residence in the family home, a transfer of a proprietary interest in the home or in the farm, or an order for sale of the home or the farm with a division of the proceeds is impossible to tell. However, a consideration of the overall frequency of orders made may shed some light on how the judiciary approach the issue.

To this end, while a previous study seeking to determine the frequency of orders relating to matrimonial property struggled to make firm findings on the outcomes for the home, a more

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189 Another possibility is that, rather than ordering the immediate sale of the family home, the court may instead include an order for sale as a consequence arising only where one spouse does not avail of the opportunity to purchase the other’s interest in the home. See N v N (HC, 18 December 2003).

190 See s 18(2) of the 1995 Act and s 22(2) of the 1996 Act above.

191 As Crowley explains, ‘equitable division lends itself to excessive judicial freedoms resulting in the resolution of cases based upon the subjective leanings of a judge.’ See ‘Equal versus Equitable Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part I’ (n 5). Similarly, Shatter warned in 1997, in family law proceedings ‘the affected parties could be engaging in a game of judicial roulette where the outcome of the case could be affected by which judge hears the case rather than be affected by a previous set of precedents’. See Alan J. Shatter, ‘Open Sesame for Divorce’ Irish Times (Dublin, 18 February 1997). Sadly, this has been proven to be true, see below.

In England, Hitchings noted, ‘It appears ... there is an awareness of varying judicial approaches in the courts that solicitors practice in on a regular basis; the mantra “know thy judge” proves to be an essential non-doctrinal influence on the ancillary relief process if the case has failed to settle outside the doors of the court.’ See ‘Chaos or Consistency’ in Jo Miles and Rebecca Probert (eds), Sharing Lives, Dividing Assets (Hart Publishing 2009) 203. Puzzlingly, however, she did not believe that ancillary relief was uncertain or chaotic since she notes at 204 ‘the advice given to clients is pretty consistent, subject to local court culture and the practicalities of the individual case’. It is submitted that where the outcome depends on the judge who will hear the case, and the knowledge the solicitor has of the judge’s predilections, the system is failing at a fundamental level to ensure fairness and consistency.

192 ‘Irish Matrimonial Property Division in Practice: A Case Study’ (n 9) 78. Buckley notes at 68 that, having considered the outcomes of contested cases in Dublin, Cork and Galway, the emerging differences ‘seemed sufficiently consistent to consider Cork judges likely to be more redistributive than judges in the other two venues.’ She adds at 78, ‘This in turn suggests that “knowing the judge” is crucial, but equally, that this is not easy and that practitioners appearing outside their own locality are disadvantaged.’ Likewise, Crowley explains, ‘the impact of these 12 statutory factors differs depending not only on the facts of the case, but also on the attitude and approach of the presiding judge’. See Family Law (n 14) 48.

193 This was due to the fact that the subject matter of property transfers was not always specified, see Buckley, ‘Irish Matrimonial Property Division in Practice: A Case Study’ (n 9).
recent study conducted by Coulter sheds more light on this issue. Her analysis of the outcomes in 241 cases recorded in the Courts Service files for October 2006, where the family home was disposed of or specifically referred to, throws up some interesting findings. All in all, there were 107 property transfers of the home to the wife. This was the most popular order in relation to the family home and was sometimes made subject to the requirement that the wife make a payment to the husband in lieu of his interest. A further 49 orders for sale of the home and division of proceeds were made, while 41 transfers of the home to the husband were ordered, again which sometimes required payments in lieu. In 24 cases both spouses already had houses, while in a further 10 the couple lived in rented accommodation.

In addition, statistics available on the Courts Service website relating to orders affecting the family home provide a valuable source of information in this regard. While the statistics confirm some of Coulter’s findings, other aspects present a different picture. Moreover, by analysing statistics over a number of years trends may be appreciated. The following tables demonstrate the relative frequency of the various orders granted.

Table for Judicial Separation Orders Granted in the Circuit Court:

<table>
<thead>
<tr>
<th>Year</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Orders</td>
<td></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

194 Coulter (n 9) 64-65.
195 The final 10 cases were classified as ‘other’. This category included orders for a right of residence and deferred sale or situations where houses were left in both parties’ names while one lived in the home. By their nature such cases could return to court at later date.
196 Due to the more comprehensive nature of these figures, they are presumed to be more accurate.
197 The percentages provided in these tables are derived by adding together all the property orders recorded for each year and expressing the number of individual orders as a fraction of each yearly total. However, ancillary property orders are not always made where an order for divorce or judicial separation is granted. Couples may reach a settlement making ‘proper provision’ for the financially weaker spouse without having the terms of the settlement made an order of the court. Although this is the exception rather than the rule, it nevertheless means the figures presented here are not representative of ancillary relief outcomes in all judicial separations and divorces granted in the Circuit Court. Moreover, as more than one property order may be made in an individual case, the number of orders may exceed the number of judicial separations or divorces granted in that year.
198 Court Service, ‘Annual Report 2008’ <www.courts.ie/Courts.ie/Library3.nsf/(WebFiles)/5BF8EA23BD1AE9D2802575E7003EDA7B/$FILE/Annual%20Report%202008.pdf> accessed 05 September 2012. The total number of judicial separation orders granted in the Circuit Court in 2008 was 1,180. The total number of property orders recorded was 1,077.
199 Court Service, ‘Annual Report 2009’ <www.courts.ie/Courts.ie/Library3.nsf/(WebFiles)/AC5D8C4F7765B6C080257766005D1B58/$FILE/Courts%20Service%20Annual%20Report%202009.pdf> accessed 05 September 2012. The total number of judicial separation orders granted in the Circuit Court in 2009 was 1,080. The total number of property orders recorded was 1,089.
200 Court Service, ‘Annual Report 2010’ <www.courts.ie/Courts.ie/Library3.nsf/(WebFiles)/4523C03355124B9O8O2578CC0033B0AF/$FILE/Courts%20Service%20Annual%20Report%202010.pdf> accessed 05 September 2012. The total number of judicial separation orders granted in the Circuit Court in 2010 was 990. The total number of property orders recorded was 1,133.
As, generally, the most contentious issues such as how to deal with the family home are considered on judicial separation, the number of such orders made following a judicial separation are proportionately higher than those following a divorce. However, the breakdown of such orders following a divorce is nonetheless instructive.

Table for Divorce Orders Granted in the Circuit Court:

<table>
<thead>
<tr>
<th></th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transfer of Family Home</td>
<td>614 (34.94%)</td>
<td>562 (42.96%)</td>
<td>525 (41.14%)</td>
<td>526 (41.12%)</td>
</tr>
<tr>
<td>Sale of Family Home</td>
<td>496 (28.22%)</td>
<td>188 (14.37%)</td>
<td>209 (16.37%)</td>
<td>219 (17.12%)</td>
</tr>
<tr>
<td>Residence in Family Home</td>
<td>458 (26.06%)</td>
<td>226 (17.27%)</td>
<td>235 (18.41%)</td>
<td>220 (17.20%)</td>
</tr>
<tr>
<td>Other Property Order (excl. Family Home)</td>
<td>189 (10.75%)</td>
<td>332 (25.38%)</td>
<td>307 (24.04%)</td>
<td>314 (24.55%)</td>
</tr>
</tbody>
</table>

As many cases are settled, with the court merely making the arrangement reached an order of the court, it is hard to say to what extent these statistics represent the natural inclinations of the judiciary or are, by contrast, the product of a package favoured by the litigants who settle without separation orders granted in the Circuit Court in 2011 was 1,006. The total number of property orders recorded was 1,212.

202 Court Service, ‘Annual Report 2008’ (n 198). The total number of divorce orders granted in the Circuit Court in 2008 was 3,588. The total number of property orders recorded was 1,757.

203 Court Service, ‘Annual Report 2009’ (n 199). The total number of divorce orders granted in the Circuit Court in 2009 was 3,302. The total number of property orders recorded was 1,308.

204 Court Service, ‘Annual Report 2010’ (n 200). The total number of divorce orders granted in the Circuit Court in 2010 was 3,113. The total number of property orders recorded was 1,276.

205 Court Service, ‘Annual Report 2011’ (n 201). The total number of divorce orders granted in the Circuit Court in 2011 was 2,777. The total number of property orders recorded was 1,279.

206 However, see n 197 which notes the court may not always be required to make an order of court in relation to the property relief agreed by the parties.
having a full court hearing. Nevertheless, what does emerge from the statistics and Coulter’s findings is that transfers of the family home represent the most popular order made.207

One puzzling development is the difference which has emerged between divorce and judicial separation with regard to the frequency of orders for sale of the family home. While there has been a considerable drop on divorce, presumably in light of the difficulties which have arisen in the property market since mid-2008, the fall has been less severe in judicial separation and the 2011 figures for judicial separation remain comparable to those recorded in 2008. Furthermore, these statistics show that orders granting a right of residence in the family home are more popular than would have been presumed from Coulter’s study and, proportionately, are especially important on judicial separation.208 This, it is submitted, is understandable as the breakdown of the relationship is generally more recent in judicial separation cases and the accommodation needs of the family are often more pressing as they adjust to the new situation. Moreover, both categories also witnessed a dramatic increase in the frequency of property orders in relation to assets other than the family home. Finally, while these statistics give an indication of the types of orders made, they do not provide information as to the extent of the interest involved in the property transfer, details on the division of proceeds following a sale, where ordered, or any indication of the basis on which these orders were made.

What conclusions then can be drawn from these statistics as to the likely outcome for Mrs. Kelly? Despite the availability of this information, it is still exceptionally difficult to say with any conviction what order(s) would be made by the court, their quantum and nature. It is arguable that a right of residence, at least in the short term, or a transfer of some interest in the home in her favour might be two more likely avenues for the court to consider. While the sale of the home is also possible, it is arguably less likely in light of the presence of other assets, namely the farm, and the statistical information which shows the relative disinclination of judges and parties to make such orders. What remains very unclear, however, is the percentage interest she would receive in the home or, if a sale was ordered, in the proceeds of sale.

One further factor, over-looked thus far, could ultimately have a considerable impact on the outcome for Mrs. Kelly – a settlement. Under the Irish regime as currently applied, there is high settlement rate with relatively few cases contested in a full court hearing.209 While this may be

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207 On the basis of her study, due to the small number of cases which saw property transfers of any description where the home was in the sole name of one spouse, as compared to the situation where the home was in joint ownership, Buckley concluded, ‘[T]hese findings do suggest that courts are more likely to order transfers of the home in joint ownership situations, but are less likely to do so in general than the parties might anticipate (given consensual figures).’ See ‘Irish Matrimonial Property Division in Practice: A Case Study’ (n 9) 70. However, she concedes this might be attributed to the different packages that consensual agreements throw up.

208 A decrease in the frequency of orders granting a right of residence is evident on divorce. It is difficult to explain this fall.

reflective of a high degree of amicable separations, it is more likely that economic considerations
take precedence as the cost of legal action to terminate a marriage is prohibitive.\textsuperscript{210} Thus, instead of
encountering the often astronomical costs involved in a fully contested case, a range of Alternative
Dispute Resolution methods are availed of by many couples and would most likely also present an
attractive alternative for Mr. and Mrs. Kelly than the costs associated with a full court hearing.\textsuperscript{211}

hearing (70\%) and 27 divorce cases were disposed of in a full hearing (69.23\%). In the Circuit Court, 479 judicial
separation cases were disposed of in a full hearing (44.35\%) and 1154 divorce cases were disposed of in a full
hearing (34.94\%). This means that when considering the statistics on the outcomes of cases disposed of,
37.69\% of the total cases in both courts proceeded to full hearings. However, this is not necessarily
demonstrative of full hearings in relation to ancillary relief. If one aspect of a case goes to full hearing, with all
other issues, including property division and the destination of the family home settled, the case will be
recorded as being disposed of with a full hearing and a settlement. Therefore, it is submitted the proportion of
cases with a full hearing in relation to property, is likely to be quite low and perhaps comparable to Coulter’s
10\% noted above. Anecdotal evidence suggests that the vast majority of full hearings relate to child access and
custody disputes. Moreover, although the Courts Service does provide figures on how cases were disposed of
in the ‘Annual Report 2010’ (n 200) and the ‘Annual Report 2011’ (n 201), these merely relate to provincial
figures and exclude figures from the Dublin Circuit Court. The 2009 figures are therefore preferred. I would like
to thank Ms. Helen Priestly, Head of Information Services, Courts Service, for all her assistance in clarifying
these statistics. Any errors are my own.

Dewar notes that in light of the high settlement rate ‘discretion is preserved, arguably, for the benefit only of a
tiny minority of cases in which it might be of some use, but for the rest it serves only to confuse matters and to

Surprisingly, in her review of Irish matrimonial property division, Buckley made no reference to the high
settlement rate in family law proceedings despite the fact that it would have strengthened her argumen
t for the introduction of a deferred community of property regime, see ‘Matrimonial Property and Irish Law: A Case
for Community’ (n 51) 71-75.

\textsuperscript{210} While it is broadly considered that a low level of contested cases shows a well operating system, the reality
for many financially weaker spouses is that a court application is not an option due to the expense it involves.
It was noted by Peart J that ‘litigation can be a very protracted process, and its effect on costs is undoubtedly a
major problem and a deterrent to any but the rich, the courageous and the foolhardy’. See ‘Mediation –
Alternative Dispute Resolution +
– the Future?’ (delivered to Mediation Solutions North West, 24 February 2012).

Buckley states, ‘It must be noted that many so-called “consent” cases are in fact bitterly contested until the
last minute, so that last minute settlements could arguably have been included with contested cases.’ See
‘Irish Matrimonial Property Division in Practice: A Case Study’ (n 9) 51. Moreover, the courts encourage
consensual orders and it has been noted by McCabe J there is a ‘huge premium in family law cases where
parties resolve matters between themselves.’ See \textit{Family Law Matters} (n 209) vol 3(2) 73.

See also Anne Egan, ‘Are Fathers Discriminated Against in Irish Family Law: An Empirical Study’ (2011) 14(2)
IJFL which shows, albeit in relation to maintenance orders under the Family Law (Maintenance of Spouses
and Children) Act 1976, the impact on costs of women which act as a deterrent to legal action in many cases
even where the provision made for them is quite small. She notes: ‘One mother summed up the general
sentiment when she stated that she “didn’t want the hassle of it [going back to court]”. This unmarried mother
receives the same maintenance at present as she did when the maintenance order was granted back in 1994,
being £30.00 (€38.10), but admitted it was the cost factor that deterred her from returning to court to seek
additional maintenance.’

\textsuperscript{211} To this end, the State’s Family Mediation Service, or a private practitioner, may assist a couple in reaching a
settlement through mediation. While mediators may or may not have a legal background and the profession is
currently unregulated, there appears to be considerable executive support for the fostering of a mediation
service. Referring to the transfer of the Family Mediation Service to the Legal Aid Board under Part 16 of the
Civil Law (Miscellaneous Provisions) Act 2011, Minister for Justice Shatter recently stated, ‘This is a particularly
significant development in the evolution of family related services in Ireland. It has long been evident to me
that mediation in many family law cases offers a better route and outcome for the parties than the adversarial
While the fact that Mrs. Kelly may be entitled to Legal Aid would potentially place her in a stronger position to withstand the threat of litigation,\textsuperscript{212} the lack of rights with which she is endowed clearly places her in a very vulnerable bargaining position. Where Mr. Kelly adopts a very defensive or stubborn position with regard to financial or property provision, Mrs. Kelly may feel compelled to settle even if it is not in her best interests.\textsuperscript{213} In any case, even with the best advice of an experienced solicitor, any estimation of what she might in fact receive in a court hearing of the case is merely speculative and the balance of power undoubtedly rests with the financially stronger spouse, Mr. Kelly.

Although it would seem reasonable to assume that where Mrs. Kelly does enter into a settlement, this would be reviewed by the court in line with its constitutional requirement to ensure proper provision when ordering a decree of divorce, this may or may not happen, further adding to her vulnerability. It has been pointed out that where a couple has been legally advised, some judges consider that a settlement made under such advice constitutes proper provision.\textsuperscript{214} Moreover, it appears in light of recent studies that there is an element of rubber stamping involved in applications where a settlement is in place.\textsuperscript{215} In addition, some judges do not seem comfortable exercising their discretion in a family property setting and rather leave it to the couple environment of the courts.’ Courts Service, 

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Another new development in this area over the last decade has been the emergence of collaborative law. It is based on the concept that both parties and their solicitors will collaborate, without going to court, to determine all issues emanating from the marital breakdown. Where a settlement is reached it is then brought to court and made a rule of court thereby becoming legally binding. Crucially however, the success of the collaboration will depend on the commitment of both parties not to resort to court proceedings. For more, see Coulter (n 9) 113; Sally Dowding, ‘Self-determination or Judicial Imposition’ in Jo Miles and Rebecca Probert (eds), \textit{Sharing Lives, Dividing Assets} (Hart Publishing 2009). Still more couples reach a consensual agreement through their solicitors. In light of current economic turmoil, it is probable that in the coming years ever fewer cases will go to a full hearing and more will be achieved through settlements.

Due to the high level of settlements in England and Wales, research funded by the Economic and Social Research Council is currently underway led by Professors Barlow and Hunter entitled \textit{Mapping Paths to Family Justice}. The research seeks to establish the relative popularity of different methods of Alternative Dispute Resolution including solicitor negotiation, mediation and collaborative law. It is submitted such research would also be beneficial in Ireland.

\textsuperscript{212} Legal Aid is currently available to individuals whose disposable income is less than €18,000.

\textsuperscript{213} A recent study of legal practitioners carried out in England highlighted how a dominant party can manipulate the system to get a better deal, see Hitchings (n 191) 196.

\textsuperscript{214} See Coulter (n 9) 94. Buckley also notes: ‘Judges have ... informally expressed their anxiety to the writer not to disturb or investigate a settlement unless manifestly inappropriate. However, it does suggest a considerable amount of rubber stamping, not necessarily in accordance with best practice (in light of the statutory emphasis on proper provision).’ See ‘Irish Matrimonial Property Division in Practice’ (n 9) 73. On the other hand, however, she notes practitioners believed that judges were ‘generally disinclined to make orders without due investigation and evaluation.’ It could be suggested that maybe this is the impression judges portray to practitioners to ensure they produce an agreement that gives effect to the legislative and constitutional requirement for proper provision!

\textsuperscript{215} ibid.
themselves. Thus, the protection the court will afford an applicant such as Mrs. Kelly who may have entered into an improvident settlement is essentially fortuitous.

To sum up, therefore, it appears that if the Kellys do take legal proceedings and progress to a full court hearing, it is probable that Mrs. Kelly will benefit from some ancillary order in relation to the family home. However, any effort to accurately predict the nature and quantum of such provision is essentially glorified guesswork. While statistics are now available to show the prevalence of different orders and, on this basis, it is possible to make broad assumptions on the relative likelihood of various orders, such assumptions are really too vague to form the basis of a meaningful prediction. This becomes particularly worrying if, like the majority of separating couples in Ireland, the Kellys reach a settlement as Mrs. Kelly is undoubtedly in an exceptionally weak bargaining position.

Finally, one further possibility must be considered. What if one of the spouses dies after the granting of a judicial separation but before the finalisation of a divorce? Do the succession rights discussed in Chapter 2 continue to apply? If Mr. and Mrs. Kelly obtain a judicial separation, the court may, on the granting of a decree of judicial separation or anytime thereafter, extinguish all rights to which either party is entitled under the Succession Act 1965. However, if such an order would cause hardship

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216 Coulter notes in *Family Law Matters* (n 209) vol 3(2) 73, McCabe J’s admission that the lawyers knew more about family law than he did.

217 The inherent difficulty of such uncertainty which is encountered at a practical level is illustrated in one particular case recorded in Coulter’s study. McDonagh J at the Western Circuit Court was faced with a case where a man was seeking a divorce unopposed by his former wife and the couple had reached a settlement. The couple had two grown up children and the family home was worth €150,000 with a small mortgage. The owning husband was offering the wife €33,000 for her interest in it with which she said she was happy. Despite this, and the fact that both parties had legal representation, the judge expressed his belief that one-third of the net value would be a fair distribution and the parties agreed. See (n 9) 94. Unfortunately, however, Coulter does not provide the value of this alternate provision.

218 The court may grant this order on the application of one of the spouses at any time after the granting a decree of judicial separation once satisfied that adequate and reasonable financial provision exists or can be made by Order of the Court, or that the spouse concerned should not be provided for. See s 14 of the Family Law Act 1995. This provision essentially replicates that which was originally set out by s 17(1) of the Judicial Separation and Family Law Reform Act 1989. See *SB v RB* (n 52) where McGuinness J made an order extinguishing each party’s succession rights against the other; *JD v DD* (n 51) the succession rights of both spouses were extinguished. However, no order was granted extinguishing succession rights in *PP v AP* [1999] IEHC 60.

Under the Judicial Separation and Law Reform Act 1989 there was a four-tier test applied before an order was made extinguishing the succession rights of the spouse. The test stated the court had to be satisfied adequate and reasonable provision of a permanent nature was made for the spouse whose rights were in question, provision of a permanent nature was not required to ensure the future security of the spouse, an order had not been made under ss 14, 15 or 16(a) and that if such an application was made, it would not be successful in the court. This test no longer applies and the court is allowed to make an order extinguishing succession rights if it is in the interests of justice to do so. Life assurance policies are sometimes utilised to offset this loss of rights.

Statistics for Circuit Court decisions show that of a total of 1,006 judicial separation orders granted in 2011, 895 orders extinguishing succession rights of at least one spouse were made. See Court Service, ‘Annual Report 2011’ (n 201). The equivalent statistics in 2010 show 990 judicial separation orders were granted and orders extinguishing the succession rights of at least one spouse were made in 939 cases. See Courts Service, ‘Annual Report 2010’ (n 200). Although orders by consent are not always made an order of the court, the general trend seems to be that an order of the court will be made extinguishing succession rights in most cases. Therefore, these figures may be considered relatively accurate. I would again like to thank Ms. Helen
to Mrs. Kelly, the court may refuse to extinguish her rights. In this regard, in D v D, O’ Higgins J noted:

‘I do not think it necessary or even desirable to attempt to innumerate the circumstances in which Succession Act rights might not be extinguished following the making of an order for judicial separation. The extinguishing of rights under the Succession Act is one of the options open to the court on granting an application for judicial separation. It is one of a wide variety of orders available to the court in discharging its obligation to ensure that proper provision is made for the parties. Whether or not to extinguish the rights under the Succession Act is not a decision that should be taken in isolation from all the circumstances of the case on [sic] from the other orders which the court intends to make.‘

If Mr. and Mrs. Kelly obtain a divorce, their respective succession rights are automatically extinguished. While the court are not empowered to extinguish succession rights under the 1996 Act, once a decree of divorce is granted an individual ceases to be a ‘spouse’ for the purpose of the Succession Act and, consequently, is no longer automatically entitled as a right to a share in the estate of their former spouse. However, Shannon notes: ‘Although this may appear to finalize matters, the Divorce Act does not result in a clean break as regards inheritance rights.’ Instead, while rights to a specified share of the deceased’s estate will not exist, a residual right to apply for provision may still remain.

As a result, if Mr. and Mrs. Kelly obtained a divorce or judicial separation, and in the case of a judicial separation her right to a legal share on succession is extinguished, Mrs. Kelly will, nevertheless, be able to apply to the court for discretionary provision out of the estate. This is subject to two caveats, however. It will only apply provided that (a) she has not remarried and (b) the court has not exercised its discretion to also extinguish these residual rights to apply for provision from the

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219 (n 159). In the circumstances, O’ Higgins J referred to the ‘extremely unpredictable financial situation of the respondent’ who he considered would likely ‘accumulate a great deal of wealth’ over the following 10 to 12 years. Consequently, he concluded by stating it appeared ‘fair and reasonable’ to him not to make any order extinguishing the applicant’s rights under the 1965 Act. Likewise, in PS v PS (HC, July 1996) McGuinness J refused to extinguish either spouse’s succession rights in circumstances where the financial security of the elderly spouses was uncertain. By contrast, however, in BF v VF [1994] 1 Fam L J 15 the High Court did extinguish all residual succession rights of the applicant spouse as adequate provision for her needs had already been made through previous ancillary orders pertaining to the estate in question. See also MP v AP (n 35). For more, see Albert Keating, Probate Law and Practice (Round Hall 1999) para 6.94.

220 Although the 1996 Act does not specifically refer to the effect of a decree of divorce on succession rights, s 10(1) provides, ‘Where the court grants a decree of divorce, the marriage, the subject of the decree, is thereby dissolved and a party to that marriage may marry again.’

221 Divorce Law and Practice (n 43) 149.

222 S 15A(1) of the 1995 Act as inserted by s 52(g) of the 1996 Act and s 18(1) of the 1996 Act. S 18(1) of the 1996 Act and s 15A(1) of the 1995 Act state applications of this nature must be made ‘not more than six months after representation is first granted under the Act of 1965 in respect of the estate of the deceased spouse.’

223 S 15A(2) of the 1995 Act and s 18(2) of the 1996 Act. For more, see Shannon, Divorce Law and Practice, (n 43) 147-150.
spouse’s estate. Moreover, if Mrs. Kelly renounced her right to a legal share in a separation agreement, she cannot make an application for discretionary provision. However, if a decree of divorce is subsequently made, her right to apply for provision is resurrected.

Where Mrs. Kelly is entitled to apply for discretionary provision, the court is obliged to consider the rights of other interested parties, all the surrounding circumstances of the case, including any property adjustments already made, any devise or bequest made by Mr. Kelly to Mrs. Kelly and must be satisfied that proper provision, in the circumstances, was not made for the Mrs. Kelly during the Mr. Kelly’s lifetime. The provision made by the court cannot be greater than the share to which the applicant would have been entitled prior to the extinguishment of their succession rights.

With regard to testamentary gifts, where Mr. and Mrs. Kelly obtain a judicial separation or divorce, the will of either party is not automatically revoked. As a result, if Mr. Kelly dies testate, without having remarried, and makes a testamentary bequest to Mrs. Kelly, without referring to her status as his wife, unless he takes positive action to revoke the will, she will be entitled to take the gift. However, as a will is revoked by a subsequent marriage of the testator, unless the will was made in contemplation of the marriage, if Mr. Kelly remarries following a divorce, the new contract of marriage revokes the existing will.

4.4.3 Mr. & Mrs. Kelly, Vancouver, British Columbia, Canada

224 S 15A(10) of the 1995 Act and s 18(10) of the 1996 Act empower the court, if it is in the interests of justice to do so, to extinguish the residual right which continues to vest in the spouse to apply for a share out of a deceased's estate under s 15A(1) of the 1995 Act or s 18(1) of the 1996 Act. In 2011, 2,777 divorces were granted and 2,628 orders extinguishing succession rights under s 18(10) of the 1996 Act were made against at least one spouse. See Court Service ‘Annual Report 2011’ (n 201). In 2010, 3,113 divorces were granted and 2,841 orders extinguishing the succession rights of at least one spouse were made. See Court Service ‘Annual Report 2010’ (n 200). Again, although orders by consent are sometimes not made an order of the court, the trend seems to be that an order of the court will be made extinguishing succession rights. Therefore, these figures may be considered accurate.

Coulter notes two cases heard by the Southwestern Circuit Court where the succession rights of the husbands were extinguished but those of the wife were not, and speculates that there ‘may have been a history of abandonment with no maintenance paid for a number of years, and the maintenance of the wife’s succession rights may have been an attempt to compensate for this.’ See (n 9) 46. Indeed, orders barring the residual right to apply for a share of the deceased’s estate are generally made, as evidenced in the statistics above. However, a recent High Court decision may lead to a change in this practice. Coulter notes the case whereby a woman received a lump sum of €50,000 and €200 a week in maintenance in the Circuit Court. A blocking order that neither the former husband or wife could apply for provision out of the estate of the other was also made. The wife was, however, concerned about her security in the event of her husband’s death. As a result, she sought a modification of the blocking order allowing her to make a claim against her husband’s estate if he died. In the High Court, Peart J held, ‘It seems appropriate that the court should not make a blocking order under section 18 (10) of the Act of 1996 unless the court can be satisfied that proper provision has been made for her maintenance after her husband’s death.’ See Coulter, ‘Ruling may Affect Financial Entitlements of Ex-spouses’ Irish Times (Dublin, 27 August 2012).

225 S 15(A)(4) of the 1995 Act and s 18(4) of the 1996 Act. S 15(A)(6) of the 1995 Act and s 18(6) of the 1996 Act provide the personal representatives of the deceased must make ‘a reasonable attempt’ to ensure that notice of the death of the deceased is brought to the attention of a separated or former spouse. S 15(A)(1) of the 1995 Act and s 18(1) of the 1996 Act state that an application for provision out of the estate must be made within six months from the time representation is taken out. S 15(A)(6) of the 1995 Act and s 18(6) of the 1996 Act state where an application is made, the personal representatives may not distribute the estate until the court makes or refuses to make an order.

226 S 85(1) of the Succession Act 1965.
Upon the occurrence of a triggering event, Mrs. Kelly is entitled to a presumptive one-half share in all family assets pursuant to section 56 of the Family Relations Act 1996. The occurrence of a triggering event is critical to protecting Mrs. Kelly’s interest in the property from creditors, bankruptcy, or court orders made in unrelated actions. On the assumption that the Kellys do not enter into a separation agreement or wish to declare the marriage null and void, two alternative triggering events may arise. Mr. or Mrs. Kelly may apply for a declaratory judgment under section 57 that they have ‘no reasonable prospect of reconciliation’. Due to the importance of the triggering event in protecting her interest in the property, Mrs. Kelly would be advised to obtain such a declaration. If neither she nor Mr. Kelly seeks such a judgment, the relevant triggering event will be the making of an order for dissolution of marriage or judicial separation.

Upon the occurrence of the triggering event, the subject matter to be shared equally must then be identified. First, as family assets subject to equal division are characterized by being ‘ordinarily used for a family purpose’, the Kelly family home undoubtedly forms part of the community of property. Second, family assets also include savings ‘ordinarily used for a family purpose’. Therefore, Mr. Kelly’s savings account which meets this criterion will be subject to equal sharing. Third, business assets may be re-categorised as family assets where direct or indirect contributions are made. In this regard, Mrs. Kelly has made indirect contributions to Mr. Kelly’s farm. As a result, since matrimonial property claims in British Columbia are not limited to those acquired during the marriage, Mrs. Kelly will be presumptively entitled to a one-half share in the family farm and machinery. Therefore, when combined, Mrs. Kelly is presumptively entitled to assets worth £238,140.

Despite this presumptive rule of equal sharing, either Mr. or Mrs. Kelly could make an application seeking a greater share of the family assets pursuant to section 65. This action must be taken within two years of the making of an order for dissolution of the marriage or an order for judicial separation. Moreover, as the presumption rests in favour of the equal division of family assets, where an application for more than half the family assets is made, the burden of proof lies on the spouse trying to obtain an unequal division to prove that an equal division would be unfair having regard to the reapportionment criteria set out by section 65. In determining such an application, the court will have regard to the following factors:

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227 Creditors, where present, will be limited to recovering the debt from the interested spouse’s half share of the family assets.
228 S 58(2) of the Family Relations Act 1996. In this regard, McClean suggests, ‘The common element of the definition of a matrimonial home is that it is property in which one or both spouses have an interest and which is or has been occupied by the spouses as their family residence.’ See A. J. McClean, ‘Matrimonial Property–Canadian Common Law Style’ (1981) 31 Uni Toronto J 363, 374.
229 S 58(3)(c) of the Family Relations Act 1996.
230 S 59 of the Family Relations Act 1996.
232 Or an order declaring the marriage to be null and void.
233 See Toth v Toth (n 127) [62]. See also MacNeill v MacNeill [1997] CanLII 2493 (BC CA).
a) Duration of the marriage

It appears that Mr. Kelly would not be able to use the duration of the marriage to his advantage in seeking a reapportionment. However, if Mrs. Kelly sought a reapportionment in her favour, she could try to argue her case relying on the longevity of the relationship in seeking a greater portion of the family assets.

b) Duration of the period during which the spouses have lived apart

As Mr. and Mrs. Kelly have only recently separated, the duration of the separation would not be a factor which either could rely on in seeking a reapportionment.

c) Date the asset was acquired

The date the property was acquired does not appear to support an application by either Mr. or Mrs. Kelly for a reapportionment as none of the assets were recently acquired.

d) Extent to which the property was acquired by inheritance or gift

While the inclusion of this factor may appear to favour Mr. Kelly in an application for reapportionment, it is clear that the length of time an asset is held after its acquisition by gift or inheritance, the less importance that is placed on this factor. Thus, while Mr. Kelly certainly may rely on this factor to support a claim for reapportionment, as the marriage subsisted for many years after the inheritance of the farm, the relevance of this factor would be considerably weakened.

e) Needs of each spouse to become or remain economically independent and self-sufficient

From Mrs. Kelly’s perspective, this is a key factor if she decides to make application for a reapportionment. Having sacrificed her career in order to care for the family, she undoubtedly gave up her independence and self-sufficiency. In this regard, the allocation of child-raising and housekeeping functions certainly weighed more heavily on her. Despite this, whether a court would consider the impact to be sufficient to warrant a reapportionment is difficult to say.

f) Any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse

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234 S 65(1)(a) of the Family Relations Act 1996.
235 See Davison v Davison (n 116).
236 See PGN v BAN (n 117).
237 S 65(1)(b) of the Family Relations Act 1996.
238 See McPhee v McPhee (n 119).
239 S 65(1)(c) of the Family Relations Act 1996.
240 See Wolowidnyk v Wolowidnyk (n 122).
241 S 65(1)(d) of the Family Relations Act 1996.
242 See Lodge v Lodge (n 124).
243 S 65(1)(e) of the Family Relations Act 1996.
244 See Toth v Toth (n 127).
245 S 65(1)(f) of the Family Relations Act 1996.
Finally, the court may effectively take into account such other factors as it considers relevant. As a result, this criterion could be of benefit to either Mr. or Mrs. Kelly as a basis for strengthening their respective cases for a reapportionment. While the court may consider Mrs. Kelly’s contributions to the protection and maintenance of the home, it may also consider that the acquisition of the home was financed exclusively through Mr Kelly’s efforts. Moreover, the capacity and liability of the spouses from a financial perspective are very different now than what they were when they married. In particular, if Mrs. Kelly has primary custody of the children, child care costs will be incurred if she tries to re-enter the work place. Presumably, this will operate in Mrs. Kelly’s favour.

On the basis of the foregoing, it is submitted that a reapportionment of assets would be unlikely. Whether the factors which operate in favour of either Mr. or Mrs. Kelly are significant enough to rebut the presumption of equality is debateable. Therefore, Mrs. Kelly could be reasonably confident of at least retaining a half interest in the family assets, valued at €228,140. The next issue to be considered, therefore, is how the court would give effect to Mrs. Kelly’s interest.

Irrespective of whether the provision made for Mrs. Kelly is based on an equal division of the assets or a reapportionment is awarded, in achieving the desired result the court can utilise many of the same orders as are available under the Irish legislation. First, like the Irish legislation, the court may make an interim order for temporary property relief pending determination of the rights to the property. This would be of particular relevance for Mrs. Kelly as the court is empowered to order the exclusive occupation and use of the family home. Where such an order is made, the court may also postpone Mr. Kelly’s rights to apply for partition and sale or to sell or otherwise dispose of or encumber the property subject to the right of exclusive occupancy or use.

Second, although caution should be advised in predicting the way in which a court would give effect to Mrs. Kelly’s interest as the discretion of the court is paramount, the task is considerably easier once the share of family assets to which Mrs. Kelly is entitled can be established with a higher degree of probability. Thus, since she is entitled to €228,140, and it is unlikely that a reapportionment would be awarded against Mrs. Kelly, on a purely pragmatic approach to the situation, it is likely that the court would order the transfer of the family home, which is worth €180,000, and a lump sum representing the balance of €48,140 to Mrs. Kelly in return for her

246 In PGN v BAN (n 117) the court considered that wife was solely responsible for maintaining the family home. In reference to the matrimonial home, Fisher J held at [45]-[47]: ‘Section 65(1)(f) may be considered where an asset has been preserved wholly through the efforts of one spouse, without contribution from the other ... The increase in value of the ... property is largely attributable to the rising real estate market. However, had Mrs. BAN not maintained the property, it is more than likely it would have been sold years ago to pay the mortgage. The fact that there is equity in the ... home is attributable to Mrs. BAN’s actions and perseverance over the years. Given these circumstances, and the length of time Mrs. BAN has lived in the house and maintained it, [it] would be manifestly unfair to interfere with her use of the property now.’ See also Day v Day [1981] CanLII 748 (BC SC); Fearnside v Fearnside [2008] CanLII 1072 (BC SC); Nolan v Nolan [2005] CanLII 1807 (BC SC).

247 S 124 of the Family Relations Act 1996.

248 S 124(3) of the Family Relations Act 1996.

249 S 125 of the Family Relations Act 1996.
foregoing her interest in the family farm and machinery. Alternatively, the court could order the sale of one or more assets and the distribution of the proceeds.  

In addition, if Mr. and Mrs. Kelly decide to make a private agreement or settlement regarding the division of the assets, the task is immeasurably easier in British Columbia. Both spouses are aware of the entitlements which they both possess and, as a result, Mrs. Kelly, in particular, is in a much stronger bargaining position. The predictability which the system provides acts as a protective shield for Mrs. Kelly.  

Finally, Mrs. Kelly again needs to be aware of her succession rights, if Mr. Kelly dies before or after the finalisation of their divorce. Indeed, in light of the legislative overlap which had emerged in certain circumstances between the Family Relations Act 1996 and the former legislation governing succession, this was one area of law which the British Columbian legislature was particularly keen to remedy with the introduction of the Wills, Estates and Succession Act 2009. Conscious of the differing views in this area, the legislature approached the problem by amending the definition of a spouse for the purposes of the 2009 Act. As a result, under the Wills, Estates and Succession Act 2009, if a couple have been separated for at least two years at the deceased’s date of death, with either or both of them having the intention to ‘live separate and apart permanently’, the survivor will not be entitled to apply for discretionary provision where a will exists or be entitled to intestate

\[250\] S 66(2) of the Family Relations Act 1996.
\[251\] Some concern has been voiced in British Columbia that the current system gives rise to too much uncertainty, albeit considerably less than the Irish regime which is characterised by its uncertainty. This shall be discussed in more detail in Chapter 5, in the context of outlining the reforms which will be introduced by the 2011 Act.
\[252\] Particularly, the Wills Act 1996 and the Estate Administration Act 1996. Previously, if a married couple separated before the death of one of the spouses, in order for a surviving spouse to avail of the provisions of the Family Relations Act a triggering event must have arisen before the deceased spouse died. However, in certain specific circumstances, some spouses were entitled, upon the occurrence of a triggering event, to avail of both the family law provisions of the Family Relations Act and the law governing succession in order to receive an increased share of their deceased spouse’s property. For practical examples of such circumstances, see British Columbia Ministry of the Attorney General, Family Relations Act Review (C2 Division of Family Property, Discussion Paper–February 2007) 21-22.
\[253\] To combat the overlap, a subcommittee of the Succession Law Reform Project proposed in 2005 that upon the death of a spouse, the surviving spouse should be entitled to choose between availing of the property division provisions of the Family Relations Act or the applicable succession law, unless the deceased has indicated in his will that both options should be available to the surviving spouse. See British Columbia Law Institute, Wills, Estates and Succession: A Modern Legal Framework (BCLI Report No 45–2006) 125 and 148. However, the Ministry of the Attorney General, Family Relations Act Review (n 252) 22 noted the consultative feedback on this proposal was ‘not positive’. A central concern in the analysis of such proposals for reform was the differing aims and assumptions which are fundamental to family property law and succession law. While the regime which operates pursuant to the Family Relations Act is primarily based on notions of equal contributions made during the relationship, it was noted that succession law is concerned with ensuring provision for the financial needs of any dependants, in addition to respecting the wishes of the deceased. The 2007 report acknowledged that it is ‘not easy to reconcile these different goals’.
\[254\] This has lead to some difficulties and has delayed the commencement of the Act. While the 2009 Act draws a distinction between married and common law spouses (ie cohabitants), the recent reform of family law legislation in British Columbia endeavours to reduce if not remove these distinctions. This contradiction is currently being addressed.
provision where the deceased dies without a will. Neither will the survivor benefit from entitlements on succession under the 2009 Act where a triggering event has arisen under the Family Relations Act 1996. Moreover, where a triggering event arises or the spouses have been separated for the previous two years only the gift to the spouse will lapse. The will shall no longer be revoked.

In light of the various changes to the law, a complex legislative scheme on marriage breakdown will apply. For Mrs. Kelly, the following possibilities arise:

1. If Mrs. Kelly has been separated within the two year ‘grace period’ but there has not yet been a triggering event, she will be entitled to avail of the ordinary rules of succession. Thus, she will inherit the preferential share plus the half share of the remainder if Mr. Kelly dies intestate or any gift under the will in the case of a testate death. If she wishes, she may seek a variation of the will under the Act. She will not be entitled to a share of the family assets under the Family Relations Act 1996.

2. If Mrs. Kelly has been separated for less than two years but there has been a triggering event, the ordinary rules of succession will not apply. In the case of intestacy she will not be entitled to inherit the preferential share and the half share of the remainder from Mr. Kelly’s estate. In the case of a testate death, any gift to her under the will is automatically revoked by the triggering event unless a contrary intention appears on the face of the will and she may not seek a variation of the will under the Wills, Estates and Succession Act 2009. However, she will be entitled to a half share of the family assets under the Family Relations Act 1996 and has the right to seek a reapportionment.

Previously, under the Wills Variation Act 1996, a married spouse was entitled to apply to vary the will of their deceased spouse irrespective of whether the couple had been separated at the deceased’s death. Only divorce terminated the right of a separated spouse to apply. However, if spouses were separated for a period of a year before the death with the intention of living separate and apart and with no intention of resuming cohabitation, then the surviving spouse could not inherit under the intestacy rules. Nevertheless, such a spouse could apply to the court under s 98 of the Estate Administration Act 1996 for discretionary provision to be made from the estate.

S 2(2)(a) now provides that two persons cease being spouses of each other for the purposes of this Act if, in the case of a marriage: (i) they live separate and apart for at least 2 years with one or both of them having the intention, formed before or during that time, to live separate and apart permanently, or (ii) an event occurs that causes an interest in family assets, as defined in Part 5 of the Family Relations Act, to arise. See above regarding triggering events.

S 56(2) of the Wills, Estates and Succession Act 2009 provides: ‘If a will-maker (a) makes a gift to a person who was or becomes the spouse of the will-maker, (b) appoints as executor or trustee a person who was or becomes the spouse of the will-maker, or (c) confers a general or special power of appointment on a person who was or becomes the spouse of the will-maker, and after the will is made and before the will-maker’s death the will-maker and his or her spouse cease to be spouses under s 2 (2), the gift, appointment or power of appointment is revoked and the gift must be distributed as if the spouse had died before the will-maker.’ This is, of course, subject, under s 56(1), to any contrary intention appearing on the face of the will. Therefore, if a will indicates a testator would like the gift to take effect irrespective of any separation or divorce, then the gift may not be revoked. Under the previous legislative regime, where a disposition was made to a spouse by will or a spouse was nominated as executor, and the couple were subsequently divorced, judicially separated or the marriage was found to be void or declared null, in the absence of a contrary intention in the will, s 16 of the Wills Act 1996 provided for the lapse of the gift or appointment to the spouse and the will to be read as if the spouse had predeceased the testator. For analysis of the reasons for this change in the law, see British Columbia Law Institute, Wills, Estates and Succession: A Modern Legal Framework (n 253) 33.
3. If Mrs. Kelly has been separated for more than the two year ‘grace period’ during which her inheritance rights continued but there has not been a triggering event, it appears she is at her most vulnerable. First, Mrs. Kelly will not be entitled to the preferential share in the case of intestacy and all gifts to her under the will shall be automatically revoked, unless evidence to the contrary is apparent in the will. In addition, she will not be entitled to apply for provision under the Wills, Estates and Succession Act 2009 or the Family Relations Act 1996. Therefore, she does not benefit from a division of property under the Family Relations Act but also loses her succession rights.258

4. If Mrs. Kelly has been separated for more than two years but there has been a triggering event her situation is better. Mrs. Kelly will not be entitled to her preferential share in the case of intestacy and all gifts to her will be automatically revoked unless the contrary intention appears on the will. In addition, although she will not be entitled to apply for discretionary provision under the Wills, Estates and Succession Act 2009, she will be entitled to a half share of the family assets or to seek a reapportionment under the Family Relations Act 1996.

4.5 Conclusion

There are serious difficulties inherent in the Irish approach to the redistribution of matrimonial property following a divorce. However, these weaknesses have obviously not received sufficient negative criticism to date to generate the momentum for legislative reform. This chapter and Chapter 5 attempt to remedy this shortcoming. Tracing the introduction of divorce legislation through its turbulent history to its current implications for the Kelly family, this chapter has placed the spotlight on the practical effects of the current regime governing matrimonial property division in Ireland.

From the discussion of the case study, it is clear that there is a serious lack of certainty for spouses seeking to rely on the Irish Family Law Acts. For both the minority of spouses who take full court hearings and the majority who reach a settlement, this lack of certainty has grave ramifications, particularly for financially weaker spouses. By contrast, in British Columbia, the greater levels of certainty inherent in the approach adopted by the Family Relations Act 1996 ensure more accurate and just private ordering. Both spouses are aware of the entitlements which they possess and, as a result, the financially weaker spouse, in particular, is in a much stronger bargaining position. The predictability which the system provides acts as a protective shield for such spouses. Therefore, it is submitted that despite the obvious strides we have made in Ireland by introducing divorce, our overly conservative, discretionary approach to ancillary relief provision is creating significant problems for family lawyers and their clients. Chapter 5 explores whether Ireland should adopt an

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258 The harshness of this possible scenario caused the law governing the ‘grace period’ to be reviewed and delayed the commencement of the 2009 Act. However, a solution was ultimately reached through the new Family Law Act 2011 which introduces a single triggering event, namely separation, see below, 194. Therefore, upon the commencement of the Family Law Act, the provision of a ‘grace period’ in the 2009 Act will be of limited importance, see below, 211.

Moreover, s 465 of the Family Law Act 2011 amends s 2(2)(a)(ii) of the 2009 Act to provide for the application of the new law based on an excluded assets model.
alternative approach to matrimonial property division and considers whether lessons can be learned from British Columbia in this respect.
Chapter Five

5.1 Introduction

Despite some common threads, the regimes which govern matrimonial property division on divorce in Ireland and British Columbia contrast sharply in certain respects. This is especially pronounced in relation to the reliance on judicial discretion. As Professor Cooke explains:

‘Discretion may exist on different levels, ranging from the very weak, “background” discretion needed to interpret defined terms, through the slightly stronger discretion seen where the assessment of something like “reasonableness” is crucial, through to strong, “foreground” discretion where “the judge is at liberty to arrive at the order by taking into account whatever factors, and attaching to them whatever normative significance, he or she thinks fit”.’

At present, the Irish Family Law Acts essentially ensure that ancillary relief is subject to strong ‘foreground’ discretion due to the unweighted and non-exhaustive nature of the statutory factors enumerated in the legislation. By contrast, the regime applied in British Columbia pursuant to the Family Relations Act 1996 incorporates weaker, ‘background discretion’ with only a limited opportunity afforded to the judiciary to deviate from the statutory presumption of equal sharing. This chapter critiques both approaches and, in light of the weaknesses which emerge in relation to the Irish regime, assesses whether an approach akin to that applied in British Columbia should be considered as a template for reform. A detailed proposal for the introduction of a deferred community of property regime in Ireland, modelled on a hybrid of both the British Columbian Family Relations Act 1996 and the new Family Law Act 2011, is presented. It is submitted that such an approach would provide much more robust protection to financially weaker litigants engaged in matrimonial property disputes in Ireland, particularly in relation to the family home, and that this proposal for reform could be implemented without the need for constitutional amendment.

5.2 Glorified Guesswork versus General Predictability

5.2.1 A critique of the Irish discretionary approach

The modification of the separate property regime effected in Ireland by the Family Law Acts which facilitated the granting of ancillary relief such as property adjustment orders on marital breakdown was undoubtedly an improvement on the previous system with its ‘myopic focus on legal title’.

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3 This chapter draws on a paper presented in April 2012 at the Socio-Legal Studies Association’s Annual Conference in De Monfort University, Leicester, England entitled ‘Death, Divorce and Matrimonial Property under Irish Law’.
albeit mitigated by the potential of an equitable remedy. However, while the current system allows considerable flexibility to rest with the courts to order the ‘best’ solution possible, its weaknesses clearly outweigh its positives. In fact, equitable redistribution has been described as ‘the separate property system with a gloss of judicial discretion’ and it has been pointed out ‘It is by no means certain that [equitable redistribution] represents the most appropriate or just approach to the issue of matrimonial property rights.’

A fundamental problem with the current regime is the unacceptably high level of uncertainty. As Martin notes, ‘Unpredictability is the key characteristic of the outcome of contested divorce cases.’ There are a number of factors which it is submitted have combined to create this situation. First, a system based on discretionary justice is uncertain by its nature. The central premise of such a regime is that each case is taken on its own merits and provision is tailor-made to the facts in question; regard to previous cases or a desire to ensure a level of coherency between cases is less important than making the best provision in the case at hand. Consequently, uncertainty is almost inevitable. Indeed, as Miles observed referring to the equivalent legislation in England and Wales:

‘The difficulty with “focusing on the statutory language” and taking cases as they come “equitably” is that this takes you nowhere - and anywhere - quickly: the checklist in section

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5 Prior to the introduction of the Judicial Separation and Family Law Reform Act in 1989 which set the ball rolling vis-à-vis equitable redistribution, spouses with no legal title to property had to resort to the purchase money resulting trust and prove their contributions gave rise to an equitable interest in such property. However, certain weaknesses inherent in this equitable remedy made it an unsuitable tool for resolving property disputes following a marital breakdown, particularly where non-financial contributions were made within the home, see Chapter 1.

6 Dewar argues that reliance on judicial discretion in family law was first reflective of ‘technocratic liberalism’ meaning ‘a reposing of faith in the ability of experts, when armed with sufficient information, to arrive at optimal solutions for the parties, with “optimal” for these purposes being cast in economic or therapeutic, rather than moral or ethical, terms’. However, he is skeptical about the ability of a court to know what is best in any case. See John Dewar, ‘Reducing Discretion in Family Law’ (1997) 11 AJFL 309.

7 Brake (n 4) 774. For a criticism of equitable redistribution, see also Max Rheinstein, ‘Division of Marital Property’ (1976) 12 Williamette LJ 413, 423-424. Buckley notes: ‘in applying the legislation, the courts have tended to have regard to the extent of the parties pre-existing rights: for example, a court might not be willing to transfer the entire interest in the family home to one spouse, but might transfer the outstanding share to a spouse who is already entitled to a partial interest. The quantification of the parties’ relevant shares in the property therefore remains relevant, as this can affect the court’s view of justice in any particular case.’ See Lucy-Ann Buckley, ‘Matrimonial Property and Irish Law: A Case for Community’ (2002) 53 NILQ 39, 59.

8 ibid 39.


10 It was noted in MP v AP [2005] IEHC 326 by O’Higgins J: ‘The analysis of previous cases and the comparison with the present case of the factors to which the court is obliged to have regard by virtue of the provisions of sections 20(1)(a) to (l) of the Family Law (Divorce) Act, 1996 is of limited value, because of the number of those provisions, their varying importance from case to case, and the fact that those factors have no particular hierarchy of importance.’
25 of the Matrimonial Causes Act 1973 can generate almost any decision in an individual case.\footnote{11}

Second, while some fetters are placed on the exercise of judicial discretion, the direction to ensure ‘proper provision’ is essentially meaningless since in achieving this objective the legislature simply chose to refer the courts to unweighted, statutory factors.\footnote{12} Crowley, in particular, appears highly sceptical of the effect of such fetters. She notes:

‘Whilst proper provision is a pre-requisite for the granting of a decree and thus might be regarded as an objective of the process, the failure to identify what might constitute proper provision and how it might be calculated in any given circumstances, certainly weakens its possible status as a legislative objective.’\footnote{13}

Third, serious issues have emerged in Ireland related to the lack of reporting which also contribute to the lack of foreseeability. There are a number of contributing factors which have given rise to this situation. Foremost among these is the in camera rule which until very recently proved an insurmountable obstacle to gathering and disseminating information on matrimonial property law matters.\footnote{14} Although section 40 of the Civil Liability and Courts Act 2004 has improved the situation by permitting some access to the family courts,\footnote{15} further efforts are necessary to address this issue. Another factor contributing to the lack of information is that, until recently, very few judgments were reported as the vast majority of all judicial separation and divorces are decided in the Circuit

\footnotesize{\begin{itemize}
\item \footnote{11} Jo Miles, ‘Principle or Pragmatism in Ancillary Relief: The Virtues of Flirting with Academic Theories and Other Jurisdictions’ (2005) 19 Int’l JL Pol & Fam 242, 244.
\item \footnote{12} As noted by Keane CJ in the Supreme Court in T v T [2002] IESC 68, [2003] 1 ILRM 321 a hierarchy of factors does not form part of Irish law. Sunstein describes ‘untrammelled discretion’ as ‘the capacity to exercise official power as one chooses, by reference to such considerations as one wants to consider, weighted as one wants to weight them’. See Cass Sunstein, ‘Problems with Rules’ (1995) 83 Cali L Rev 953, 960. While it is not suggested here that the Irish system is based on ‘untrammled discretion’, Sunstein’s elaboration of the hallmarks of regime based on discretion does bear considerable parallels with the Irish regime.
\item \footnote{13} Family Law (n 2) 46.
\item \footnote{14} Article 34.1 of the Irish Constitution requires that all cases should be heard in public subject to special and limited cases as prescribed by law. The in camera rule was first introduced by the Judicial Separation and Family Law Reform Act 1989 to protect the privacy of the families involved. For an analysis of the arguments for and against the in camera rule, see Coulter, (n 9) 17-20. See also Frank Martin, ‘The Changing Face of Family Law in Ireland’ (2005) 5(1) Jud Stud Instit J 16, 39 and McGuinness J, Courts Service, Family Law Matters (2007-2009) vol 1(1) 2
\item \footnote{15} S 40 allows bona fide family law researchers to apply for access to the family courts. For more on the reform of the in camera rule, see Coulter (n 9) 2-4. However, it does not give legal researchers the automatic right to attend hearings or view family law files. Nevertheless, it facilitated the Family Law Reporting Pilot Project which was led and managed by Carol Coulter and provides an interesting insight into the actual operation of the Irish Family law system. The resultant Family Law in Practice: A Study of Cases in the Circuit Court ibid combines empirical data from circuit court files with Coulter’s personal observations of the proceedings. Coulter explains at xiv, ‘My primary purpose was to assemble the evidence to permit an informed discussion about how our family system works, identify its failings and propose remedies.’ The results of this project will be discussed in detail below. The Family Law Matters series (n 14) also came about due to the access afforded by the Pilot Project.
\end{itemize}}
Court, with a very small percentage being initiated in the High Court. In general, Circuit Court judgments are not written and there is, with some limited exceptions, no stenographic record of what happens. This was in turn exacerbated by the fact that those that were reported generally dealt with big money cases or complex issues of law in the High Court or the Supreme Court and were therefore of limited value, if any, in the majority of ‘typical’ family law cases. Moreover, with the notable exception of those of McGuinness J, many cases that were reported from the superior courts were not reasoned and made minimal reference to case law or legal principles. The existing evidence does not bode well for the future development of solid precedent in this area.

When each of these factors are combined, namely the discretionary nature of the system, the limited value of the fetters in place to guide judicial discretion and the wide ranging issues with access to the courts and reporting, the central problem which emerges is a high level of unpredictability in Irish matrimonial property disputes. In an accurate synopsis of the difficulties with discretionary systems, it has been noted, ‘Writing laws for judges and hoping that this will create a trickle-down effect to guide settlements only works when judges are invested with a limited discretion, and when the values underlying the statute are clear.’

Unfortunately, however, as Shannon explained:

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16 Merely 61 judicial separation and divorces were granted in the High Court in 2011, while 3783 were granted in the Circuit Court. See Court Service, ‘Annual Report 2011’ <www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/1EFA33B0C5E24F980257A3E0037FCC9/$FILE/Courts%20Service%20Annual%20Report%202011.pdf> accessed 05 September 2012.

17 As a result, ‘There is no way of knowing, whether and to what extent, the jurisprudence being developed in the higher courts, however open to criticism it may be, is being applied in the lower courts. It is unknown, too, how precepts being laid down in the legislation like “proper provision” are being interpreted and applied in these courts.’ See Coulter (n 9) 17. She points out, however, that McMahon J was one exception when he was a Circuit Court judge as he did occasionally hand down written judgments in family law, see for example, NC v KLM (CC, 22 February 2002) or R v R (CC, 18 January 2005).

18 Coulter notes, ‘very little is known of what the outcomes are of the almost 6,000 divorce or separation proceedings that are finalised by the courts each year’. See (n 9) xi. This also means that the emerging jurisprudence in family law has been disproportionately focused on achieving ‘proper provision’ in ample resource cases. The case law has not elucidated this issue where the resources are more limited, a scenario where the achievement of proper provision is undoubtedly more difficult.

19 This point was stressed by Frank Martin in, ‘Judicial Discretion in Family Law’ (1998) 16 ILT 168 who noted, ‘Reported and unreported cases which are available, are in general little more than a historical record of how particular judges chose to exercise their discretion or how they applied a vague standard to a particular set of facts’. Although no statistics are provided from the court service on the extent of judicial reference to the statutory factors, the situation may have improved slightly since McGuinness J issued the following admonition in 2001 in MK v JP (Orse SK) [2001] IESC 87, [2001] 3 IR 371; [2003] 1 IR 326: ‘The court must have regard to all the factors set out in s 20 measuring their relevance and weight according to the facts of the original case. In giving the decision of the court, a judge should give reasons for the way in which his or her discretion has been exercised in the light of the statutory guidelines. In his judgment in the instant case the trial judge has notably failed to do this.’ Nevertheless, the lack of reference to case law remains a concern. Coulter (n 9) 106-107 notes, on the basis of her analysis of the proceedings of 19 courts in the 8 Circuits over a 62 day period, ‘There was little reference to the case law from the superior courts in most of the cases ... This could be due to a number of factors, the most likely of which is that most of these cases in the higher courts are normally based on their own facts, particularly the possession of substantial assets. This is not directly comparable to the bulk of cases heard in the Circuit Court, where the judge is often faced with the problem of making “proper provision” where the resources are simply not sufficient to support two households.’

There exists a substantial lack of precedent, resulting in the absence of principles as to how and when such orders should be granted ... Such a lack of clear and binding authority in respect of the manner and circumstances in which property adjustment orders ought to be made simply serves to exaggerate the power of the judiciary and to increase the level of uncertainty in this sweeping area.\textsuperscript{21}

The truth in Ireland is that the underlying goals of the legislative provisions for asset distribution were never set out.\textsuperscript{22}

One way in which the uncertainty could be minimised, would be through the development of a coherent codification of existing principles. According to Martin ‘it is highly desirable, particularly in a common law system like ours, to codify and reduce judge-made family law decisions to a tolerable and flexible legal method that adheres to the rule of law maxim. Regrettably we cannot codify that which does not exist.’\textsuperscript{23} Indeed, in many cases the courts steer clear of enunciating any general propositions. As Fennelly J observed, ‘It is only with the greatest care ... that one should formulate any general propositions. The judge must always, and in every case, have particular regard to the particular circumstances of the case.’\textsuperscript{24} Therefore, a lack of clarity exists in relation to the importance or otherwise of principles of equality and compensation, as well as the relevance of need.\textsuperscript{25} While the judiciary have failed to develop any principles to guide the exercise of their discretion, it is still possible to make some general observations on how the courts tend to view applications for ancillary relief:

- While equal division is a possible outcome, no principle or policy of equality exists. Having considered a wide range of cases before the courts as part of her study, Coulter explains:

  ‘Where the parties have made an equal contribution, either through one party paying the mortgage and the other the household bills, or one party paying all...’

\textsuperscript{21} Geoffrey Shannon, \textit{Divorce Law and Practice} (Roundhall 2007) 122.
\textsuperscript{22} Crowley notes, ‘the lack of guiding legislative principles results in a failure to in any way embrace the value and importance of certainty in such a contentious area of law.’ See Louise Crowley, ‘Equal versus Equitable Division of Marital Assets—What can be learned from the Experiences of Other Jurisdictions? Part I’ (2007) 10(1) IJFL 19, 19. By way of contrast, the Family Law (Scotland) Act 1985 laid down principles for the application of judicial discretion in distributing assets, implementing the proposals made by the Scottish Law Commission in its \textit{Report on Aliment and Financial Provision} (Scot Law Com No 67–1981).
\textsuperscript{23} ‘Judicial Discretion in Family Law’ (n 19).
\textsuperscript{24} \textit{T v T} (n 12) at 418.
\textsuperscript{25} The principles underpinning the exercise of the court’s discretion in the reallocation of assets in England and Wales as enunciated variously in \textit{White v White} [2001] 1 AC 596; \textit{Miller v Miller; McFarlane v McFarlane} [2006] UKHL 24, [2006] 1 FLR 1186; \textit{Charman v Charman} (No 4) [2007] EWCA Civ 503, [2007] 1 FLR 1246 are need, compensation and sharing. As a result, it has been remarked: ‘From a theoretical perspective this proliferation poses a problem, in that each of the bases presupposes a slightly different model of marriage; from both a practical and a theoretical perspective, there is the challenge of deciding whether, and if so when, needs should take precedence over sharing, and how compensation fits into the court’s assessment.’ See Jo Miles and Rebecca Probert ‘Sharing Lives, Dividing Assets: Legal Principles and Real Life’ in Jo Miles and Rebecca Probert (eds), \textit{Sharing Lives, Dividing Assets} (Hart Publishing 2009) 7.
expenses while the other cared for the children of the family, that share is likely to be in the region of 50/50.\(^\text{26}\)

Nevertheless, Fennelly J in the Supreme Court decision of \(T \text{ v } T\) asserted that the relevant statutory language ‘does not erect any automatic or mechanical rule of equality’.\(^\text{27}\) Moreover, Denham J added, ‘it is not a question of dividing the assets ... on a percentage or equal basis.’\(^\text{28}\)

- Where the resources of the couple are limited, need remains the over-riding consideration with the courts looking to the future rather than dwelling on the past. Again, Coulter notes:

  ‘Overall, what emerges ... is that judges are guided by an essentially pragmatic consideration of how the parties to a marriage can proceed in the aftermath of a marriage breakdown. Rulings are forward looking, and the history of the marriage is mainly of relevance in assisting the judge to make proper provision for the parties and dependent members of the family into the future.’\(^\text{29}\)

Buckley makes the same point: ‘Overall, the greatest emphasis appears to be placed on the needs of the parties at the time of the application, as opposed to the making of a fair overall distribution based on the respective contributions to the marriage.’\(^\text{30}\)

- Where assets exceed liabilities, it is clear that provision is not limited to meeting need. This was acknowledged in \(T \text{ v } T\)\(^\text{31}\) and reiterated in \(GB \text{ v } AB\) where the court explained:

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\(^{26}\) (n 9) 105. Similarly, in \(R \text{ v } R\) (n 17) McMahon J held: ‘In normal circumstances where a breakdown occurs in such a situation, one would be disposed as a starting point to consider dividing the assets accumulated during the marriage on a more or less equal basis bearing in mind the provisions of s 16 of the Family Law Act 1995, which obliges the court to make “adequate and reasonable” provision for the spouses and any dependent children.’

\(^{27}\) ibid. Note, however, Murray J, in the minority, adopted a strikingly communitarian interpretation of proper provision. The absence of a rule of equality was also emphasised by McGuinness J in \(MK \text{ v } JP \text{ (Orse SK)}\) (n 19): ‘I very much doubt that a policy of equal division of assets between husband and wife has prevailed under common law rules since the beginning of the 19th century, or even the 20th century, either in this jurisdiction or in England.’ Instead, she stressed the importance of the factors enumerated in the legislation and cited with apparent approval the dictum of Thorpe LJ in \(Cowan \text{ v } Cowan\) [2001] EWCA Civ 679 at 15 who held: ‘The decision in \(White \text{ v } White\) clearly does not introduce a rule of equality. The yardstick of equality is a crosscheck against discrimination. Fairness is the rule and in its pursuit the reasons for departure from equality will inevitably prove to be too legion and too varied to permit of listing or classification. They will range from the substantial to the faint but that range can be reflected in the percentage of departure.’ However, while fairness is often cited as a justification for not adopting a rule of equal sharing, Bailey-Harris notes in relation to law of England and Wales, ‘fairness is a concept of such self-evident generality that its content in the individual case must be largely dependent on judicial subjectivity ... For that reason, the articulation of fairness adds little of substance to the policy definition of s 25.’ See Rebecca Bailey-Harris, ‘The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales’ (2005) 19 Int’l JL Pol & Fam 229, 232.

\(^{29}\) (n 9) 106.

\(^{30}\) ‘Matrimonial Property and Irish Law: A Case for Community?’ (n 7) 61. On the basis of her research, Buckley noted at 66, ‘In some situations, it is clear that the court is more concerned with meeting bare needs, rather than with equality or fairness’. She added at 79, ‘Much of this may reflect a pragmatic approach: what is the point of emphasising conduct or contributions or duration of the marriage when the primary requirement is to provide for a family from very limited means.’
‘Counsel for the husband submitted strongly to me that in the case of potentially large assets, which may emerge in this case on an optimistic view of the development of the husband’s business, the yardstick of equality should not be used as a criterion for division, but rather the court should consider that the term “provision” used in the context of the 1996 Act and the Constitution should be considered in terms of the needs of the dependent spouse. I consider that I am precluded by the authority of \textit{T v T} from taking this needs based approach.’

Instead, the court referred to the ‘overall yardstick of parity’. In light of these decisions, Crowley notes:

‘The concept of “need” as the starting point for the calculation of asset distribution has lost its primacy as a determining factor.Whilst it might feed into the decision-making process as a secondary issue of fact, the courts, particularly in cases with surplus financial provision, no longer limit the entitlements of the dependent spouse to the financial needs of that spouse.’

- Although ‘proper provision’ is required to be made, it is sometimes argued that this does not equate with ‘property division’. In \textit{T v T}, Murray J noted that property adjustment orders, which ‘to some extent may have the appearance of division of property’, are in reality simply ancillary to the periodic payments which will ordinarily represent proper provision. As was explained in the recent Supreme Court decision of \textit{G v G}, ‘the requirement is to make proper provision and it is not a requirement for the redistribution of wealth’. In this regard, however, Buckley notes:

‘there is no meaningful practical distinction between “provision” and “division” and ... it is not true to say that Irish law does not provide for the “division” of assets. Undoubtedly, it is correct to say that the legislation in this area does not require redistribution, but this does not mean that it does not provide for “division”. A

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\item [31] (n 12).
\item [32] [2007] IEHC 491.
\item [33] ibid.
\item [34] Louise Crowley, ‘Equal versus Equitable Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part II’ (2007) 10(2) IJFL 12. However see \textit{MY v AY} as referenced in Buckley ‘Matrimonial Property and Irish Law: A Case for Community’ (n 7) where Budd J stated a husband who possessed ‘substantial sums with which to indulge his own extravagant lifestyle’ was ‘well capable of providing the relatively small sums which his wife and child require to live on in a frugal and thrifty manner’. See also \textit{McA v McA} (HC, 23 May 2000).
\item [35] (n 12) [149]. Similarly, O’Higgins J in \textit{MP v AP} (n 10) stated: ‘It is clear that the law does not mandate any particular ancillary form of order in divorce cases. Although it is true that in many, if not most, cases there will be a division of the assets existing at the time of the hearing, there is no requirement that that be done in every case. What is required is that “proper provision” be made and it is clear that the consequences of such provision is very often an appropriate division of the assets.’
\item [36] [2011] IESC 40 [22]. The court went on to explain at [25], ‘Proper provision means that the provision is reasonable in all the circumstances.’
\end{itemize}
refusal to divide (that is, to confer some of the property of one party on another) is itself a division, in favour of the property owner.'

- The overall discretion of the court is paramount in granting ancillary relief. The supreme position of discretion was recently noted by O’Higgins J in *C v C*:

  ‘The law provides very specific statutory guidance as to the factors to be taken into account by the court in deciding what constitutes proper provision in any given case. The widely different circumstances from one case to another however make it desirable that there be considerable discretion vested in the court of trial.’

The only conclusion which can be drawn from this analysis is that the judiciary appear to view the goal of certainty as no more important than the legislature!

Any possible development of the law towards the establishment of principles is shunned as potentially introducing a fetter on the discretion of the court which would reduce its power to make whatever order it deems reasonable in the circumstances.

When both principles and certainty are eschewed in matrimonial property division, difficulties are created for both lawyers and their clients. As has been noted:

‘If the law appears to offer only the prospect of the exercise of an unfettered judicial discretion based on no discernible principle, a lawyer’s advice will inevitably be speculative and clients may feel that their affairs are out of their control. They may feel that they are drawn into a free-for-all of haggling in which one side makes an inflated claim and the other tries to beat it down. Much may be thought to depend on which judge might decide the case and the lawyer’s knowledge of the judge’s propensities. Such a process does not facilitate the settlement of property matters by restrained and orderly negotiation. It increases

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37 Lucy-Ann Buckley, ‘“Proper Provision” and “Property Division”: Partnership in Irish Matrimonial Property Law in the wake of T v T’ (2004) 3 IJFL 9, 11.

38 [2005] IEHC 276. Similarly, in *T v T* (n 12) the majority of the court determinedly avoided endorsing the notion of the presence of any principle of equality to ensure the paramount position of judicial discretion. The Supreme Court specifically referred to the importance of judicial discretion. Keane CJ held, ‘it is obvious that the circumstances of individual cases will vary so widely that, ultimately, where the parties are unable to agree, the trial judge must be regarded as having a relatively broad discretion in reaching what he or she considers a just resolution in all the circumstances.’ Likewise, Fennelly J recognised ‘The [Irish legislature], in choosing the approach it enshrined in s 20, made a considered decision to confer upon the court a duty of a particularly broad discretionary character’.

39 Similarly, referring to the law of England and Wales, Cooke notes: ‘The House of Lords’ reluctance to settle for any overarching rationale for, or for any hierarchy of strands within, the yardstick of equality arises from a fear that anything less than complete flexibility may produce a result which does not generate an order that is just right for this particular applicant.’ See Elizabeth Cooke, ‘Miller/McFarlane: Law in Search of Discrimination’ (2007) 19 CFLQ 98, 106.

However, it is also possible that the judiciary do not feel they have a mandate to develop principles. As Parkinson notes, ‘Appellate courts in both [Australia and England] have felt constrained by the generality of the legislative language from developing clear principles that reduce the width of a trial judge’s discretion.’ See Patrick Parkinson, ‘The Yardstick of Equality: Assessing Contributions in Australia and England’ (2005) 19 Int’l JL Pol & Fam 163, 167.
animosity and bitterness between the parties and in the parties’ attitudes to the law and lawyers.\textsuperscript{40}

The effects of a discretionary regime and the attendant uncertainty weigh particularly heavily on financially weaker spouses, usually women, who are in a very weak bargaining position. Professor Parkinson notes:

‘[J]udgments are often intuitive rather than reasoned, subjective rather than principled. And judges of experience and intellectual integrity will frequently vary widely in their intuitive sense of a just outcome, making prediction of the result precarious. The system invites litigation from risk-takers. It is also weighted against the risk-averse and those who cannot afford to litigate. These people are at the mercy of the low “take-it-or-leave-it” offer.’\textsuperscript{41}

Moreover, in an Irish context, Buckley notes, ‘It is clear, that merely empowering judges to take note of homemaking contributions will not necessarily result in weight being given to them, particularly where the bulk of the family property is owned by the other party.’\textsuperscript{42} Indeed, in a recent study Moore found that such contributions were not equally rewarded on marital breakdown.\textsuperscript{43} This is especially worrying in an Irish context as statistics available for 2011 show over 500,000 women were engaged exclusively in looking after the home and the family.\textsuperscript{44} While this is especially worrying for spouses occupied full-time in the home, it is also highly relevant for spouses who work part-time to take on a higher workload at home.\textsuperscript{45}

The impact of the judicial treatment of homemaker contributions is exacerbated by the fact that men and women do not feel the consequences of marital breakdown equally.\textsuperscript{46} Due to family commitments, women generally work fewer hours and therefore receive lower wages. Buckley noted in her study of divorce and judicial separations there was a ‘considerable disparity between husbands and wives, in terms of financial resources generally’ with husbands normally better off than wives.\textsuperscript{47} She added ‘Wives were less likely to have personal savings, shares or other assets, or to belong to a pension scheme’.\textsuperscript{48} While this study was by no means comprehensive, it does support anecdotal evidence that men are the generally wealthier than women. The most recent statistics

\textsuperscript{41} ‘Reforming the Law of Family Property’ (n 20).
\textsuperscript{42} ‘Matrimonial Property and Irish Law: A Case for Community’ (n 7) 62.
\textsuperscript{43} See Elena Moore, ‘The Significance of “Home-maker” Contributions upon Divorce’ (2007) 10(1) IJFL 15 discussed above, 141.
\textsuperscript{44} Central Statistics Office, \textit{Women and Men in Ireland 2011} (Stationery Office 2012) 27. This is especially important as ‘the extent of downward mobility for those who move out of the labour market even for a short period is greater for today’s women than it was for previous generations’, as noted in Miles and Probert, ‘Sharing Lives, Dividing Assets: Legal Principles and Real Life’ (n 25) 20. The CSO figures also show that approximately 10,000 men were occupied full-time in the home.
\textsuperscript{45} See figures below 187 for average hourly working week of women.
\textsuperscript{46} See Jacqueline Scott and Shirley Dex, ‘Paid and Unpaid Work: Can Policy Improve Gender Inequalities’ in J. Miles and R. Probert (eds), \textit{Sharing Lives, Dividing Assets} (Hart Publishing 2009) which shows that gender is still very relevant to the division of responsibilities and wealth in relationships.
\textsuperscript{48} ibid, 59.
from the Central Statistics Office for 2011 demonstrate this point even more clearly. To begin with, the employment rate of men is 63.3% while the employment rate of women is 56%. While the difference in the overall employment rates is not very significant, it is worth noting the impact of the presence of children on this percentage. Thus, while 85.7% of women with no children were engaged in the workforce, this fell to a mere 51.5% where women had children between 4 and 5 years of age. The effect is amplified when the working week of men and women is compared. Thus, while men work an average of 39.4 hours per week, women work an average of 30.6 hours. Furthermore, while 44.5% of married men work more than 40 hours per week, a mere 14.7% of women do likewise. The difference in wages between men and women is also considerable. Thus, while in 2009 men had an average income of €34,317, the average income for women was €25,103, or 73.1% of men’s income. Adjusting these figures to reflect the average hours per week spent in paid employment, women’s average hourly income was about 94% of men’s for the year. The result is a triple-whammy for financially weaker spouses. If they go to court, the value that is placed on any homemaker contributions is at the discretion of the judge and his or her subjective leanings which in many cases appears to lead to an undervaluation of contributions. Alternatively, if they reach a settlement, they are doing so blindly with no idea of what they could reasonably expect to receive in litigation. This necessarily impacts on their bargaining power. Lastly, in the case of women, the provision that they do receive, whether by court order or private agreement, gains heightened importance because they generally feel the financial effects of marital breakdown more acutely than men.

Yet, the argument will be made that a discretionary regime allows for tailor-made justice which, in theory, ensures that such vulnerable spouses will be more readily catered for than would be the case under a system of fixed rules. However, there is a serious flaw in this logic when applied to Ireland: as noted, the vast majority of cases are settled without a full hearing and with little or no judicial discretion exercised. Therefore, since equitable redistribution is dependent on the exercise of judicial discretion, which in turn is dependent on full hearings, if there are few full hearings, judicial discretion is rarely exercised and equitable redistribution, as a system, is arguably pointless. For each spouse that benefits from individualised justice, how many suffer from the lack of fixed rules? Financially weaker, non-owning, spouses such as Mrs. Kelly in Chapter 4 certainly suffer and this vulnerability is often most acute in relation to the family home. Yes, Mrs. Kelly may reach a settlement which affords her some ancillary relief to the family home. However, she possesses no

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49 ‘Women and Men in Ireland 2011’ (n 44).
50 ibid 16.
51 ibid 22. The statistics also show that while the proportion of men with children between the ages of 4 and 5 engaged in the workforce also fell, the effect was much less dramatic with 73.8% remaining in employment.
52 ibid 21.
53 ibid 21.
54 ibid 28.
55 ibid 28. In addition, the statistics show that the difference between male and female incomes for persons aged 15-64 increased with age. As a result, while the average income of women aged 15-24 was 94.9% of that of men in the same age group in 2009, women in the 55-64 age group were limited to an average income was 61.4% of men’s.
56 See above, 186.
57 See above, 165.
entitlement to any such relief and is in an extremely weak bargaining position with regard to the home. The desire to persist with such an illusory system of justice seems illogical. It is in this context that the attributes of the British Columbian approach appear most appealing.

5.2.2 A critique of the British Columbian presumption of equal sharing

While spouses enjoy separate property rights while the marriage subsists, upon marital breakdown, matrimonial property is prima facie subject to equal sharing and each spouse is presumptively entitled to a one-half interest in the family assets as a tenant-in-common. Moreover, although it may be assumed that the implementation of a default community regime would necessarily signal the death knell for the exercise of discretion by the court, the British Columbian regime demonstrates this is not the case. This system presumes that in the majority of cases, equal sharing is the fairest means of division. Where it is not, a reapportionment may be granted.

The key advantage of the British Columbian presumption of equal sharing is that it allows for more consistency and predictability in matrimonial property division, thus placing financially weaker spouses in a much stronger position both in court applications and private ordering. It is submitted that these attributes of certainty, consistency and foreseeability are central to any ‘fair’ system. Moreover, as Miles notes:

‘[I]n ordinary cases, the fact that the parties’ needs will be determinative may make notionally starting at 50:50 appear pointless. Even here, however, there may be something

58 Subject to certain limited restrictions which seek to protect property which may be subject to deferred distribution at a later date, for example, the family home. See below.

59 It has been noted, ‘the rejection to date by the English legislature of anything resembling community of property ... stems from an inherent misconception of the lack of flexibility of any formal regime’. See Elizabeth Cooke, Anne Barlow and Thérèse Callus, Community of Property: A regime for England and Wales? (Nuffield Foundation 2006) 11.

60 Dewar notes ‘we are increasingly seeing a shift towards conceptualising family law as a means of giving effect to rights irrespective of consequences, or to specific a priori juridical models of family relations, rather than as being concerned to search for the most beneficial or welfare-maximising outcome. This has been characterised as a shift from a “utility” or “needs” model of family law towards a rights model, and it seems to be associated with greater reliance on rules, or at least, norms that come closer to the rules end of the spectrum.’ See ‘Reducing Discretion in Family Law’ (n 6).

61 Although the predictability of results under the regime in its current format has recently been questioned. As a result, reform is imminent. See below.

62 Parkinson notes: ‘Predictability in the law is important in order to ensure that lawyers can confidently give advice on the likely outcome of a case if it is litigated. As Birks (citation omitted) wrote in another context: “It is essential in modern society that the law be closely and cogently reasoned. Access to the courts is hugely expensive. An expensive palm tree is no use to the people. The law must be so stated as to facilitate prediction and advice. It is impossible otherwise to plan with confidence. And it is impossible to know when to litigate.” The fewer the palm trees in family law, the better.’ See ‘The Yardstick of Equality’ (n 39) 174.

63 Miles noted consistency is in itself ‘an aspect of fairness’, See Jo Miles, ‘Charman v Charman (No 4)–Making Sense of Need, Compensation and Equal Sharing after Miller/McFarlane’ (2008) 20 CFLQ 378, 387. Elsewhere, Miles noted, ‘The treatment of like cases alike is surely an aspect of the fairness said to be implicit in the statutory language; and that is an objective that can only be safely attained by the ascertainment of more specific substantive principles to guide decision-making than the legislation on its face creates.’ See ‘Principle or Pragmatism in Ancillary Relief’ (n 11) 254. Moreover, Professor Barlow also notes, ‘Certainty might be the new fairness, given that uncertainty is viewed as unjust.’ See Anne Barlow, ‘Community of Property–The Logical Response to Miller and McFarlane’ (2007) 39 Bracton LJ 19.
intangible (and, more concretely, an enhancement of bargaining position) to be gained from the idea that each party is prima facie entitled to an equal share of the capital and that a non-owner applicant is not merely a “needy supplicant”.  

Therefore, it is submitted that the key features of the regime adopted in British Columbia are very attractive as an alternative to the system of equitable redistribution currently applied in Ireland. Indeed the merits of a community of property approach were summed up succinctly by Crowley: ‘Whilst equitable division might more likely ensure fairness in the particular circumstances of a case, the use of equal division as the basis for asset distribution might more readily guarantee an element of fairness in the more general sense.’

The continued vitality of regimes based on a community of property may also be observed in the almost global move towards, or retention of, fixed rules or presumptions based on equality: Continental civil law Europe is already based on the use of community of property regimes; recent decisions in England and Wales have lead some academic commentators to suggest ‘a community of property approach judicially developed from inside a statutory discretion-based framework’ now exists in that jurisdiction, equal sharing as a starting point was proposed in Australia in 1995 and continues to stimulate discussion; both New Zealand and Scotland rely heavily on a presumption of equality, and the Northern Ireland Law Reform Advisory Committee recommended a community

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64 ‘Charman v Charman’ (n 63) 389 (emphasis original). A similar point is made in Sonia Harris-Short and Jo Miles, Family Law: Text, Cases and Materials (2nd edn OUP 2011) 477.

65 ‘Equal versus Equitable Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part I’ (n 22).

66 Dewar noted in 1997, ‘a number of recent legislative developments in both jurisdictions [England and Australia], especially in the areas of children, property distribution and child support, offer evidence of a trend away from discretion towards a more rule-based family law … it could be said that we are moving slowly and uncertainly towards a “post-liberal” family law, in which prescriptive rules are more prominent’. See (n 6) 309.

67 See Cooke, Barlow and Callus, Community of Property: A regime for England and Wales? (n 59) 41. They note at 28, ‘Even prior to the recent House of Lords judgments in the cases of Miller and McFarlane, developments in the case law relating to ancillary relief on divorce … had already given rise to claims that England and Wales has in practice adopted a system of deferred community of property’. See also Stephen M. Cretney, ‘Community of Property Introduced by Judicial Discretion’ (2003) 119 LQR 349. On the basis of Charman v Charman (n 25), equal sharing is now the starting point, not a ‘final check’ as suggested in White v White (n 25), though as Miles points out, it is not a ‘required starting point’, see ‘Charman v Charman’ (n 63) 382. On the other hand, Baroness Hale in Miller v Miller: McFarlane v McFarlane (n 25) stated at 151, ‘We do not yet have a system of community of property, whether full or deferred.’ Similarly, Professor Cooke believes that England does not have a form of community of property, see (n 1) 110; Elizabeth Cooke, ‘Community of Property, Joint Ownership, and the Family Home’ in Martin Dixon and Gerwyn LL. H. Griffiths (eds), Contemporary Perspectives on Property, Equity and Trusts Law (OUP 2007) 54.


69 The Scottish regime is based on judicial discretion. However, this discretion is only exercisable ‘within the confines of very detailed guidelines’. There is an underlying presumption supporting equal division of community property, see Crowley, ‘Equal versus Equitable Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part I’ (n 22) who considers the Scottish approach in detail. For an
style system governing matrimonial assets in 1999. However, while fixed rules, or at least a starting point of equality, are increasingly the norm elsewhere in relation to the division of assets on matrimonial breakdown, there has been no statutory review of the Irish system since it was introduced, no indications that such reform is on the legislative agenda or judicial developments towards the incorporation of such principles.

Yet it is submitted there is no reason to fear such a development in the law. Despite the common perception, equitable redistribution is not the polar opposite of a deferred community-style system such as the one which operates in British Columbia. When analysed, it is clear that both systems facilitate sharing out of a community fund on marriage dissolution and are based on the view that marriage is a partnership. However, there is a spectrum of interference in matrimonial property and the two approaches are at different points on that spectrum. As Professor Dewar explained:

‘Discretion and rules are sometimes portrayed as opposites locked into some zero sum relationship: the more discretion, the fewer rules, and vice versa ... it is better to visualise a continuum or spectrum, with hard and fast rules at one end and unconstrained discretion at the other, with many intermediate points along the way.’

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70 Law Reform Advisory Committee for Northern Ireland, *Matrimonial Property* (Report No 10–2000). The report proposed that household assets acquired by either spouse or both for the joint use of the couple should be generally co-owned.

71 This is unlike other regimes, including British Columbia, which quickly moved from equitable redistribution to sharing, see below. Parkinson (n 20) highlights the considerable attention given by law reformers in Australia to the issue of family property. Despite this, leading Irish family law academics have critiqued the current Irish approach and have made compelling cases for the introduction of fixed rules: Crowley drew on the Scottish approach, see ‘Equal versus Equitable Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part I’ (n 22); Buckley favoured the system of deferred community of property which operates in Germany, see ‘Matrimonial Property and Irish Law: A Case for Community’ (n 7); and Professor O’ Connor suggested the introduction of a system of immediate community of property, see Paul O’ Connor, *Key Issues in Irish Family Law* (Roundhall 1988) 214.

To the extent that Buckley’s proposal is based on deferred community, it is similar to the proposals contained herein. However, Buckley’s proposals were based on the German system, which is quite different from the British Columbian approach with regard to the characterisation of assets forming the community and the level of discretion in making any order other than equal sharing. Moreover, this research considers the judicial decisions and the empirical evidence which has emerged in the last 10 years since Buckley’s study. While the legislation was only in its infancy for her study, it has now been in place for 15 years.

72 Buckley makes a similar point in ‘Matrimonial Property and Irish Law: A Case for Community’ (n 7) 68. Interestingly, the *Report of the Second Commission on the Status of Women* (Stationary Office 1993) noted at 39, ‘Many people do not realise that a form of deferred community property has already been part of Irish legislation since the passing of the *Judicial Separation and Family Law Reform Act 1989*.’

Irish matrimonial property law has been taking tentative steps further along the continuum since the introduction of the Succession Act 1965 and, it is submitted, it is time to complete the journey. While fixed rules were introduced on death to give support to a surviving spouse, the socio-legal environment prevailing at the introduction marital breakdown legislation militated against the adoption of such an approach on judicial separation and divorce. Nevertheless some progress was made along the continuum towards community property. The importance of non-financial contributions in the home was recognised in the 1989 Act, 'clearly demonstrating a gradual shift in emphasis from purely financial considerations to evaluating the role of both parties in a broader light'. Subsequently, the failed Matrimonial Home Bill 1993, although also premised on support, gave recognition to the equal contributions of women and men in the home.

The driving force behind the application of communitarian principles on divorce should now be a desire to give recognition to the equal status of the spouses and equal recognition of contributions, whether financial or domestic in nature, where the title to property does not reflect the contribution of both, while simultaneously facilitating the provision of support where equal sharing does not achieve this end. The remainder of this chapter is devoted to exploring the benefits and viability of this writer’s proposal for the reform of this area of law.

5.3 A Proposal for Reform

The central pillars of the proposal for reform set out later in this chapter are borrowed from the British Columbian regime: specifically, a presumption of equal sharing and the possibility for a reapportionment where the circumstances dictate equal sharing is not appropriate. However, it is important to consider the weaknesses of the regime as perceived in British Columbia and the imminent reform of the law introduced by the Family Law Act 2011. The principles for assessing proposals for the reform of matrimonial property law as enunciated by Professor Parkinson are also discussed before the detail of the proposal is delivered.

5.3.1 Family Law Act 2011 – A time of change

74 In fact, both the protections afforded by the legal right share in the Succession Act and the protection against the unilateral disposition of the family home in the Family Home Protection Act 1976 are commonly associated with community of property regimes. Therefore, while it may be said, as above, that England and Wales are effectively implementing a deferred community regime, the truth may be that the Irish system, overall, is much closer to community than our neighbours across the Irish Sea.

75 Buckley, ‘Matrimonial Property and Irish Law: A Case for Community’ (n 7) 62.

76 At the introduction of the Family Law Bill 1994, it was said in relation to the Matrimonial Home Bill: ‘The essence of the Bill was an attempt to copperfasten the principle of equality in marriage and was aimed at stable marriages. It was not framed to deal specifically with instances of marriage breakdown, be they separation, nullity or, for that matter, divorce.’ See Dáil Deb 23 February 1994, vol 439, col 613 per Minister Taylor, Minster for Equality and Law Reform. The logic of this statement is debatable. Deputy O’Donnell challenged the Minister on this interpretation: ‘I do not recall that the concept of a stable marriage was spoken about in the debate on the Matrimonial Home Bill. We had a fulsome contribution from all sides and now much is being made in a revisionist way about the notion of a stable marriage.’ See Dáil Deb 8 March 1994, vol 440, cols 182-183.

77 While support will also flow from such equal sharing, where it is insufficient to meet the needs of dependent children, these can be accounted for in a reapportionment.
Despite its superiority to the Irish regime, matrimonial property division is currently being reformed in British Columbia. Thanks to the well-oiled statutory review procedure applied in the province, assessments of the appropriateness and effectiveness of the legislation are quite regular. A glance through the jurisdiction’s official publications relating to matrimonial property law highlights this desire for improvement. However, despite the various reviews of the legislation, it has remained largely untouched since its original introduction in 1979. That is, until now.

Originally, the legislature of British Columbia adopted a regime strikingly similar to the Irish approach. The Family Relations Act 1972, modifying the pre-existing separate property regime, empowered a judge with the discretion to order a fair distribution of matrimonial property provided such action was taken within two years of proceedings to terminate the marriage. Unfortunately, as in Ireland, the legislation afforded minimal guidance to the judiciary in the exercise of this power. Unlike Ireland, however, the legislature quickly realised the shortcomings of the regime. As a result, the 1972 Act was soon repealed and replaced by the Family Relations Act 1979 which first introduced the concept of equal sharing which is now applied by the Family Relations Act 1996.

Having noted the development of the law from 1972 to 1979, the British Columbia Law Reform Commission stated in 1989: ‘It is our tentative conclusion that legislation must continue in its evolution by providing further guidance on the division of family property in more precisely defined terms and thereby minimizing the role of judicial discretion.’ In concluding the 1989 report, the Commission made proposals for reform drawing heavily from the provisions applied in Ontario. Central to the reform advanced was that, rather than determining the divisible property using the family purpose test and a contribution-based test for re-categorizing business assets and ventures, the legislation would adopt the following approach:

‘Increases in the financial worth of the spouses occurring over the course of the marriage attributable to income they earn or changes in value of their assets should be assessed and a

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79 See Keith B. Farquhar ‘Section 8 of the Family Relations Act—An Experiment in the Exercise of Judicial Discretion and the Distribution of Matrimonial Property’ (1979) 13 Uni BCL Rev 169.
80 *Property Rights on Marriage Breakdown* (n 40) V(D)(1)(e). This was contrary to the findings of a 1985 review as noted at (f) (citation omitted) which found: ‘Our system of law postulates as a virtue that similar cases be decided similarly, both for the sake of that principle itself and for the sake of making law certain and therefore predictable ... The criticism is made that family law lacks these characteristics of certainty and predictability. We do not take issue with this criticism. It is a fact that the outcome of matrimonial cases is unpredictable. What we do suggest is that predictability is only one of the virtues a legal system may possess and that it must be weighed against the other attributes the system should possess. The price which is paid for certainty and predictability is that a certain proportion of the situations which exist will not fit comfortably within the more tightly defined framework of the law, which will in turn lead to the disposition of cases in a way which will be seen to be unfair. There is no institution in society more variable than the institution of the family and the application of a rigid framework of rules to a broken family will inevitably generate unsatisfactory results.’ Instead, the 1989 report suggested, ‘In order to achieve similar results on similar facts - a hallmark of justice - it is necessary to provide the courts with more guidance on how family property is to be divided.’
81 ibid VII(C).
payment made to the spouse who has acquired less wealth over the course of the marriage in order to ensure equality between the spouses. 82

This proposal bears a remarkable resemblance to the German system which provides for the equalisation of gains. The 1989 proposals made no distinction between family assets and business assets and included no special provisions to protect the matrimonial home. 83 The Commission also proposed that ‘a non-owning spouse should not share in the value of property acquired by gift or inheritance. Increases in the value of such property, however, should be taken into account when determining the amount of an equalizing payment.’ 84 The Commission believed that such an approach would ‘drastically’ reduce the role of judicial discretion in ascertaining the rights of spouses but the power to order a reapportionment would remain. 85 These reforms were never enacted and it was subsequently noted that they generated ‘little support at that time from lawyers.’ 86

The issue of matrimonial property was once again reviewed in the Attorney General’s 2010 White Paper on Family Relations Act Reform. 87 The key difference between this review and its predecessor is that the more recent proposals are due to be implemented by the Family Law Act 2011 which is due to come into effect on 18 March 2013. Akin to the 1989 Report, the over-riding theme in the 2010 White Paper was a desire to reduce judicial discretion. It noted that under the Family Relations Act 1996, British Columbia relied ‘heavily’ on judicial discretion to resolve property division disputes. 88 As a result, the Ministry of Justice commented: ‘British Columbia historically had a higher than average level of property division disputes in court; the broad flexibility and discretion in this area created uncertainty and promoted litigation.’ 89 To this end, the White Paper proposed a multi-faceted assault on discretion which has since been implemented by the Family Law Act 2011.

Central to the proposals in the White Paper was a move from the family purpose and contributions-based model of identifying family property to an excluded assets model, analogous to the system of acquests in France. 90 It was argued that this reform would make the characterisation of assets ‘simpler, clearer and easier for the average person to understand’, thereby reducing litigation, and

82 ibid VII (C). It noted, ‘The theory upon which shared rights in property depends is clarified. Unless the spouses otherwise decide, the economic side of marriage is to be thought of as a joint venture or financial partnership where each contributes equally.’
83 In this regard, the proposals departed from Ontario, see below, 201.
84 British Columbia Law Reform Commission, Property Rights on Marriage Breakdown (n 40) VII (C). This reflected the Alberta approach over the Ontario approach.
85 ibid VII(C).
87 ibid 87-93.
88 ibid 79.
90 Although the proposals were in fact influenced by the Alberta Matrimonial Property Act. The White Paper refers to the fact that opinion was divided on this approach to categorisation, see British Columbia Ministry of the Attorney General, White Paper on Family Relations Act Reform (n 86) 80. While the report notes that some felt such a change in the law ‘might result in women leaving marriages with fewer assets than they do now’, this argument did not garner support.
would accord better with ‘most people’s intuitive sense of fairness’. \(^{91}\) The system proposed dictated that family property subject to division would include all real and personal property owned by one or both spouses at the date of separation unless the asset in question was excluded. \(^{92}\) Excluded property would include property acquired gratuitously, such as gifts and inheritances to one spouse, as well as pre-and post-relationship property. \(^{93}\) Spouses would, nevertheless, share in the increased equity of excluded assets. \(^{94}\) Putting forward the argument in favour of such reform, the White Paper noted:

> ‘Changing to an excluded property scheme removes the broad judicial discretion from the asset identification stage and leaves some discretion at the distribution stage. This change is designed to make it easier to identify property subject to division and, therefore, reduce the potential for disagreement’\(^{95}\)

The overall effect of this change would be to reduce recourse to the courts in determining what constitutes the community fund. These recommendations are implemented by sections 84 and 85 of the Family Law Act 2011. \(^{96}\)

Furthermore, the White Paper recommended that, in addition to sharing family assets, spouses should share family debts. Section 86 provides that family debt includes all financial obligations incurred by a spouse during the relationship in addition to debts incurred after the date of separation, if incurred for the purpose of maintaining family property. This extension of liability to debts arising after the separation is justified ‘[s]ince both spouses generally continue to benefit from the family property until it is divided, both are presumed to be responsible for the cost of maintaining that property until that time.’ \(^{97}\)

The 2010 White Paper also proposed reforming the law in relation to triggering events. It proposed replacing the existing four triggering events with one, namely the date of separation. \(^{98}\) The aim of this amendment was to reduce recourse to the courts in order to trigger an entitlement to an interest and to avoid the difficulties which can arise where one spouse dies or is declared bankrupt after the date of separation but before the occurrence of a triggering event. It was noted, ‘The call for change reflects the fact that it can take a long time to conclude a separation agreement, and, in

\(^{91}\) ibid 80. Another factor which was arguably more important in the introduction of such reform was that it would bring British Columbia in line with ‘most other provinces in this increasingly mobile age’. More arguments in support of this change in the law are set out at 81.

\(^{92}\) If the property was excluded, only the increase in the value of the asset during the relationship would be divisible. Whether an asset was ordinarily used for a family purpose would be irrelevant in deciding if it is family property.

\(^{93}\) For more, see British Columbia Ministry of the Attorney General, White Paper on Family Relations Act Reform (n 86) 81. It also states that where there is a dispute about whether an asset is excluded property, the person claiming the exclusion will bear the burden of proof.

\(^{94}\) In this regard the proposal is akin to the German system. Note, however, that no determination was made on whether negative equity should be shared between the spouses. This was described as an ‘outstanding policy issue’, ibid 81.

\(^{95}\) ibid 81.

\(^{96}\) S 84 provides that post-separation property can constitute family property where it is derived from property held at the date of separation or the disposal of such property.

\(^{97}\) Ministry of Justice, Family Law Act Explained (n 89).

\(^{98}\) British Columbia Ministry of the Attorney General, White Paper on Family Relations Act Reform (n 86) 86.
the meantime, a spouse has no way to protect his or her rights to family property without going to court. The Ministry for Justice explained:

‘Using separation as the triggering event means that spouses will not be required to go to court or negotiate a separation agreement to trigger entitlement to an interest in family property. This ... accords with most people's expectations; it makes intuitive sense for spouses to use the date of separation as the point from which to disentangle their overlapping financial lives.’

This recommendation is implemented by section 81 of the 2011 Act. Thus, on the date of separation the extent of the community is determined and the presumptive one-half interest of both spouses arises. To provide clarity on when separation arises, section 83 adds that spouses are not considered to have separated if, within one year after separation, (a) they begin to live together again with the primary purpose of reconciling, and (b) they continue to live together for one or more periods, totalling at least 90 days.

Furthermore, while the Family Relations Act 1996 did not specify the appropriate valuation date, section 87 of the 2011 Act now establishes the valuation date as the date of an agreement or the date of a court hearing dividing the assets.

Finally, the 2010 White Paper suggested increasing the threshold to be surmounted in obtaining a reapportionment. While the Family Relations Act 1996 permits a judge to order an unequal division of assets if it would be ‘unfair’ not to do so having regard to specified criteria, it was proposed that this standard should be increased to that of ‘clearly unfair’, thereby making the test for reapportionment ‘stricter’. Although section 95 of the 2011 Act makes the test stricter, in a departure from the recommendation, the court is directed to consider whether an equal division of family assets and debts would be ‘significantly unfair’. In making such a determination, section 95(2) sets out a non-exhaustive list of factors to consider. These include:

- the duration of the relationship between the spouses
- the spouse's contribution to the career or career potential of the other spouse
- whether family debt was incurred in the normal course of the relationship between the spouses

99 ibid 85.
100 Ministry of Justice, Family Law Act Explained (n 89). However, see below for the difficulties in adopting such an approach.
101 Ministry of Justice, Family Law Act Explained (n 89) notes, ‘There is much case law on what does and does not constitute “separation” and this provision is not intended to be exhaustive but to simply provide some guidance.’
102 However, a different date may be selected by agreement or by court order. It was noted ibid: ‘The Family Relations Act did not provide any guidance on setting a date for valuing family property. This resulted in criticism that judicial discretion with respect to determining valuation dates was too broad and resulted in too much uncertainty. This uncertainty, in turn, made negotiating settlements more difficult.’
103 British Columbia Ministry of the Attorney General, White Paper on Family Relations Act Reform (n 86) 82.
104 This standard also applies in determining whether a reapportionment of pension entitlements should arise.
if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt

whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends.\(^{105}\)

Interestingly, while the Family Relations Act 1996 was silent on how property division should interact with spousal support, under section 95 of the 2011 Act this interaction is relevant in an application for reapportionment.\(^{106}\) Section 95(3) provides:

‘The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.’

In this regard, section 161 states:

‘In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

(a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;

(b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;

(c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;

(d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.’

Thus, the 2011 Act empowers the court to ‘use an unequal division of property to compensate for situations where spousal support is insufficient to meet the spousal support objectives’.\(^{107}\)

Finally, with regard to excluded assets, section 96 provides that such assets may only be divided in very limited circumstances: where family property or family is debt located outside British Columbia and cannot practically be divided; or where it would be significantly unfair not to divide excluded

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\(^{105}\) Other factors include the tax liability which the spouses would incur as a result of a transfer or sale of property or other court order; whether a spouse caused a decrease or increase of property beyond the market trends after the separation; the fact that a spouse, other than a spouse acting in good faith, (i) substantially reduced the value of family property, or (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected.

\(^{106}\) It was noted in the Ministry of Justice, Family Law Act Explained (n 89), ‘while property division and spousal support are separate issues in law, in practice, they overlap’.

\(^{107}\) Ibid.
property in light of the duration of the relationship and a spouse’s direct contribution to the preservation, maintenance, improvement or management of the excluded property.

5.3.2 Professor Parkinson’s Principles

Before setting out the detail of this author’s proposal for reform of the Irish system, it is instructive to consider the principles which should guide the reform of matrimonial property law as established by Professor Parkinson. First, Parkinson points out, ‘The legislation needs to give guidance to the parties (and their lawyers) about how to settle cases rather than giving guidance to judges about how to decide cases.’ Therefore, law should be drafted with the parties in mind, not the judiciary. It is submitted that, in light of the high settlement rate which currently applies in Ireland, this seems like a sensible approach. The practical effect of this principle would be that the legislation needs to have a basic simplicity and the focus of the legislation should be on specifying the parties’ prima facie entitlements instead of structuring the application of judicial discretion.

Second, Parkinson states the focus of the reform should be on the experience of the majority of divorcing couples rather than the ‘ample resources’ cases which tend to dominate discussion. To this end, he suggests ‘a way of testing the efficacy of a proposal is to ask, not how a judge might decide it, but what advice a suburban family law practioner would be able to give to a client in terms of making a fair offer, or in assessing an offer from the other party’. It is contended that just as ‘ample resource’ cases cannot be allowed to dominate, neither should the minority of cases where the spouses are in dire financial straits. The aim should be to consider the actual implementation of the measure on an ‘average’ or ‘typical’ couple in so far as is possible.

Third, Parkinson believes:

‘The premise that a court of law can place a financial value on one person’s contribution to the welfare of the family is a fundamentally irrational premise … If the notion of assessing contributions is abandoned, and replaced with a rule that property acquired during the course of the marriage should be treated as jointly owned, a great deal of heat will be taken out of the debate about family property reform. No longer will there be the continuing arguments that the law “undervalues the homemaker contribution”.

While the rationale on which this principle is based is easily understood, there are two central problems with it. Parkinson’s approach which disregards contributions, could give rise to difficulty where the marriage was very short. It suggests that the marriage itself gave rise to the entitlement.

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108 See ‘Reforming the Law of Family Property’ (n 20). While these principles were designed as a means of assessing proposals for reform of matrimonial property law in Australia, it is contended they are of general benefit to all researchers engaged in this area of law.
109 ibid.
110 John Eekelaar, ‘Financial and Property Settlement: A Standard Deal’ [2010] Fam Law 359 explored different possible solutions to financial and property settlement, but it is submitted they are confusing and would be difficult for the public to interpret in order to negotiate a settlement independently.
111 ‘Reforming the Law of Family Property’ (n 20).
112 ibid.
This perhaps goes too far. In addition, the class of assets considered by Parkinson, namely property acquired during the marriage, is arguably too narrow as it pays scant regard to the critical importance of a family home which may have been acquired prior to the marriage. Therefore, it is submitted that a more functionally oriented category of assets might be more appropriate.

Fourth, Parkinson proposes that objectives rather than factors be the guiding force for the exercise of judicial discretion. He continues, ‘Then courts will have some guidance about the goals for which they have been entrusted with a discretion, and why it is that they may need to adjust from a starting point set of entitlements.’

Fifth, recognising ‘surely the first goal of public policy in dealing with marriage breakdown ought to be to ensure the needs of children are met as far as is possible in the circumstances’, he consequently proposes:

‘Giving priority to the needs of children means that in determining whether an adjustment should be made for future needs, on either model, the first priority should be to ensure as far as possible, that the housing of any children in the household will be adequate as a result of the orders.’

While not all these principles have influenced the proposal below, the author has found them to be a useful benchmark in assessing its benefits.

5.3.3 Deferred Community of Property: A proposal for Ireland

At its most fundamental level, an approach based on the British Columbian regime would dictate that each spouse would have a presumptive entitlement to an equal share of the family assets on the occurrence of a triggering event. Thus, it would introduce a deferred community of property system as the default regime.

Let us now turn to the detail of the proposal.

113 Although the Matrimonial Home Bill 1993 essentially applied this approach, this author’s proposal for the introduction of a system of community of property would go beyond the family home to include assets used for a family purpose. Moreover, where there were direct or indirect contributions, business assets would also be equally shared.

114 ‘Reforming the Law of Family Property’ (n 20). The merits of this alternative approach are certainly worth considering and appear to possess inherent strengths which could be useful in the Irish context.

115 ibid. He adds: ‘While this weights the exercise of discretion in favour of the parent with whom the children primarily reside, it is important also that the court should take into consideration the needs of the children when they are staying with the other parent. When residence orders are made, or contact is awarded for half the school holidays, then the court needs to balance the needs of both parents for adequate housing given the proportions of time that they will have the children living with them.’ This principle is effectively the same as the proposal made in Cooke, Barlow and Callus, Community of Property: A regime for England and Wales? (n 59).

116 Parkinson’s final principle for reform was that domestic violence should be addressed directly as a compensation issue. However, given the Irish approach to the relevance of conduct in this area and, in particular, the high threshold which must be surmounted for it to be considered, it is submitted such a principle would be difficult to incorporate.

117 The possibility of opting out of such a regime is discussed below, 210. An immediate community of property regime is deemed unnecessary in light of the protection already afforded by the Family Home Protection Act 1976 and the protection of equitable interests in the family home afforded by the doctrine of notice and s 72(1)(j) of the Registration of Title Act 1964. Moreover, such development in the law is unlikely, see Chapter 1.
a) Philosophical Basis for Sharing

The Family Relations Act 1996 is seriously weakened due to the absence of a statement of the underlying rationale for marital property division. The inclusion of such a provision would, it is submitted, ensure a more cohesive, unified and predictable approach in the application of such legislation, particularly with regard to reappor tions. In this proposal, the philosophical basis for division would be explicitly stated. However, not all assets which form the community of property subject to division shall be shared on the same basis. Essentially, this proposal presents two independent rationales for sharing. On one hand, the division of ‘family assets’, arises as a consequence of marriage. On the other hand, the rationale for the division of ‘quasi-family assets’ is contribution-based.

b) Triggering Events

With regard to the triggering event which gives rise to the presumptive interest, the White Paper claims ‘it makes intuitive sense for spouses to use the date of separation as the point from which to disentangle their overlapping financial lives’. However, there will often be differing opinions as to the actual date of separation and, in this writer’s view, the ‘simplification’ of the law which the 2011 Act claims to bring about, could cause considerable conflict and litigation between spouses. Therefore, this writer’s proposal features two alternative triggering events: the initiation of legal proceedings seeking a judicial separation or divorce or entering into a separation agreement. Any fears that delaying the triggering event in this manner leaves property vulnerable to capture by creditors or dispositions in favour of a third party can be allayed by pointing out the current

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117 Keith B. Farquhar noted in ‘Matrimonial Property and the British Columbia Court of Appeal’ (1988) 23(1) Uni of BCL Rev 31, 34: ‘Even a cursory glance at this legislation reveals that, despite its complexity and apparent detail (and in some cases because of it), a substantial number of very important questions about the ultimate destination of matrimonial property were left unanswered by the Legislature. Many of these involved vital issues of policy with which the courts immediately had to come to grips, and it is a matter of notoriety that there was, and continues to be, a flood of litigation on property issues between husbands and wives whose marriages have broken down. In these circumstances the British Columbia Court of Appeal has been called upon to perform extraordinary service in attempting to bring some finality to the seemingly endless list of questions that arise on a daily basis in the trial courts.’ The position is clearer under the 2011 Act which indicates to a certain extent what is not the underlying rational for sharing. S 81 provides, ‘spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution’, and ‘on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt’. The reapportionment of ‘true’ family assets and business assets that constitute family assets are governed by the same criteria under the Family Relations Act 1996. However, the basis on which such assets fall into the community for division is different since contribution is irrelevant for an entitlement to family assets but central to the inclusion of business assets. The Family Law Act 2011 does not apply such categories.

118 British Columbia Ministry of the Attorney General, White Paper on Family Relations Act Reform (n 86) 86. S 3(4) of the Family Law Act 2011 provides that spouses may be separated despite continuing to live in the same residence, and the court may consider, as evidence of separation, ‘communication, by one spouse to the other spouse, of an intention to separate permanently’; and ‘an action, taken by a spouse, that demonstrates the spouse’s intention to separate permanently’. Presumably, this would include the instigation of legal proceedings to terminate the marriage.
protections afforded by Irish legislation in this respect, for example, pursuant to section 5 of the Family Home Protection Act 1976 and the anti-avoidance provisions of the Family Law Acts.

c) Characterisation of Assets

While there are a range of different approaches to determining what constitutes the community fund or marital/family assets, it is submitted that an approach which replicates that currently applied in British Columbia pursuant to the Family Relations Act 1996 but incorporates more detailed provisions and certain aspects of the 2011 reforms represents the best option for Ireland. It may seem counter-intuitive to draw on a regime which has proven to be unsatisfactory in placing too much discretion in the hands of the judiciary. However, in this writer’s view, less drastic reforms of the law than those made by the Family Law Act 2011 could have achieved the desired reduction in discretion and, under the new legislation, British Columbia risks throwing the baby out with the bathwater! The 2010 White Paper noted, ‘The existing statute provides a general framework for dividing property but relatively few detailed rules.’ This, it was submitted, gave rise to considerable litigation and recourse to judicial discretion and the legislature reacted by completely overhauling the system of categorisation. Such extreme action may have been unwarranted. Instead, the reliance on discretion which had emerged in British Columbia could have been cured by more detailed rules.

This writer’s proposal involves the categorisation of assets as family assets, quasi-family assets, business assets and other assets. What constitutes a family asset would be determined by a functional test based on whether it was ‘ordinarily used for a family purpose’. Consequently, bank accounts used for a family purpose would be shared.

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121 For this reason, the implementation of the proposals discussed in Chapter 1 is vital to ensure the maximum effectiveness of the Irish legislation where debts are incurred by the owning spouse. The other fear in British Columbia is that a spouse could die between the date of separation and the occurrence of the triggering event. However, under the Irish regime the rights afforded by the Succession Act 1965 would continue until the triggering event.

122 See s 35 of the 1995 Act and s 37 of the 1996 Act.

123 For instance it can include all assets owned by both spouses, or only assets purchased after marriage. Alternatively, the temporal accretion model gradually includes separate assets depending on the duration of relationship. In British Columbia, under the Family Relations Act 1996 the categorisation of an asset as a community asset depends on use for a family purpose or contribution to a business asset. For a description of the scope of different regimes, see Cooke, Barlow and Callus, Community of Property: A regime for England and Wales? (n 59) 4.

124 The British Columbia Ministry of the Attorney General, White Paper on Family Relations Act Reform (n 86) 79.

125 This represents a departure from the British Columbian approach.

126 Recent studies have shown that how money is held and under whose name is not necessarily determinative of the intentions of the parties. See Caroline Vogler, ‘Managing Money in Intimate Relationships: Similarities and Differences between Cohabitating and Married Couples’ in Jo Miles and Rebecca Probert (eds), Sharing Lives, Dividing Assets (Hart Publishing 2009); Carole Burgoyne and Stefanie Sonnenberg, ‘Financial Practices in Cohabitating Heterosexual Couples: A Perspective from Economic Psychology’ in Jo Miles and Rebecca Probert (eds), Sharing Lives, Dividing Assets (Hart Publishing 2009); Gillian Douglas, Julia Pearce and Hilary Woodward, ‘Money, Property, Cohabitation and Separation: Patterns and Intentions’ in Jo Miles and Rebecca Probert (eds), Sharing Lives, Dividing Assets (Hart Publishing 2009). Burgoyne and Sonnenberg note at 103 that joint accounts may not always mean equal sharing in practice, and that individual accounts may not necessarily
asset would be irrelevant as it is submitted that ordinarily using property for a family purpose reflects a settled intention to share the property. To avoid any confusion, a legislative statement to the effect that the family home would automatically fall within this category is required.

In this latter respect, the proposal made here departs from the British Columbian approach. In various reviews of its matrimonial property regime, British Columbia has shown limited concern with protecting the family home. In considering the options for reform of the Family Relations Act in 1989, the Law Reform Commission examined the approach adopted in Ontario which includes special provisions directed at the protection of the family home. This approach dictated that the full value of the matrimonial home would be divided between the spouses at the time of marriage breakdown, even if the property was brought into the marriage, or received by gift or inheritance. The British Columbia Law Reform Commission refused to recommend the incorporation of such special protection arguing:

‘First, the “special” nature of the matrimonial home as shelter and a focal point for family activity seems to be a factor of insignificant weight when assessing the increased wealth of the spouses over the course of the marriage ... Second, while it is true ... that the matrimonial home is a major asset, this in itself does not seem reason to accord it different status from other, possibly major, assets owned by the spouses ... Third, the special signify separate financial entities or a lack of commitment. In this regard, a functional analysis akin to that applied in British Columbia under the Family Relations Act 1996 appears attractive and is replicated here. Furthermore, while it is outside the scope of this thesis to discuss the issue in depth, some mention must be made of the treatment of pensions. Debora Price, ‘Pension Accumulation and Gendered Household Structures: What are the Implications of Changes in Family Formation for Future Financial Inequality?’ in Jo Miles and Rebecca Probert (eds), Sharing Lives, Dividing Assets (Hart Publishing 2009) 257 highlights, albeit in relation to England, that divorcees are the poorest group of older women. This is often due to their interrupted participation, if any, in the workforce which then impacts directly on their personal pension entitlements. Oddly, despite the ‘sophisticated legislation’ applied in Ireland to deal with the allocation of pensions, Coulter notes: ‘Only a minority of those seeking judicial separation or divorce avail of it, and even then a significant proportion seek nominal pension adjustment orders, preserving their pensions with the agreement of the other spouse ... Such a nominal order may be offset against a greater share of the family home’. See (n 9) 65. In light of these findings, Coulter notes, ‘there appears to be a reluctance on the part of litigants to exercise their rights under the legislation’. She theorises that this could be due to the fact that issues relating to child maintenance and the family home are more pressing for many litigants than pensions and obtaining an immediate gain is, therefore, more attractive. Later, at 105, she suggests alternative explanations: perhaps ‘the issue of pension adjustment orders is seen as overly complex by practitioners’ or litigants prefer a clean break and financial finality than deferred benefits. Part 6 of the Family Relations Act 1996 in British Columbia essentially provides for deferred sharing of the pension benefits accrued during the marriage, with the benefits not arising until the parties retire. See British Columbia Law Institute, Pension Division on Marriage Breakdown: A Ten Year Review of Part 6 of the Family Relations Act (BCLI Report No 44–2006). It was concluded that overall the pension division provisions of the act, worked well, see The Ministry of Justice, Family Law Act Explained (n 89). As a result, they are carried into the 2011 Act with some ‘refinements’ and ‘additional guidance’, as noted by the Ministry of Justice, but no major amendments. This approach to pensions represents a clear and straight-forward approach and is replicated here. Nevertheless, it is proposed that the value of the interest in the pension could be converted into a greater interest in the family home, if so desired by the recipient spouse. However, it is accepted that, in light of the complexity of issues relating to pensions, this is an area especially worthy of further study in Ireland.

127 Under the Ontario regime, the value of any other property brought into the marriage would be deducted from net family property.
treatment of the matrimonial home seems to cause the legislation, which is intended to adjust wealth acquired over the marriage in terms of personal rights between the spouses, to focus upon particular assets and the proprietary interests of the spouses in those assets ... Fourth, it is an approach which appears to retain the flavour of the use for a family purpose test which has contributed so much confusion to British Columbia law. Lastly, concerns over shelter can be addressed through possessory rights, a jurisdiction which the courts have separately.\footnote{128}

Thus, the Law Reform Commission concluded that the matrimonial home should be treated like any other asset owned by the spouses.\footnote{129} This view was also adopted in the 2010 White Paper and, as a result, the Family Law Act 2011 makes no special provision for the family home.

It is submitted that limiting the community fund to post-marital acquests, to the total exclusion of any protection for a family home that was acquired before the marriage, was inherited or was the subject of a gift is harsh. The new British Columbian approach could easily leave a non-owning spouse in a particularly vulnerable position where the family home was held solely in the other spouse’s name and constituted excluded property. Therefore, as befits its special position in other areas of Irish matrimonial property law, special provision for the family home forms an integral part of these proposals.\footnote{130}

Admittedly, the deferred sharing of family assets would require the introduction into Irish law of provisions for the characterisation of family assets which have not been a feature of our law heretofore.\footnote{131} Moreover, it has been noted that difficulties have arisen in British Columbia in the application of a functional test for characterising such assets.\footnote{132} The adoption of such an approach in Ireland without any adjustments would, therefore, continue to place much discretion in the hands of

\footnotesize\begin{itemize}
\item \footnote{128} Property Rights on Marriage Breakdown (n 40) VI(G).
\item \footnote{129} ibid.
\item \footnote{130} Special protection is already afforded to the family home by s 56 of the Succession Act 1965 and s 3 of the Family Home Protection Act.
\item \footnote{131} It is interesting to note, however, that matrimonial property division in common law jurisdictions seems increasingly to be moving towards such a characterisation. In England and Wales, characterisation of assets has been introduced since Miller v Miller; McFarlane v McFarlane (n 25). See, in particular, Lord Nicholls at [22]-[26] who spoke of ‘matrimonial’ and ‘non-matrimonial’ assets and Baroness Hale at [149]-[151] who distinguished between ‘family’ and ‘non-family’ assets. This distinction was more recently addressed in Charman v Charman (n 25) where it was noted at [65]-[66] that the principle of equality applies to all the parties property ‘but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality’. For more, see Miles, ‘Charman v Charman’ (n 63). See also the Law Reform Advisory Committee for Northern Ireland, Matrimonial Property (n 70) discussed in Buckley ‘Matrimonial Property and Irish Law: A Case for Community’ (n 7) 55-57. The report proposed that household assets acquired by either spouse or both for the joint use of the couple, should be generally co-owned on marriage.
\item \footnote{132} It has been noted: ‘On its face, this test would appear to be a fairly straightforward method of determining whether any particular asset qualifies as a family asset .... A number of reported cases, however, demonstrate that it is not always clear whether an asset is “ordinarily used for a family purpose”.’ See British Columbia Law Reform Commission, Property Rights on Marriage Breakdown (n 40) II(B). The ‘mystifying nature’ of the concept of ‘ordinary use for a family purpose’ as a category of family asset was also noted by Professor Farquhar, see Keith B. Farquhar, ‘Family Assets in British Columbia’ [1995] 12 CJFL 229. See also Farquhar, ‘Matrimonial Property and the British Columbia Court of Appeal’ (n 117) 31.
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the judiciary. However, it is contended that many of these difficulties are due to the absence of detail to provide guidance in the relevant provisions of the Family Relations Act 1996 which need not be replicated by the proposals for Ireland.

First, the 1996 Act does not specify the date on which an asset ought to be characterised or when the asset should be valued. The approach adopted in the 2011 Act overcomes these shortcomings and is thus replicated here. Consequently, it is proposed that assets would be characterised on the occurrence of the triggering event while the valuation of the assets would take place on the date of the hearing.

Second, the proposed legislation would provide that where there is more than one function of the property, its predominant purpose should be definitive for characterisation purposes; where part of an asset is used for a family purpose, only that part should be considered a family asset; sole use by one spouse alone should not be sufficient to render an asset a family asset; and an unrealized intention does not change the status of an asset from being a family asset. It would also specify at the outset which assets will generally not be considered family assets, such as assets associated with hobbies. In addition, the onus of proof would be on the person claiming that the asset in question is not a family asset.

It is submitted that the approach adopted by the Family Relations Act 1996, whereby business assets which are normally excluded from division may form part of the community fund where contributions are made by the non-owning spouse, possesses considerable strengths and is thus replicated, albeit with amendment, here. The current approach in British Columbia under the 1996 Act ensures that where direct or indirect contributions such as ‘savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property’ are made, business assets are recharacterised as family assets subject to division. It is proposed that, like British Columbia, these contributions should give rise to some interest in such assets. However, some variations on this approach are suggested.

First, where such contributions are made, business assets do not become ‘family assets’ per se but rather quasi-family assets. Second, there would be a legislative statement to the effect that work in the home creates a rebuttable presumption that an indirect contribution was made to the

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133 This was a central concern in the British Columbia Ministry of the Attorney General, White Paper on Family Relations Act Reform (n 86).

134 As noted: ‘It was open to the legislature to make all property owned by spouses divisible between them, but in many cases that approach would be inappropriate. It was recognised, however, that a separate property regime for business assets might be equally unfair in some cases, and so the legislature adopted a special test to determine whether a non-owning spouse was entitled to a share in business assets.’ See British Columbia Law Reform Commission, Property Rights on Marriage Breakdown (n 40) III(B).

135 The contribution is to the business, venture or family asset, not its acquisition. It was noted: ‘Any approach that attempts to determine entitlement on a case by case basis will not be problem free. The relationship of marriage represents a tangle of financial considerations. No single formula will provide a means to achieve perfect fairness when the financial interests of spouses are to be separated. How is the law to distinguish between generous and mean income earners? Should different rules apply to a dependent spouse who is a master of economy and to one who has a taste for the fine things in life? The only approach which can accurately take these factors into account is to prepare a balance sheet of contributions and benefits conferred by spouses during the marriage. That approach is undesirable and probably unworkable.’ ibid.

136 This distinction is important for reapporrtionments. See below, 204-205.
business. Third, taking on board aspects of the Family Law Act 2011, it is submitted that where the business asset was acquired before the marriage or was a gift or inheritance, only the increased value of the asset would be subject to division. Fourth, there would be no distinction between business assets and ventures. Indirect contributions in the home can cause either to be re-categorised as quasi-family assets. Fifth, the sharing of quasi-family assets would be subject to temporal accretion whereby equal sharing would only be achieved after five years of marriage with a spouse accruing a 10% share each year until the fifth year. This reflects the fact that ‘the actual value of most non-pecuniary contributions, especially homemaking, is implicitly linked to duration’. The main benefits of adopting such a scale would be to minimise the applications to court for a reapportionment where the marriage was short on the basis that equal sharing is unfair and, simultaneously, to retain certainty in the fixed rules. Thus, the fundamental rationale for the sharing of quasi-family assets is based on contributions. All other assets, including business assets where no direct or indirect contribution is made, would constitute other assets which would not be subject to division.

d) Reapportionment

Bearing in mind the fundamental distinction between equal sharing of family assets which arises by virtue of marriage and quasi-family assets which can be brought into the community fund where contributions are made, the following proposals are advanced for the limited situations where a reapportionment of shares is appropriate.

First, the entitlement to equal shares of the family assets is afforded on the basis that it is a consequence of marriage. Therefore, a reapportionment of such assets should not be awarded on any basis related to the spouse’s needs. Nevertheless, it is submitted, a reapportionment of family

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137 No link needs to be evidenced between the actual indirect contributions and the business. Under the Family Relations Act 1996 as currently applied the weight of authority suggests that a spouse who is an effective homemaker will usually be entitled to a share in business assets without proof of more, ibid III(C)(2)(b) relying on the decision in Elsom v Elsom [1983] CanLII 692 (BC CA).

138 It was noted, ‘It is difficult to see what is gained by treating ventures separately from business assets.’ See British Columbia Law Reform Commission, Property Rights on Marriage Breakdown (n 40) III(D).

139 John Eekelaar, ‘Asset Distribution on Divorce—Time and Property’ [2003] Fam Law 828. He discusses this durational element in the context of moving from a welfare based approach to an entitlement based approach to financial provision on marital breakdown, see below. See also Anne Barlow and Craig Lind, ‘A Matter of Trust: the Allocation of Property Rights in the Family Home’ (1999) 19(4) Legal Stud 468. The possible benefits of such a regime based on that applied in Sweden were alluded to in Cooke, Barlow and Callus, Community of Property: A regime for England and Wales? (n 59) 34. Interestingly, however, Baroness Hale and Lord Nicholls reject the idea of temporal accretion in Miller v Miller, McFarlane v McFarlane (n 25) at [17] and [152]. In particular, Hale preferred a method based on discounting from equality in short marriages. Moreover, Cooke notes, ‘The rejection of temporal accretion is consistent with a partnership model’, see ‘Miller/McFarlane: Law in Search of Discrimination’ (n 1) 108.

140 See Cooke, Barlow and Callus, Community of Property: A regime for England and Wales? (n 59) 38 where they note: ‘There was support for marriage itself to be a basis for entitlement although the lukewarm response to equal division in our examples might well justify guidance similar to that in Sweden whereby equality would normally be departed from during the first five years of marriage.’

141 A number of factors are listed in s 95 of the 2011 Act for the reapportionment of family property or family debt. These provisions are not included in this proposal unless specified.

142 In any event, in many cases equal sharing will meet both compensation and, indirectly, need. Miles notes: ‘Where certain needs were not met because they did not correspond with whatever measure for
assets (or quasi family assets) should be available where it required in order to meet the needs of dependent children. Miles notes that the needs of children ‘may justify prolonged postponement of full implementation of the court’s order ... for example where the principal asset is the family home required for the children’s occupation, preventing the adult parties from accessing their shares until that need is satisfied’. However, this proposal would go further in considering the needs of children in the calculation of the quantum in a reapportionment where their needs are not already met in the provision made between the spouses.

Second, quasi-family assets should be subject to reapportionment where the temporal accretion system gives rise to a result which is ‘clearly unfair’ having regard to the extent of the contributions made or, again, where the needs of the children require such a reapportionment. Spousal needs will not give rise to a reapportionment of quasi family assets.

Third, while it is clear from the above that the needs of the spouses would not give rise to a reapportionment of community assets under this proposal, it is necessary to question whether the provision of compensation for a spouse who has sacrificed their earning potential to care for the family ought to give rise to a reapportionment. A desire to prioritise compensation has emerged in English jurisprudence and the academic literature on matrimonial property and there is a clear move away from casting the payee into the role of needy supplicant rather than deserving claimant. In particular, Miles makes a compelling argument against the relevance of need, in favour of a more compensatory approach:

‘[T]he additional presence of need [as well as compensation] as a basis for relief distorts the picture in two ways. First, the nature of the marital relationship projected by needs-based financial provision is very different from that projected by the entitlement and compensation rules for property division - dependant and provider; equal partners with legitimate claims to remedies for the economic impact of the relationship on them ... Second ... the choice between compensation and need has huge practical importance where the compensation the courts adopted (for example, deriving from disability rather than childcare obligations, or because the claimant had limited earning capacity regardless of the marriage), that might be felt to be the right result.’ See ‘Principle or Pragmatism in Ancillary Relief’ (n 11) 256.

These would be needs above and beyond the day-to-day expenses associated with child care and may include perhaps the need to house them in the family home and remain in an area they are familiar with.

‘Principle or Pragmatism in Ancillary Relief’ (n 11) 253. See below 207 for the proposals contained here in relation to the allocation of the interest accruing on the occurrence of the triggering event.

Thus, to this extent it avoids the dangers of assuming domestic contributions are equal as highlighted in Cooke, ‘Miller/McFarlane: Law in Search of Discrimination’ (n 1) 101. However, in only extreme cases, it is envisaged, would such contributions not be of equal value.

In particular, see Miles, ‘Principle or Pragmatism in Ancillary Relief’ (n 11) and Miles, ‘Charman v Charman’ (n 63). Miles clearly favours the development of an ideological basis for sharing founded on entitlement or compensation rather than need. However, she concedes in ‘Principle or Pragmatism in Ancillary Relief’ 255 that abandoning need in favour of other principles is a ‘radical solution’. While the importance of compensation is reflected in this proposal, the removal of need in all circumstances, as Miles proposes, is not. Eekelaar also noted a move away from the language of a welfare-style dependency construction of a wife’s needs or reasonable requirements in the aftermath of White v White (n 25) towards a new entitlement basis, founded on entitlements earned through the non-financial contributions of home-making and childcare, see John Eekelaar, ‘Back to basics and forward into the Unknown’ [2001] Fam Law 30.
claimant is not in need, but has sustained economic losses, or conferred some economic benefit on the other party, in consequence of the relationship.\textsuperscript{147}

Therefore, as befits this proposal where the relevance of spousal need is effectively eliminated, it is submitted that following the imposition of equal sharing, compensation for any financial losses incurred by the division of responsibilities within the home must be tackled. In some cases, spousal compensation will, in fact, be met in the equal division of property.\textsuperscript{148} However, in many others, it will not. After all, it is widely acknowledged that equal sharing can often place a financially dependent spouse in a vulnerable position. As Miles highlighted,

‘[F]ormal equality achieved by splitting existing capital 50:50 may not leave the parties in economically comparable positions going forward after the divorce since it neglects the parties’ respective earning capacities - 50% plus substantial earning power is self-evidently better than 50% and no earning power.’\textsuperscript{149}

Although the issue of compensation must therefore be considered, it is contended that it should not, as a default position, be relevant in the context of a reapportionment of the equal sharing of property. The practical and theoretical difficulties created when the issues of compensation and property division are considered together were highlighted in British Columbia over 20 years ago:

‘Requiring that [the need for economic independence and self-sufficiency] be taken into account when dividing family property blurs the distinction between property rights and maintenance obligations. One may easily question whether [this factor] has any relevance in determining entitlement to property.’\textsuperscript{150}

The 2011 Act redefines the relationship between compensation and property and the approach adopted under sections 95(3) and 161 of that Act is replicated by this writer’s proposals.\textsuperscript{151} Compensation should, therefore, be first met by spousal maintenance provision.\textsuperscript{152} Only where

\begin{footnotes}
\item[147] ‘Principle or Pragmatism in Ancillary Relief’ (n 11) 251-252.
\item[148] British Columbia Ministry of the Attorney General, \textit{White Paper on Family Relations Act Reform} (n 86) noted a desire to clarify that spousal support would only be awarded where spousal support objectives were not met by property division. See s 161 of the 2011 Act outlined above 196.
\item[149] ‘Charman v Charman’ (n 63) 391. She adds, ‘To the extent that the disparity of earning power is a product of the parties’ contributions to the marriage, it is something that ought in fairness to be corrected.’ See also Harris-Short and Miles, \textit{Family Law: Text, Cases and Materials} (n 64) 432-433. Likewise, Crowley notes the ‘equal division of assets post dissolution of the marriage results in a very unequal starting point for the parties. The unskilled wife, lacking in experience and exposure to the workforce, very quickly trails behind the skilled and well-established husband.’ See ‘Equal versus Equitable Division of Marital Assets ─ What can be learned from the experiences of other jurisdictions? Part I’ (n 22) 19.
\item[150] British Columbia Law Reform Commission, \textit{Property Rights on Marriage Breakdown} (n 40) IV(B)(5)(a).
\item[151] See above, 196.
\item[152] As Bailey-Harris notes, ‘formal equality of division may not represent equality of outcome for the party economically disadvantaged at the moment of divorce and thereafter ... Such disadvantage may be rectified by means of an increased capital award (as under the Family Law Act in Australia), or by recognizing maintenance orders as an entitlement deriving from contributions rather than as a badge of undesirable continuing dependency’. See ‘The Paradoxes of Principle and Pragmatism’ (n 28) 235 (emphasis added). In particular, it is submitted the objective-based approach under s 161 of the Family Law Act 2011 has a lot to recommend it. Moreover, it is contended that the law in its current format does not adequately separate the value that is placed on domestic contributions from the economic impact on the earning capacity encountered as a result
\end{footnotes}
maintenance is inappropriate, would compensation be converted into an interest in the property, thereby giving rise to a reapportionment.

There are two primary difficulties which arise in the context of assessing an entitlement to compensation. First, how should it be measured? Rather than calculating with mathematical precision the exact value of lost earnings and determining lost future earnings in a manner akin to that applied in negligence cases, it is possible to take a pragmatic approach in determining the impact of the marriage on the spouse’s earning capacity. Second, as Miles has pointed out, it is necessary to place ‘some limit on the legitimate reach of the applicant’s argument for compensation’ since it is not mutual in its nature. Taking on board her proposal, it is suggested that such compensation should be made to a level which does not unduly prejudice the financial position of the respondent. Similarly, section 162 provides that in determining the amount and duration of spousal support under the Family Law Act 2011, the conditions, means, needs and other circumstances of each spouse must be considered. While this proposal does advocate the consideration of the conditions and means of both spouses in determining the quantum and duration of spousal support, the inclusion of ‘need’ as a criterion for consideration is not made here. Finally, a reapportionment based on the compensation principle may affect family assets or quasi-family assets only. Business assets (which are not re-categorised as quasi-family assets) and other assets shall not be subject to division unless such division is required in order to meet the needs of the children and such needs have not been met through the division and/or reapportionment of the community fund.

e) Allocation of Assets

of making such contributions. This proposal would eradicate this issue. Further, it is not proposed a former spouse should possess an entitlement to future earnings.

Perhaps, due to the lack of financial resources as compared to property resources or the possibility of non-compliance.

Miles does note: ‘One potential disadvantage of giving greater prominence to compensatory principles is that calculating losses sustained and/or relevant gains acquired by each party and ascertaining their causes may be more problematic and time-consuming than the current focus on the parties’ budgets and the most practical way of meeting them ... But any such increased costs might ... to some extent be offset by the increased certainty accompanying the clearer sense of what the courts were seeking to achieve.’ See ‘Principle or Pragmatism in Ancillary Relief’ (n 11) 256. See also Parkinson, ‘Reforming the Law of Family Property’ (n 20).

‘Charman v Charman’ (n 63), 390. Noting the apparent neglect of a compensation principle for the respondent’s interests, Miles adds: ‘The need principle seems eminently fair because of its mutuality: the needs of both parties are examined and the court does its best to meet them all, so far as the assets permit. Equal sharing has a self-evident mutuality. Not so - at first sight - the compensation principle’.

Miles is of the view that the compensation principle should not be applied if its application would ‘unduly depreciate the financial position of the respondent relative to that of the applicant, viewed in the round’. ibid 391-392. She added: ‘We are not dealing here with an applicant who can complain of having suffered from the depredations of the respondent. The applicant’s sacrifice was a product of the parties’ partnership in life, where they made decisions together about work and family responsibilities. She cannot therefore claim full compensation for past and future earnings, pension and earning capacity losses, regardless of how that would impact on the respondent ... The focus should therefore be on ensuring that the ongoing economic impact of the applicant’s career sacrifice is shared between the parties.’ See also Law Commission for England and Wales, Cohabitation: The Financial Consequences of Relationship Breakdown (Law Com No 307–2007).

However, see below.

The division of excluded property is provided for in limited circumstances under s 96 of the 2011 Act, however, it is not contended such a provision would be necessary in these proposals.
Once the community fund is established and the fixed entitlements are applied or a reapportionment is granted, it is then necessary to determine how the actual assets are divided and to whom the family home, for instance, is allocated. In this regard, it is highly possible a dispute may arise. It is submitted, therefore, that the court should be empowered to resolve such disputes and, to this end, the first priority ought to be the needs of the family.\footnote{To the extent that effect is given to entitlements, Miles did feel need was a relevant consideration: ‘Whilst the needs of the adult parties ought not ... to provide the basis for an award, such needs may be taken into account when deciding how to implement an award made on entitlement/compensation grounds, for example in allocating certain items of property to one or other party. More difficult and controversial is consideration of adult needs as a basis for postponing the implementation of equal sharing; this ought arguably not to be a legitimate consideration ... However, the other, vitally important needs-based factor that inevitably and properly encroaches on satisfaction of the adult parties’ claims is the needs of children of the family.’ See ‘Principle or Pragmatism in Ancillary Relief’ (n 11) 253. See above 204, however, as she felt the needs of children of the family could be relevant in this regard.}

In supporting a form of deferred community of property, Buckley notes, ‘The most worrying issue relates to children, as an equal division of assets may preclude the retention of the family home by the primary carer’.\footnote{‘Matrimonial Property and Irish Law: A Case for Community’ (n 7) 74. She felt a deferral of the sale of the family home under her proposals would have theoretical and practical ramifications. Any such difficulties in this proposal are dealt with below.} To avoid this injustice, it is submitted that the powers currently vested in the Irish judiciary, including the power to grant exclusive occupation of the home and defer the sale of the home, should continue.\footnote{Where the spouse is entitled to the full value of the family home and it is allocated in satisfaction of that entitlement, no order for exclusive occupation or order for the deferral of sale is required.} However, where such an order is made, it should be considered in full or partial satisfaction of the recipient spouse’s entitlements under the proposal.\footnote{In order to ensure an accurate valuation of the benefit arising from the order, actuarial calculations would have to take place.} It is submitted this would represent a practical and viable method of allocating assets on marital breakdown and would accord with the apparent popularity of such orders in Irish courts as noted in Chapter 4.\footnote{As a clean break principle does not apply in Ireland, such ongoing maintenance would be acceptable.}

Unfortunately, however, despite its strengths such a solution is not without its own difficulties. It has been pointed out that such a postponement of sale could just delay injustice in circumstances where childcare responsibilities have had seriously negative consequences for the earning capacity of the dependant parent who is the primary carer of the children.\footnote{ibid 36 notes that 50% of the net equity might not be sufficient to save such a spouse from poverty. A similar point about the risk of poverty was alluded to by Eekeaar in ‘Asset Distribution on Divorce – Time and Property’ (n 139).} Nevertheless, under these proposals such claims would be met by spousal maintenance.\footnote{In addition, the provision of powers allowing for the deferral of sale and subsequent equal sharing also proved to be very popular amongst the respondents to the survey conducted in Cooke, Barlow and Callus, \textit{Community of Property: A regime for England and Wales?} (n 59), albeit in relation to England and Wales. It was noted at 35-36: ‘People in our sample found the principled egalitarian approach which equal sharing on divorce/relationship breakdown offers very attractive, particularly when combined with a Mesher order [an order that the house remains unsold until all children have finished full time education] which keeps the children in their own home during their childhood’. At 33 it was noted, ‘there was a reassuring near-consensus that the provision of a home for the children and their carer should take precedence over all other considerations’.} Another criticism of such an approach is that it requires a court application to secure such protection for the family home. There is no easy solution
to this issue. Perhaps the best defence is that at present court action is required for all applications and a spouse possesses neither a pre-defined share nor a right to the family home. As this proposal does provide a fixed right to a share of the home, it arguably strengthens an applicant’s case for a special order relating to the asset. Moreover, the inclusion of a welfare objective in this regard ought, in theory, to ensure a clear line of authority emerging from the courts which would in turn lend itself to facilitating separation agreements and post-separation arrangements for the family home.

f) Miscellaneous Provisions

A number of further miscellaneous issues must be addressed in such a proposal. First, it is submitted, as in British Columbia, a limitation period of two years for applications for reapportionment should be retained vis-à-vis property division. While this would introduce an element of clean break into Irish law, the proposal would ensure that ongoing obligations are met through spousal maintenance. No time limit would apply to claiming the presumptive equal share however. Second, it is submitted the proposal would not just apply prospectively to couples who marry after the introduction into effect of the legislation, but also to couples who are already married.

Third, it is necessary to consider the liability consequences of this proposal. Following the recommendations of the 2010 White Paper, the Family Law Act 2011 now provides for equal sharing of family debts. On initial analysis, it seems reasonable and quid pro quo that where assets are subject to fixed rules of division, debts should equally be divided. However, considered from a

166 The time limits on applications regarding property are included in the definition of spouse under s 1 of the Family Relations Act 1996 and are contained under s 198(2) of the Family Law Act 2011.
167 A similar point is made by Buckley, ‘Matrimonial Property and Irish Law: A Case for Community’ (n 7) 74-75. In fact, it is submitted that the current situation regarding the lack of clean break could come under considerable pressure for reform due to the growth in second families. At the moment, property adjustments cannot be made in favour of a remarried spouse but they can be made against a remarried spouse. Rheinstein noted, ‘As the view that dissolution of a marriage should clear the way for establishment of a new family gains ground, the tendency to eliminate as much as possible future obligations between ex-spouses also increases in strength’. See (n 7) 425. It is contended that this is an issue which is likely to gain ground in Ireland as the longer term effects of divorce become apparent.
Coulter’s study suggests that couples prefer a clean break instead of maintenance and that this can be achieved by awarding a disproportionate share of the home in lieu of maintenance see, Courts Service, Family Law Matters (n 14) vol 1(1) 27. This could be achieved perhaps in a settlement between the parties themselves.
A desire for clean break was also noted in Frank Martin, ‘From Prohibition to Approval: The Limitations of the “No Clean Break” Divorce Regime in the Republic of Ireland’ (2002) 16 Int’l JL Pol & Fam 223. Therefore, while the proposal appears to go against the natural preference of separating couples, it is submitted it is necessary to consider the issue of compensation under a heading other than property division while retaining the possibility of converting such compensation into an interest in property where necessary.
168 It is submitted such provisions could be introduced without constitutional question, see below 217.
169 See above, 194. In general, this aspect of matrimonial property law has generated relatively little discussion. However, see Andrea Finney, ‘The Role of Personal Relationships in Borrowing, Saving and Over-indebtedness: A Life-course Perspective’ in Jo Miles and Rebecca Probert (eds), Sharing Lives, Dividing Assets (Hart Publishing 2009).
different point of view, such sharing of debt seems manifestly unjust.\textsuperscript{170} Since the financially weaker spouse does not have an interest in the other spouse’s assets, they would not have the credit rating in order to build up considerable debt. By contrast, the owning spouse can rely on the property they own to secure significant credit. Therefore, the ability to access credit and generate debt is not equally shared.\textsuperscript{172} Indeed, further weaknesses in this development of the law can be seen. First, the division of debt often only serves to benefit a creditor who would otherwise have only one person to claim from. Second, it seems wrong that where one spouse is already in a financially weak position, they are then burdened with the debt incurred by the other. Third, the inclusion of family debt in the 2011 Act has also warranted the extension of factors for reappportionment to include factors related to the reappportionment of debt. It is submitted such an approach is likely to give rise to considerable litigation in circumstances where the entire premise of the Act is the reduction of discretion and litigation. Consequently, in these proposals it is argued that each spouse would remain exclusively liable for his or her debts from their own separate property. Upon the occurrence of a triggering event, while there may be less in the community fund after the debts are paid, the separate property of the non-debtor spouse would not be liable for the other spouse’s debts.

Fourth, akin to other systems based on a fixed rule, it would be important to allow spouses to opt out of this deferred community of property where independent legal advice is obtained.\textsuperscript{172} Where such an opt out is availed of, the current equitable redistribution regime would once again come into play to ensure proper provision is made for the dependent spouse.\textsuperscript{173}

\textsuperscript{170} Moreover, the qualitative Nuffield foundation research showed that respondents were largely not in favour of the sharing of debts. See Cooke, Barlow and Callus, Community of Property: A regime for England and Wales? (n 59).

\textsuperscript{171} Indeed, referring to immediate community of property regimes, Cooke notes ‘the availability of property as a source of credit is one of the objectives of community of property ... it gives [the economically weaker spouse] a credit rating which [they] would otherwise not have’. See ‘Community of Property, Joint Ownership, and the Family Home’ (n 67) 45.

\textsuperscript{172} Buckley also advocates the introduction of a system whereby people can contract out of a deferred community of property, see ‘Matrimonial Property and Irish Law: A Case for Community’ (n 7) 72. An opt out clause is already in place in Irish matrimonial property law as it is possible to opt out of an entitlement to the legal right share.

\textsuperscript{173} This is because the constitution requires ‘proper provision’ to be made before a decree of divorce can be granted. A situation where an opt out would free separation agreements from the eyes of the court would, therefore, be unconstitutional. It is also imperative that sooner rather than later, legislative status is afforded to pre-nuptial agreements. Crowley is strongly in favour of such a move, see Louise Crowley, ‘Pre-Nuptial Agreements–Have They Any Place in Irish Family Law?’ (2002) 1 IJFL 3. Furthermore, as Rheinstein states, ‘Even those to whom divorce still appears deplorable must see that it is no longer rare and that its incidence cannot be reduced by legal non-recognition of contracts regulating the consequences in advance.’ See (n 7) 435. Even if deferred community is not introduced, such a change in the law should be forthcoming. Rheinstein adds, ‘The need for admission of advance contractual regulation clearly exists in jurisdictions with a fixed proportion of property division. But an equal need for recognition exists in jurisdictions that leave property distribution to judicial discretion.’ See also Lucy-Ann Buckley, ‘Ante-nuptial Agreements and “Proper Provision”: An Irish Response to Radmacher v Granatino’ (2011) 14(1) IJFL 3. In England, Professor Barlow and Dr. Smithson, in conjunction with the National Centre for Social Research are currently undertaking a study entitled ‘Exploring Prenuptial Perceptions’ in order to gauge public attitudes to private marital agreements. Moreover, legislation is currently planned to confer legislative recognition on pre-nuptial agreements in Ireland on the basis of the Report of the Study Group on Pre-nuptial Agreements (Presented to the Minister for Justice, Equality and Law Reform, 2007). This reform also emphasizes the need for fixed rules so that people know what they are contracting out of in addition to fully understanding what they are agreeing to.
g) Interaction between Death and Divorce

Finally, the interaction between these proposals and the Succession Act 1965 must be considered. Essentially, the proposal needs to ensure some provision for a spouse while simultaneously preventing them from having two bites of the cherry. Currently in Ireland, one of the key weaknesses in the Irish regime is that despite the obvious link between succession law and family law, neither legislative enactment expressly tackles the effect of judicial separation or divorce on testamentary dispositions to former spouses. While a will is revoked by a subsequent marriage of the testator, unless the will was made in contemplation of the marriage, the issue of what happens if the deceased spouse did not remarry following a divorce has given rise to the potential for serious difficulties. In this regard, Monaghan notes an interesting anomaly.\(^\text{174}\) On one hand, if a man executes a will in which he makes dispositions to his wife but afterwards obtains a decree of divorce and, ultimately, predeceases her without remarrying, since she is no longer his ‘wife’ the inheritance will be deemed invalid. On the other hand, in the same circumstances, if he makes a gift to her by expressly naming her in the will, without referring to her status as his wife, ‘it is certainly arguable that the gift should survive’.\(^\text{175}\)

By contrast, while there might be a lack of legislative consideration in Ireland for all the permutations which arise where family law and succession law intersect on death, British Columbia has, through the Wills, Estate and Succession Act 2009, grappled with these issues and discovered how tricky they can be. The effect of the 2009 Act is to ensure recourse may only be had to one piece of legislation governing family property rights upon the death of one of the spouses. However, the need to ensure all spouses have recourse to some protection while simultaneously preventing a spouse from benefitting from a windfall and being over compensated is a difficult balance to achieve. While, as evident in the case study, the interaction of the Wills, Estate and Succession Act 2009 and the Family Relations Act 1996 has created an obvious lacuna,\(^\text{176}\) progress has been made with the Family Law Act 2011. Under the new 2011 Act, the revised occasion of a triggering event, namely to that of ‘separation’, means that the difficulties which formerly could have arisen where a couple separated but no triggering event had occurred is avoided.\(^\text{177}\)

What approach, then, should be adopted in these proposals? Currently in Ireland, where a divorce or judicial separation is not obtained, but a married couple live separate and apart following a short

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\(^{175}\) Ibid. Monaghan notes, ‘There does not exist a legislative provision to govern such a situation but the courts may choose to interpret such a bequest as being against the intention of a former spouse, now divorced. Perhaps the most recent decision of the court, ie the decree of divorce, may be seen as superseding any previous, connected legal documents. However, this writer submits that such action would represent blatant judicial activism and would constitute a breach of the constitutional requirement of the separation of powers. Rather, as has already occurred in the English Parliament, it is an issue that the Irish legislature will be forced to deal with in order to resolve this problematic scenario.’ She then refers to The Administration of Justice Act 1982 which introduced s 18A to the Wills Act 1837 for England and Wales which sought to address this issue. This section states that unless it appears that there is a contrary intention in the will, a former spouse should be precluded from benefitting from a will made before the marriage was dissolved, without affecting the will in any other way.

\(^{176}\) See above, 175.

\(^{177}\) This should also render the ‘grace period’ provided by the Wills, Estate and Succession Act 2009 effectively obsolete.
marriage, and one or both spouses start a relationship with a new partner which may subsist for many years, the married couple will still be bound by the Succession Act entitling the surviving spouse to the legal right share, share on intestacy or gift under the will. While this may seem harsh, the introduction of a grace period is not proposed due to the inherent possibility of such measures resulting in a surviving spouse receiving no provision on death where no legal formalisation of the separation has occurred. Moreover, the situation is now ameliorated in Ireland and some degree of balance between a spouse and a cohabitant is achieved. To this end, ‘qualifying cohabitants’ may apply under section 194 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 for discretionary provision from the deceased cohabitant’s estate. In line with the constitutional preference for the marital family, however, no order made under this section may affect a surviving spouse’s legal right share.

It is submitted that until the occurrence of a triggering event, spouses will be entitled to avail of the Succession Act 1965. However, once a triggering event occurs, rights arising under the Succession Act cease to apply, unless preserved by a separation agreement. Instead, in such circumstances, the matrimonial property division afforded in this proposal will apply. Moreover, a legislative statement to the effect that gifts are automatically revoked to former spouses in the absence of contrary intention should be included.

5.3.4 Proposal in the Balance

While this proposal based on a deferred community of property would go a long way to improving the position of the financially weaker spouse in Ireland on matrimonial property division, there is no silver bullet to make property division on marital breakdown pain-free. There will still be contention over title to assets, what actually constitutes family assets, the value of assets, whether contributions other than those in the home are sufficient to re-categorise business assets as quasi-family assets. Nevertheless, it is submitted the number of issues which will arise can be limited by

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178 However, s 120(2) of the Succession Act 1965 does provide: ‘A spouse against whom the deceased obtained a decree of divorce a mensa et thoro, a spouse who failed to comply with a decree of restitution of conjugal rights obtained by the deceased and a spouse guilty of desertion which has continued up to the death for two years or more shall be precluded from taking any share in the estate of the deceased as a legal right or on intestacy’ (emphasis added). Moreover, s 120(3) adds, ‘A spouse who was guilty of conduct which justified the deceased in separating and living apart from him shall be deemed to be guilty of desertion within the meaning of sub-s (2)’. For discussion of the concept of desertion, see Alan J. Shatter, Shatter’s Family Law (4th edn Butterworths 1997) para 8.35.


180 S 194(10) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Subject to certain exceptions, a qualified cohabitant cannot apply under this section where the relationship ended two years or more before the death of the deceased.

181 Similarly, albeit seeking to amend the current law, Shatter suggests ‘provision should be made by law for the granting of a decree of divorce to automatically revoke a specific devise or bequest contained in a will made prior to a divorce degree being granted, save where the provision so made in a will expressly states that such devise or bequest is not to be affected by a couple’s marriage being dissolved by a decree of divorce’. See (n 178) 839-840. Shatter explains at 840: ‘In the absence of the law being so reformed, it is inevitable that specific devises or bequests contained in wills made long before divorce proceedings were instituted will take effect many years after a divorce decree has been granted in circumstances in which a testator did not intend to make provision for a surviving divorced spouse but failed to make a new will to take account of the new family circumstances resulting from the granting of a divorce decree.’
effective, detailed legislation, drawing from the strengths inherent in British Columbia’s Family Relations Act as currently enacted and the Family Law Act 2011.

The approach contained in this proposal is vastly superior to the equitable redistribution regime applied under the Irish Family Law Acts. In light of the high degree of settlements in Ireland, the additional predictability would be especially welcome allowing parties to settle their disputes quicker, cheaper and with less acrimony.\(^{182}\) It minimises arbitrary results and, in particular, affords financially weaker spouses much greater bargaining power, empowering them to reach a settlement themselves which would be in line with a judicial pronouncement.\(^{183}\) It is submitted the benefits inherent in the proposal are particularly important in relation to the family home. The provision of an entitlement to a one-half share to family assets in general, and the family home in particular, ensures much more comprehensive protection for financially vulnerable, non-owning spouses than the current regime. Moreover, the empowerment of the court to deal with issues surrounding the allocation of assets, with the needs of the family stated to be the principal consideration, and the continuation of the powers to defer an order for sale or grant order for exclusive occupation, would strengthen further the position of vulnerable, non-owning, spouses vis-à-vis the family home.

5.3.5 Application of the proposal to the case study

Under these proposals, on the initiation of legal proceedings Mrs. Kelly would be entitled to a one-half share of the family home which is currently valued at €180,000 thereby giving her a right to €90,000. Although she made indirect contributions to the family business, because the farm was inherited, she will only have a one-half share of the increase in value of the asset, namely €121,280, thus entitling her to €60,640. A one-half share of the farm machinery increases her share by a further €25,000 while a half share of the family fund adds another €12,500. When combined these interests total €188,140. This will provide Mrs. Kelly with the value of the family home, and €8,000 extra in cash. All in all, the total share which Mrs. Kelly would receive would be 41.23% of the total estate. The issue of compensation for financial losses associated with taking up work in the home would be dealt with by way of spousal maintenance. If the court felt maintenance was inappropriate, perhaps due to lack of liquid assets or the likelihood of default based on past behaviour, they may order a reapportionment instead. Furthermore, if Mr. Kelly was unwilling to agree to a division of the assets premised on Mrs. Kelly receiving the family home, she could make an application to the court who would, in turn, be guided by the accommodation needs of the spouses and the children in determining what way the assets ought to be allocated.

\(^{182}\) The Explanatory Memorandum of the Family Law Reform Bill (No 2), which sought to introduce a presumption of equal sharing in Australia, noted at para 3, ‘This structured approach will enable the parties to predict more accurately the likely outcome of a court resolution of a particular dispute and assist them in their negotiations.’ However, see Dewar, ‘Reducing Discretion in Family Law’ (n 6) who notes that the provision of equal rights does not make people more agreeable necessarily. He suggests that the move away from discretion is precipitated by a desire to reduce cost of family breakdown, both internal to the legal system and external to the state itself or the parties concerned. Another factor he sees is the ‘growing interest in reviving questions of normative or justificatory frameworks governing the rights and obligations of family members to each other’. To this end, he also refers to the ‘growing politicization of family law’.

\(^{183}\) As Sunstein notes, a rule based approach ensures a ‘wide range of judgments about particular cases will occur before the point of application’. See (n 12) 961. After all, on death the legal right share guides will-making, it is submitted a similar need for fixed rules to guide settlement agreements needs to be made in Ireland.
Finally, if, prior to the occurrence of a triggering event, Mr. Kelly dies, Mrs. Kelly retains her rights under the Succession Act 1965 and will take any gift under Mr. Kelly’s will if present, or if not, she would be entitled to two-thirds of the estate on intestacy. However, if his death arises after the occurrence of a triggering event, she will be limited to seeking provision under this proposal and, moreover, would not take the benefit of any gift under the will in the absence of evidence of a contrary intention.

It is submitted such a proposal is vastly superior to the uncertain, discretionary system currently applied under the Irish Family Law Acts. Pursuant to this proposal, Mrs. Kelly is entitled to a share in the home by virtue of her marriage to Mr. Kelly and a share in the business assets thanks to her indirect contributions in the home. Thus both the partnership nature of marriage is recognised and the equal contributions of both spouses, financially and non-financially, are equally rewarded. Mrs. Kelly does not share in the value of the farm when it was inherited as this was unrelated to her contributions, however, the increased value of the farm is divisible. This approach, as well as being philosophically sound, has the advantage of incorporating elements of a clean break approach, at least with regard to property adjustments and succession rights further bolstering the attractiveness of the proposal.

5.4 Is the Introduction of a Deferred Community of Property a Fanciful Idea?

To determine the likelihood of such a proposal being enacted, it is necessary to question why the legislature chose to adopt equitable redistribution in the first place, how attached we are in Ireland to the system at a fundamental level and whether the same reasons which prompted such an approach continue to prevail.\textsuperscript{184}

In answering the first part of this question, it is clear that the introduction of a discretionary regime on marital breakdown has resulted in a clear inconsistency in Irish law. After all, the legal right share introduced by the Succession Act 1965, provided a precedent for a communitarian-like approach to the devolution of assets on the death of a spouse and a clear distaste for discretionary rules was noted on its introduction. Discussing the Succession Bill 1964 in the Dáil, Minister Lenihan stated, ‘no system can be satisfactory which obliges the members of a testator’s family to go to court to obtain what should be theirs as of right.’\textsuperscript{185} Referring to the application of a discretionary regime on death in other jurisdictions, he explained ‘experience shows that different judges tend to take different views of what constitutes a just and reasonable provision.’\textsuperscript{186} He alluded to the ‘anomalous decisions’ which can ‘lessen the effectiveness’ of a system based on discretion.\textsuperscript{187} He made the point that the ‘bringing of legal proceedings is an expensive process’ which most estates can ‘ill afford to bear’,\textsuperscript{188} it is a ‘forbidding, and even a frightening, prospect for many people’\textsuperscript{189} and went on to explain that such an approach would have the potential to cause family disharmony. Why then,

\textsuperscript{184} This section forms part of a paper entitled ‘Deferred Community of Property – Why the Reluctance for Reform?’ which was delivered at the Society of Legal Scholars Annual Conference 2012 in the University of Bristol, September 2012.

\textsuperscript{185} Dáil Deb 2 December 1964, vol 213, col 342.

\textsuperscript{186} ibid col 343.

\textsuperscript{187} ibid.

\textsuperscript{188} ibid col 342.

\textsuperscript{189} ibid col 343.
some thirty years later, did the legislature adopt a regime based on discretion on divorce rather than one based on fixed rules? To answer this question it is necessary to refer to the socio-legal context of the mid-1980s to the mid-1990s.

In particular, as noted above, the government was encountering serious difficulties in seeking to introduce divorce and the public mood was generally against the introduction of any such legal recognition of marital breakdown. While the government was juggling the ‘hot potato’ of divorce, Deputy Shatter, from the opposition benches, introduced a Private Member’s Bill in 1987 which allowed, in arguably the vaguest possible way, for the adjustment of property rights on judicial separation. Despite initial opposition from the Government, the Bill was ultimately adopted and enacted as the Judicial Separation and Family Law Reform Act 1989.

Such an approach based on equitable redistribution ensured that difficult questions such as the value placed on contributions in the home, the importance of equality, the state’s view of marriage and the policy which would underwrite provision on marital breakdown were avoided. The legislation achieved the introduction of judicial separation without scaring the electorate that property would be subject to fixed rules of division on marital breakdown. It could, it appeared, be all things to all people.

Dewar claimed in relation to England and Australia that reliance on discretion arose as there was ‘a belief that it was impossible to frame any explicit normative or justificatory framework for resolving the consequences of divorce, either because there was no consensus for doing so, or because such matters were regarded as private and therefore beyond the reach of legislators’. See ‘Reducing Discretion in Family Law’ (n 6).

It was the first published Private Members Bill to be enacted into law in over 30 years. It was noted of Shatter, ‘he has stirred the Government to act in an area where they were dragging their feet’. See Seanad Deb 1 March 1989, vol 122, col 352 per Senator Ferris. Senator Ross in congratulating Shatter and anybody else who had a hand in the drafting and production of the Bill, added at col 363, ‘I do not feel that so much congratulation is due to the Government side because to my mind their acceptance is reluctant and somewhat grudging. Also, one can say it has been forced upon them. I do not believe such a Bill would have been introduced without Opposition initiative.’ He added, ‘It is significant that this Bill is something [the Government] would rather see swept under the carpet, got through and dispensed with.’ Moreover, at the second reading of the Family Law (Divorce) Bill 1996, it was noted by Deputy Dukes referring to the Judicial Separation Bill which had come before the Irish legislature some years previous: ‘Deputy Shatter and my colleagues sat on a special committee and prevented that Government from emasculating the Bill. It took a lot of parliamentary foot-work and finesse to ensure it was not emasculated by the then Government. The value of that Bill is eloquently illustrated in many of the provisions in the Bill before us [ie the 1996 Bill].’ See Dáil Deb 27 June 1996, vol 467, col 1951. It was clearly a very politically sensitive issue and that undoubtedly influenced the cautious approach of the Irish legislature in adopting a system based on equitable redistribution.

From a land owner’s perspective, the absence of fixed rules based on equal sharing meant they were appeased their property would not necessarily be divided with their spouse on divorce. From the point of view of campaigners who felt economically weaker spouses would not be sufficiently cared for, they were appeased by the fact that ‘proper provision’ would be made and this could be even in excess of equal sharing. Indeed, Ward noted: ‘It is ironic to recall the central role which the issue of property played in the 1986 referendum ... The anti-divorce lobby argued that the introduction of divorce would ultimately threaten the integrity of the family farm as the courts would inevitably be given power to distribute property as they saw fit. The image of the disintegration of holdings which have passed intact through generations proved to be quite an emotive one.’ See Peter Ward, Divorce in Ireland, Who should bear the cost? (Cork University Press 1993) 26-27. See also Jenny Burley and Francis Regan, ‘Divorce in Ireland: The Fear, The Floodgates and The Reality’ (2002) 16(2) Int’l JL Pol & Fam 202.
Although, perhaps, it could be argued the door was ajar on the repeal of the 1989 Act and the introduction of the Family Law Acts 1995 and 1996 to give effect to egalitarian principles, the reality was such a possibility was unlikely. Forgoing the opportunity to introduce a communitarian regime or more meaningful reform on the basis of fixed rules, it is submitted the choice of a regime based on equitable redistribution, replicating the 1989 Act was simply pragmatic. While the 1995 Act was introduced prior to divorce, the 1996 Act was also released in a Bill format in the run up to the constitutional referendum to show the direction the legislature intended to take if the referendum passed. A conservative, ambiguous, approach to the issue of property rights on marital breakdown was, therefore, politically expedient at the time. Choosing to pass the thorny issue of matrimonial property division onto the judiciary and making sure to give them the widest possible latitude to do what they thought was necessary to ensure ‘proper provision’, was the most practical method of dealing with matrimonial property without drawing the ire of a public who were none-too-keen on the prospect of legislating for divorce in the first place. Moreover, in light of the failure of the Matrimonial Home Bill 1993, there was a fear that any general rule of fixed application would be constitutionally challenged. Furthermore, even if it was not challenged and was constitutionally secure, doubts could easily be raised in the minds of the public by opponents of the referendum and the debate could pose a distraction from the substantive issue of divorce itself. A system based on equitable redistribution appeared to pose no such difficulties.

Today, these arguments hold little currency. Divorce and judicial separation are widely accepted across the country and the socio-legal context which was so influential in the development of the

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193 Indeed Minister Taylor, Minister for Equality and Law Reform on the second reading of the Family Law Bill 1994, noted: ‘The purpose of the Family Law Bill is to consolidate those important ancillary provisions in Part II of the 1989 judicial separation Act concerning maintenance and property orders’. See Dáil Deb 23 March 1994, vol 440, cols 1103. ‘However’, he added, ‘the Bill goes much further in that it introduced a range of new provisions.’ These included the automatic attachment of earnings in certain circumstances where periodic payments are ordered, new provisions relating to financial compensation orders and pension adjustment orders.

194 In a comment which could equally be applicable to the Irish scene, the Scottish Law Commission noted the ‘serious disadvantage’ of having discretion without objectives condemning it as ‘an abdication of responsibility by Parliament in favour of the judiciary … [and] also an abdication of all collective responsibility in favour of the conscience of the single judge.’ See Scottish Law Commission, Report on Aliment and Financial Provision (Scot Law Com No 67–1981) para 3.37. Similarly, Parkinson observed, ‘The approach to legislative drafting of giving the trial judge factors to consider is a useful one, as long as it does not represent the Parliament’s abdication of responsibility for setting policy.’ See ‘The Yardstick of Equality: Assessing Contributions in Australia and England’ (n 39) 166. He added, ‘the conferral of a broad discretion on judges can at times be used by legislatures to avoid deciding what values and priorities should be given precedence in making decisions in controversial areas. The division of matrimonial property is one area in which the gains of matrimonial property reform for one constituency of voters is likely to be matched by a corresponding loss for another constituency. Politically speaking, it is a zero sum game. The conferral of a broad discretion on judges then becomes a convenient way of shifting responsibility for hard policy choices by delegating that responsibility to the courts.’

195 Deputy Ahern alluded to the concern regarding the constitutionality of the 1994 Bill in light of the failure of the Matrimonial Home Bill 1993 noting, ‘if the Bill is passed, it must be capable of withstanding any challenge to its constitutionality … I strongly urge the Minister to consult as widely as possible among constitutional and family lawyers so that any necessary amendments may be made on Committee Stage.’ See Dáil Deb (n 193) Col 154 – 156.

196 Dewar points out though that reliance on discretion has concealed ‘the lack of public consensus over basic terms on which the law should intervene in personal relationships. This is partly because such consensus was
legislation in the 1980s and 1990s no longer exists. However, there still appears to be a reluctance to embrace principles of equality on marital breakdown. Unlike England and Wales, there is no indication from the Irish judiciary that communitarian principles are present in judicial reasoning or a community system of equal sharing will be introduced through the courts. Nevertheless, while the judiciary may be reluctant to fetter its power with the development of any principles, it is clear from the legislative scheme that the Irish matrimonial property regime already possesses several core characteristics of a community regime, particularly well illustrated by the Family Home Protection Act 1976 and the legal right share conferred by the Succession Act 1965.

Although the impetus for their introduction may have been support/protection based, the overall effect is no doubt to incorporate communitarian principles to a greater or lesser extent inter vivos and on death. Moreover, although it subsequently fell at the constitutional hurdle, the introduction of the Matrimonial Home Bill 1993 followed much apparent support for a system of communitarianism in the Irish legislature and, as Buckley notes, the Bill was ‘specifically predicated on partnership ideals’, effectively attempting to introduce a statutory community property regime, albeit limited to the matrimonial home and chattels. It is submitted it is now time to complete the circle and implement such a system on marital breakdown. Indeed, as evident in the recent Nuffield Foundation study, albeit in relation to England and Wales, popular support for sharing continues to exist. It notes, ‘the intuitive appeal of automatic joint ownership remains very strong for married couples’. Although automatic joint ownership is not under discussion here, the findings are nonetheless a heavy nod towards support for sharing. Anecdotal evidence suggests

197 Shannon cites a study carried out by the Irish Times indicating that if the referendum on divorce were to take place now, 75% of people would support it. See ‘Editorial’ (n 9).
198 There have been some nods to this effect but the overall trend from the higher courts is not in this way.
199 This could be due to the judiciary’s distaste of equal sharing; a desire to retain as much freedom as possible without laying down a principle which might subsequently fetter the exercise of their discretion; evidence of judicial conservatism; or, simply, the result of the restrictions imposed by the legislation on the judiciary, see above.
200 “Proper Provision” and “Property Division”: Partnership in Irish Matrimonial Property Law in the wake of T v T’ (n 37). However, s 7 of the 1993 Bill permitted a married couple or a couple contemplating marriage to opt out or exclude the application of s 4.
201 The introduction of some form of community property was first mooted with the Succession Act 1965 and subsequently reiterated by the Report of the Commission on the Status of Women (Stationary Office 1972) 175. The desirability of a regime founded on a community of property was stated again in the Report of the Second Commission on the Status of Women (n 72). Nor was the Matrimonial Home Bill 1993 considered the end of the reforming process. Going even further, Senator Gallagher explained the 1993 Bill was considered by the Commission and the Minister as ‘a first step in providing a suitable régime of marital property’, see Seanad Deb 27 October 1993, vol 137, col 1539. The protection of the matrimonial home was, she noted at col 1540, a ‘matter of priority’ in this regard.
203 ibid 23.
similar results would be achieved in Ireland. After all, the Matrimonial Home Bill 1993 was premised on equal sharing within marriage and received widespread popular support.  

It is contended that not only would the introduction of a deferred community of property regime be acceptable in the Ireland of 2012, but it is necessary to cure the ills which have come to seriously reduce the functional usefulness of a system based on discretion. In particular, it is submitted that the presence of such a high level of settlements should act as a ‘game-changer’ in terms of assessing the appropriateness of a discretionary regime. It is widely accepted that settlements should take place in the shadow of the law. However, as Dewar points out, ‘the law’s shadow needs to be well defined if private agreement is to be feasible’.  

Due to the lack of predictability in the operation of the Irish regime, no such definition exists. The provision of fixed entitlements would be a great improvement in protecting vulnerable spouses in this regard.

Finally, while the fear of constitutional challenge is no longer the debilitating force it arguably once was, it is still necessary to determine whether such a regime, interfering with family assets on a fixed basis, would fall foul of a constitutional referral under Article 26. First, as ‘proper provision’ is a pre-condition to the granting of a decree of divorce, would it be necessary to have a constitutional amendment in order to facilitate a scheme of ancillary relief based on these proposals? It is submitted it would not. These proposals, through the application of principles based on equal sharing and compensation, would, in fact, more effectively meet the constitutional imperative for ‘proper provision’ than the current regime based on equitable redistribution despite no longer placing such provision as the explicit objective.

Second, considering the constitutional ramifications of the Family Law Bill 1994, McDowell contended:

‘There is plenty of room, without in any way infringing the view of the Supreme Court in the Matrimonial Home Bill case, to reverse the effect of the Supreme Court decision in L v L and to provide that a woman, but a spouse in general, can earn an equity in the family home simply by performing the role of partner within a marriage. I do not see any reason that should not be done. As long as it is done on a basis that enables the Judiciary on a case by case basis to evaluate the contribution I do not see any constitutional infirmity with such a proposition.’

Does this imply, therefore, that there may be constitutional issues in applying fixed rule on divorce? It is argued that such an interpretation may be unduly pessimistic. While it has been suggested that

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204 While there may be reluctance in some sectors such as the farming community, the primary fears driving this scepticism would be allayed by the provision of legal status to pre-nuptial agreements. In any case, despite being portrayed as a lesser evil than fixed rules, in reality the current regime possesses the power to be even more intrusive than the provision of equal sharing.


206 Article 26.1.1° states: ‘The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.’

207 Dáil Deb (n 193) col 1097-1098 (emphasis added).
issues regarding the separation of powers could arise if the role of the judiciary is removed, it is submitted in adopting an approach based on the British Columbian model, the role of the judiciary would not be eliminated but rather reduced to circumstances where an application for reapportionment is sought.

Third, could the imposition of a fixed rule of property division on divorce be deemed an unjustified attack on the property rights of a wealthier spouse? Again, it is submitted such a proposition cannot survive scrutiny. Under the current regime, the property rights of a wealthier spouse are arguably much more subject to attack with all property up for grabs and no limitation on the judiciary as to what inroads would be made on them. Therefore, it is suggested the introduction of a deferred community of property would not be repugnant to the constitution and would instead represent the culmination of the current legislative enactments which already incorporate communitarian principles to a greater or lesser degree.

5.5 Conclusion

It is clear from the above critique that there are clear shortcomings in the discretionary approach to matrimonial property division applied in Ireland under the Family Law Acts 1995 and 1996. At a practical level, it is clear the need for greater foreseeability and consistency is particularly pressing. As Professor Cooke explains:

‘[I]t is particularly important that the principles of ancillary relief be clear enough to be operated without recourse to litigation. In particular, the answer to a given problem should not depend upon the perceptions of an individual judge, but should rest on factors which individuals can work out for themselves, or with help from mediators and lawyers.’

She adds:

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208 See Crowley, ‘Equal versus Equitable Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part II’ (n 34).
209 Shatter (n 178) noted at 839 that in light of the failure of the 1993 Bill: ‘It is, of course, clear from the Supreme Court’s judgment that no future legislation can be enacted to interfere with the ownership arrangements of existing homes so as to provide for any homes currently held in the sole name of a spouse to automatically vest in the joint names of both spouses. Such legislation would require a constitutional referendum to amend Article 41 and possibly also Article 43.’ However presumably these comments were only intended to apply to immediate co-ownership and do not apply to the proposals at hand which are based on a deferred community of property.
210 This view is supported by Buckley, see ‘Matrimonial Property and Irish Law: A Case for Community’ (n 7) 59. In the Dáil, O’Donnell noted: ‘Much reliance was placed on the decision in L & L, where (citation omitted) it was stated that anything that would help to encourage that basis of full sharing in property values as well as every other way between the partners in a marriage must directly contribute to the stability of the marriage, the institution of the family and the common good … In other words, they upheld the fundamental principle, which was a good one and had the support of the House, that to help and support the notion of an equal partnership in marriage is supportive of marriage but because it was mandatory and interfered in decisions entered into by the spouses it was not reasonably proportionate … I got a clear signal from that judgment that they were not blowing the fundamental principle of joint ownership out of the water but that the Bill, as framed, was too expensive [sic].’ See Dáil Deb (n 77) col 183.
211 ‘Miller/McFarlane: Law in Search of Discrimination’ (n 1) 98.
'Far too high a value is being placed upon the supposed ability to do individual justice, and insufficient value on predictability. The cost, to divorcing couples, of flexibility must be greater than the cost of clear principle. This is so even if settling for a clear principle, or hierarchy of principles, means that in some cases the solution produced for an individual is less than ideal.'

The argument in favour of the introduction of reform based on fixed rules was also expressed succinctly by Brake who noted, 'as a practical matter, it achieves more desirable results in the vast majority of cases, while minimising the expenses involved in dividing property.'

What we in Ireland need are a priori declarations about the rights and responsibilities to which marriage give rise. In this regard, a more standardised regime is clearly preferable to the discretionary, individualistic, justice which currently prevails but which is, in reality, enjoyed by a very limited proportion of separating couples. It is contended the proposal contained in this chapter, based on fixed rules with the possibility of reapportionment rectifies these shortcomings. After all, as Rheinstein points out, 'In the run-of-the-mill case the parties will know that the partition will be equal and that litigation about the proportions would be futile.'

In particular, the protections afforded to the family home by this proposal ought not to be underestimated. The importance of affording spouses a pre-defined entitlement to a share of family assets in general, and the family home in particular, is particularly vital. Affording financially vulnerable, non-owning, spouses such an entitlement vis-à-vis the family home as opposed to discretionary ancillary relief creates a protective shield for such spouses. However, the provisions outlined above go further in providing protection for the home. The inclusion of a right to apply to the court in relation to the allocation of property, empowering the court to make exclusive occupation orders and orders for deferral of the sale of the family home, and the prioritisation of the needs of the family in the exercise of this judicial discretion, combines to create a powerful matrix in the protection in the premises, most notably for non-owning spouses. The benefits inherent in the introduction of such a regime would, therefore, undoubtedly provide such spouses with vastly superior protection vis-à-vis the family home than that currently afforded by the Irish Family Law Acts.

However, the argument could be made that our system simply needs more time to develop and, at this point, such proposals for change are a step too far. Coulter argues:

‘Given the state of our knowledge of the workings of family law in Ireland, there is little empirical knowledge on which to base an analysis of its impact on the family and wider society. Work like that of Eekelaar, Dewar and others in the British and Australian context is

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212 ibid 106. Referring to ancillary relief on the breakdown of cohabitant relationships, the Law Commission for England and Wales in Cohabitation: The Financial Consequences of Relationship Breakdown (n 156) para 4.3 noted, ‘Results must be predictable, not with mathematical precision but with some degree of confidence.’ It continued at para 4.16, ‘We regard it as particularly important that the court should not be presented with a “menu” that simply invites the judge to “have regard to” a wide range of considerations without any prioritisation in deciding what relief is appropriate to the circumstances of the case.’

213 (n 4) 763. He also noted at 773-774: ‘If one wishes to provide both spouses with an interest in the results of the gainful activity of the marriage, it is unproductive to subject those interests to a game of chance.’

214 Rheinstein (n 7) 435.
while far off. It is necessary first to establish what type of decisions are made in order to
attempt to discern what patterns, if any, exist, what premises they are based on, whether
these need to be challenged and whether the law needs to be changed.\footnote{215}

While more empirical work would certainly add to discussions in relation to this area of law, it is
questionable whether we should in fact sit tight and wait for more information to emerge before
challenging the regime as it currently exists. Even allowing for the introduction of section 40 of the
2004 Act, Buckley noted, \textit{it may be some time before case reporting reaches a sufficient level to
permit in-depth quantitative analysis}.\footnote{216} Indeed, the fact that the information is not readily available
some 23 years after the first introduction of a system of equitable redistribution under the Judicial
Separation and Family Law Reform Act 1989 is a damming indictment in itself. Moreover, whether
the increase in reporting actually provides us with more clarity is questionable. Durcan SC suggested
that there is, in fact, more confusion nowadays than even existed immediately after the enactment
of the 1996 Act.\footnote{217}

Nevertheless, the conservative leanings of the legal community and familiarity with the current
regime will all weigh in favour of retaining the status quo despite its clear shortcomings for
applicants.\footnote{218} Additionally, such reform would possibly run contrary to the interests of practitioners
as fixed rules may allow many more couples to settle with less legal advice. As Shatter explained:

\begin{quote}
‘The likelihood of a legislative initiative by government to provide for a regime of community
of property in the future is minimal. While a system of community of property is in force in a
variety of forms in a number of States, the practical and legal difficulties involved in
superimposing such a system on a common law jurisdiction in which a regime of
independent property ownership has been in operation for over a hundred years would be
enormous’.\footnote{219}
\end{quote}

\begin{footnotes}
\footnote{215} (n 9) 20.
\footnote{216} ‘Irish Matrimonial Property Division in Practice: A Case Study’ (n 47) 49.
\footnote{217} See Coulter (n 9) 16 citing Gerry Durcan SC (citation omitted).
\footnote{218} Dewar notes, albeit in relation to Australia, ‘how difficult it can be to change the law in this area, and how
attached family law professionals are to the now traditional technique of wide–ranging judicial discretion’. See
John Dewar, ‘Property and Superannuation Reform in Australia: A Danger Averted, or an Opportunity Missed?’
(2000) 3(1) IJFL 2. Professor Parkinson points out, again in relation to Australia: ‘One of the main obstacles to
reform is that so many practising family lawyers are now comfortable with the present approach, believe it is
tolerably predictable and will be resistant to change. It is often said that experienced family lawyers can
predict what the outcome of a case is likely to be within a certain range and advise their clients about
settlement accordingly. However, the law needs to be clear enough for inexperienced lawyers to understand
as well ... Practising family lawyers are only one of the constituencies affected by the law of family property,
and it would be a pity if conservatism within vocal elements of this constituency became an obstacle to
reform.’ See ‘Reforming the Law of Family Property’ (n 20).
\footnote{219} (n 178) 836. However, these comments were directed at the \textit{Report of the Second Commission on the Status
of Women} (n 72) seeking an automatic joint ownership of family home. Crowley also notes her doubts over the
development of the law in this way: ‘The incorporation of a rule of equal division is unlikely; such a rigid
approach would be regarded as excessively strict and would greatly encroach on the powers of the judges who
traditionally have played a very influential role in the area of Irish family law’. See ‘Equal versus Equitable
Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part II’ (n 34).
She, therefore, recommended ‘clarification of the underlying principles and policy aims of divorce legislation
\end{footnotes}
Shatter now holds the ministerial portfolio for justice and defence, making it highly unlikely that the present Government will undertake any major reform in this area. However, it is strongly contended that such reform is required. As Buckley noted in 2002, ‘To date, the focus in Ireland has been on ameliorating existing rules, rather than on revising the nature of the system itself – on remedying individual instances of injustice, rather than on providing a prescription for the just ownership of marital property.’ The aim of this chapter was to provide such a prescription for the just ownership of marital property. It is submitted the time has come for a comprehensive rethink about how we approach matrimonial property division and the protection of non-owning spouses in the family home on marital breakdown in Ireland. The proposal outlined above based on a deferred community of property which provides considerable protection with regard to the family home ought, therefore, to be afforded serious consideration.

which seeks to fairly redistribute assets’. Again, it is submitted these criticism do not apply to the proposal made in this chapter as provision is made for the exercise of discretion in certain circumstances.

220 The political difficulties of tampering with family law were observed by Maclean and Eekelaar who noted, ‘As society becomes more fluid and more diverse, the chances of creating a new family law which will not offend the private values and expectations of a significant number of potential voters become slimmer and slimmer.’ See Mavis Maclean and John Eekelaar, ‘The Perils of Reforming Family Law and the Increasing Need for Empirical Research, 1980-2008’ in Jo Miles and Rebecca Probert (eds), Sharing Lives, Dividing Assets (Hart Publishing 2009) 26.

Moreover, referring to the Law Commission for England and Wales’ refusal to put ancillary relief reform on its programme for reform Miles notes, ‘there are strong arguments against the Commission conducting such a review: the increasingly politicised and controversial nature of issues relating to marriage and civil partnership; the lack of contemporary, large-scale empirical research into the operation of the current law; and the resource-intensive nature of such a project.’ See ‘Charman v Charman’ (n 63) 394. It is submitted similar obstacles are present in the Irish system.

221 ‘Matrimonial Property and Irish Law: A Case for Community’ (n 7) 71.
Conclusion
The introduction to this thesis opened with a quote from Professor Kahn-Freund and it is appropriate to open the concluding chapter with another quotation from the same author. In 1959, Kahn-Freund observed, ‘The matrimonial home and its contents are, as it were, the material substratum of the matrimonial consortium. We are here at the point where property relations and personal relations become indistinguishable.’ The truth of this statement has not been tarnished by the ravages of time. The home remains of fundamental importance at the ‘material substratum’ of the family. It is for this reason that the protections in place to protect the home must be fit for purpose. Whether, and to what extent, the Irish provisions meet this standard has been teased out in considerable detail in the preceding chapters.

What emerges is that, in certain circumstances, considerable protection is currently afforded to the non-owning spouse in relation to the family home by Irish law. Areas of particular strength include the restrictions against the unilateral disposition of the family home imposed by the Family Home Protection Act 1976 and the provision of the legal right share and the right to appropriate the family home in satisfaction of such a share by the Succession Act 1965. The importance of the automatic conferral of both of these rights should not be taken for granted and represents a key strength of the Irish regime.

Nevertheless, the family home does not always receive such robust protection. Indeed, this thesis demonstrates that the protection afforded to the family home in Ireland is, in fact, quite patchy. A number of weaknesses with significant implications were identified at each stage of the marital relationship. While the successful introduction of the Matrimonial Home Bill 1993 would have strengthened the protection of the family home inter vivos, on death and on divorce thereby eliminating the key weaknesses identified, the Bill was found to be repugnant to the Constitution. It is highly unlikely further efforts to introduce an immediate community of property, whether limited to the family home or otherwise, will be made in the foreseeable future.

Alternative solutions must, therefore, be considered. To this end, the foregoing chapters presented practical and viable methods of strengthening the protections which currently exist inter vivos and on death, as well as formulating an alternative regime to deal with matrimonial property division on marital breakdown. When combined, these proposals for reform would ensure much more comprehensive protection for the family home in Ireland.

One of most worrying shortcomings which emerged in the thesis was the vulnerability of the family home where a judgment mortgage is registered against it. While it is submitted that the result reached in First National Building Society v Ring could be developed on a surer footing under the Land and Conveyancing Law Reform Act 2009 to better protect co-owned family homes, the need to protect homes in the sole-ownership of the debtor spouse requires some legislative tweaking. In particular, amending section 5 of the 1976 Act to remove the requirement to prove a deliberate

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2 In any case, as was noted in Chapter 1, if the Bill was reintroduced with only prospective effect and in conjunction with a reform of the purchase money resulting trust, the protection it would afford would continue to be patchy.

intention to deprive the spouse of their right to reside in the home, as suggested by Shatter, would vastly strengthen the protection afforded by the legislation to non-owning spouses where the registration of a judgment mortgage against the family home is anticipated. While Shatter’s simple yet highly effective recommendation appears to have fallen by the wayside in the 15 years since it was first made, it is hoped its reiteration here will put this sensible and pragmatic fine-tuning of the legislation back on the legislative radar. Moreover, the implementation of the Law Reform Commission’s 2004 proposals in respect of judgment mortgages which would have allowed all interested parties to be heard before an order for sale of the home could be made to enforce a judgment mortgage seems a fair and rational solution to the difficulties presented by the current approach. However, to date, no action has been taken and it is arguable that the legislature views the lacuna in protection afforded to the family home in this respect somewhat benignly in light of its failure to implement the 2004 recommendations in the Land and Conveyancing Law Reform Act 2009. Yet the shortcoming of the law in this respect is very real and poses a considerable danger to the family home. The author has not identified any practical or theoretical impediment to the implementation of the 2004 proposals and, in light of the current economic climate, contends that the reforms ought to be introduced as a matter of priority. Hopefully it will not take a case of grave injustice to prompt legislative action on this front to ensure the continued protection of the family home.

Variations in the level of protection afforded to the family home pursuant to the Succession Act 1965 were also identified. In particular, weaknesses in the application of a fractional share system and in the right to appropriate the family home were highlighted, which have inexplicably escaped detailed discussion in the 50 years since the introduction of the legislation. Novel solutions to these shortcomings were advanced. The incorporation of a system based on a preferential share following a testate or an intestate death, as an alternative to the current legal right share and share on intestacy, has much to recommend it and would provide substantially greater protection for non-owning spouses vis-à-vis the family home. Although it is accepted that an alteration of the law to provide for a preferential share from a testate estate could be viewed in some quarters as an infraction too far on testamentary freedom, it is nonetheless argued that this proposal would not present any greater interference in the testamentary autonomy of the testator than the law as it currently stands in the majority of cases. Instead this innovative approach would further develop and restructure the important fixed rights already afforded by the Succession Act 1965. Providing surviving, non-owning, spouses with the right to a fixed monetary sum, irrespective of the size of the estate, would radically enhance their protection against disinheritance and place them in a much stronger position vis-à-vis the family home on death.

The thesis also made important proposals for reform to combat the weakness which have emerged in relation to the appropriation of a family home on agricultural land. The implementation of these proposals would fill a substantive gap in the legislation as it is currently framed and would, again, enhance the protection afforded to the non-owning spouse where the family home constitutes a farmhouse.

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Finally, this thesis illustrates the precarious position of the family home following a marital breakdown. Although the system of equitable redistribution currently applied affords flexibility to the judiciary to arrive at the best possible solution in the provision of ancillary relief, the justice this provides has been proved to be illusory in light of the high rate of negotiated settlements. Non-owning spouses, in particular, find themselves utterly void of protection and in a very weak bargaining position when reaching a settlement. Even the minority of spouses who do instigate litigation are reliant on the discretion of the court and cannot predict with any degree of certainty what the outcome may be. Property redistribution and the destination of the family home, in particular, ultimately becomes a game of chance.

This thesis has made a strong argument for law reform which reflects the practical reality that most separating couples negotiate the property division without a full court hearing. It argues that the governing legislation needs to be framed in a manner which allows spouses to ‘bargain in the shadow of the law’, a virtual impossibility under the current approach. To this end, the proposal developed here presents an alternative approach which would ensure more effective compliance with the constitutional requirement to make ‘proper provision’ for dependent spouses. By affording spouses fixed rights in the community of assets identified which arise by virtue of marriage and are not dependent on contributions, the proposal gives non-owning spouses much deeper protection vis-à-vis the family home. This protection is further strengthened by the retention of legislative provisions which allow the court to make orders for the exclusive occupation of the asset or a deferral of sale of the home. However, in exercising this discretion it is important that the courts are directed to have regard to the needs of the family. This new regime would create a robust matrix of protection for vulnerable, non-owning spouses in relation to the family home.

In addition, this new regime would better ensure theoretical consistency in the overall scheme of matrimonial property law in Ireland. It is clear from the analysis which has taken place of each of the different phases of a relationship that a veritable patchwork of matrimonial property systems co-exist under Irish law and no single approach prevails throughout. As Buckley explained:

‘[T]he view Irish law takes of marriage, let alone of matrimonial property, is far from clear. Current law appear to demonstrate conflicting understandings and values at different stages of the marital relationship, leading to a complex and inconsistent approach to the issue of marital property.’

The proposal presented here, based on a deferred community of property, would ensure a much more cohesive regime of matrimonial property in Ireland in which marriage gives rise to important property rights through all the stages of a relationship. It would be more compatible with the protection afforded to the family home inter vivos by the Family Home Protection Act and on death

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5 Professor Barlow suggested at the Society of Legal Scholars Conference 2012 that an empirical study evaluating parties satisfaction or dissatisfaction with the settlements they reached would be helpful in this area. However, it is submitted that as people are currently reaching settlements in a vacuum it is not possible to bargain in the shadow of the law. As a result, their satisfaction levels are essentially fortuitous and often perhaps dependent on the characters involved in the settlement, the other spouse and solicitors. In the writer’s opinion, this is unacceptable.

6 Lucy-Ann Buckley, “Proper Provision” and “Property Division”: Partnership in Irish Matrimonial Property Law in the wake of T v T’ (2004) 3 IJFL 9, 8.
by the legal right share and the right to appropriate the family home. Unfortunately, although no serious impediment exists to the introduction of a deferred community of property regime, reform of matrimonial property division does not appear to be on the agenda of the Irish Government.\footnote{Nevertheless, as noted in the introduction, European harmonisation does appear to be looming which may encourage the Government to re-evaluate the current regime sooner or later. Furthermore, as has been noted, if the Government is persuaded to consider a community of property approach, the most likely model is a deferred community property approach.}

Therefore, despite the practical weaknesses in the protection of the family home through the different phases of a marital relationship as highlighted by this thesis, law reform appears to be an unlikely prospect in the immediate future. What then is the value of, or merit in, this research? Faced with a similar dilemma in relation to reform of ancillary provision on divorce in England and Wales, Professor Cooke noted, ‘if reform is not imminent, then we should use the intervening time as an opportunity for research, so that when reform does happen, it will be informed by accurate data.’\footnote{Elizabeth Cooke, ‘The Future for Ancillary Relief’ in Gillian Douglas and Nigel Lowe (eds), \textit{The Continuing Evolution of Family Law} (Jordan Publishing 2009) 219.} This thesis represents the writer’s contribution in this respect. It consists of an in-depth analysis of the protections available to the family home under Irish and British Columbian law highlighting the strengths and weaknesses of both regimes through the different stages of the relationship and presents proposals for reform which are occasionally novel but always considered.

In the aftermath of the failed attempt to introduce the Matrimonial Home Bill 1993, de Londras notes, ‘the need for security within a couple subsists and continues to be left unsatisfied by the law’.\footnote{Fiona de Londras, \textit{Principles of Irish Property Law} (2nd edn Clarus Press 2011) 221.} It is the hope of this writer that sooner rather than later the need to better protect the family home in Ireland will be recognised and that the proposals delivered in this thesis will be taken into consideration.
Bibliography

Books/Articles


– “‘Proper Provision” and “Property Division”: Partnership in Irish Matrimonial Property Law in the wake of T v T’ (2004) 3 IJFL 9


– ‘Ante-nuptial Agreements and “Proper Provision”: an Irish Response to Radmacher v Granatino’ (2011) 14(1) IJFL 3


Casey N and others (eds), Law Society of Ireland Manual: Conveyancing vol 2 (3rd edn OUP 2006)

Coggans N and Jackson S, Family Law (Divorce) Act, 1996 (Sweet and Maxwell 1998)

Conneely S, Family Mediation in Ireland (Ashgate 2002)


-- Co-ownership of Land: Partition Actions and Remedies (2nd edn Bloomsbury 2012)


-- ‘Community of Property, Joint Ownership, and the Family Home’ in Martin Dixon and Gerwyn LL. H. Griffiths (eds), Contemporary Perspectives on Property, Equity and Trusts Law (OUP 2007)

--‘Miller/McFarlane: Law in Search of Discrimination’ (2007) 19 CFLQ 98

-- ‘The Future for Ancillary Relief’ in Gillian Douglas and Nigel Lowe (eds), The Continuing Evolution of Family Law (Jordan Publishing 2009)


Cooney M, ‘Succession and Judicial Discretion in Ireland: The Section 117 Cases’ (1980) 15(1) IJ 62


-- Property Law (2nd edn Gill and Macmillan 1998)

Coulter C, Family Law in Practice: A Study of Cases in the Circuit Court (Clarus Press 2009)

-- ‘Ruling may Affect Financial Entitlements of Ex-spouses’ Irish Times (Dublin, 27 August 2012)

Cretney S M, ‘Reform of Intestacy: The Best we can do?’ (1995) 111 LQR 77

-- ‘Community of Property Introduced by Judicial Discretion’ (2003) 119 LQR 349

Crowley L, ‘Pre-Nuptial Agreements–Have They Any Place in Irish Family Law?’ (2002) 1 IJFL 3

-- ‘Divorce Law in Ireland–Facilitating or Frustrating the Process’ (2004) 16(1) CFLQ 49

-- ‘Equal versus Equitable Division of Marital Assets–What can be learned from the Experiences of Other Jurisdictions? Part I’ (2007) 10(1) IJFL 19

-- ‘Equal versus Equitable Division of Marital Assets–What can be learned from the Experiences of Other Jurisdictions? Part II’ (2007) 10(2) IJFL 12
-- *Family Law* (Thomson Roundhall 2008)


-- ‘Reducing Discretion in Family Law’ (1997) 11 AJFL 309


-- ‘Property and Superannuation Reform in Australia: A Danger Averted, or an Opportunity Missed?’ (2000) 3(1) JFL 2


Eekelaar J, ‘Back to basics and forward into the Unknown’ [2001] Fam Law 30

-- ‘Asset Distribution on Divorce–Time and Property’ [2003] Fam Law 828


Farquhar K B, ‘Section 8 of the Family Relations Act–An Experiment in the Exercise of Judicial Discretion and the Distribution of Matrimonial Property’ (1979) 13 Uni BCL Rev 169

-- ‘Matrimonial Property and the British Columbia Court of Appeal’ (1988) 23(1) Uni of BCL Rev 31


-- ‘Reforming Family Property–Comparisons, Compromises and Common Dimensions’ (2003) 15 CFLQ 1

-- ‘Creditors and the Concept of “Family Home”: A Functional Analysis’ (2005) 25(2) Leg Stud 201


Friedmann W (ed), Matrimonial Property Law (Stevens and Sons 1955)


Gray K and Gray S F, Elements of Land Law (5th edn OUP 2009)


Harvey C, The Law of Dependants’ Relief in Canada (Carswell 1999)

Hitchings E, ‘Chaos or Consistency’ in J. Miles and R. Probert (eds), Sharing Lives, Dividing Assets (Hart Publishing 2009)


Johnston J Jnr., ‘Sex and Property: The Common Law Tradition, the Law School Curriculum and Developments Towards Equality’ (1972) 47 NYUL Rev 1033


-- ‘Matrimonial Property: Some Recent Developments’ (1959) 22(3) Mod L Rev 241
-- ‘Uses and Misuses of Comparative Law’ (1974) 37 Mod L Rev 1
Keating A, Probate Law and Practice (Round Hall 1999)
-- ‘Donationes Mortis Causa in Irish Law’ (2005) 10(3) CPLJ 62
-- Keating on Probate (3rd edn Roundhall 2007)
-- ‘The Valuation Date of an Appropriation by Personal Representatives’ (2011) 16(2) CPLJ 22
-- ‘Wills Made in Contemplation of Marriage or Civil Partnership’ (2012) 17(3) CPLJ 49
Lyall A, Land Law in Ireland (3rd edn Roundhall 2010)
-- ‘Brussels Calling: The Unstoppable Europeanisation of Irish Family Law’ (2006) 9(3) IJFL 8
Maine H, Ancient Law (1875)
McDonald S, ‘Appropriation as a Means of Satisfying the Legal Right Share?’ (1999) 4(3) CPLJ 62
-- ‘Partition and Sale of the Family Home’ (1993) 15 DULJ 78
-- ‘The Husband, The Bank, The Wife and Her Signature’ (1994) 57 MLR 467
-- ‘Family Home–Consents, Guarantees and the “Badge of Shame”’ (1994) 1(1) DULJ 197


-- ‘Judgment Mortgages, Co-ownership and Registered Land’ (1999) 4 CPLJ 28

-- The Property Rights of Cohabitees (Hart Publishing 1999)

-- ‘The End of the Affair–The Equitable Rights of Cohabitees’ (2001) 6(2) CPLJ 43


-- ‘Succession and the Civil Partnership Bill 2009’ (2009) 14(4) CPLJ 86

Meston M C, ‘Succession Rights or Discretion’ (1987) Jur Rev 1

Miles J, ‘Principle or Pragmatism in Ancillary Relief: The Virtues of Flirting with Academic Theories and Other Jurisdictions’ (2005) 19 Int’l JL Pol & Fam 242

-- ‘Charman v Charman (No 4)–Making Sense of Need, Compensation and Equal Sharing after Miller/McFarlane’ (2008) 20 CFLQ 378

-- and Probert R (eds), Sharing Lives, Dividing Assets (Hart Publishing 2009)


Monaghan L, ‘Recent Developments in the Law of Succession’ (1998) 1(2) IJFL 5

Moore E, ‘The Significance of “Home-maker” Contributions upon Divorce’ (2007) 10(1) IJFL 15


Müller-Freienfels W, ‘Family Law and the Law of Succession in Germany’ (1967) 16(2) Int’l & Comp LQ 409


O’Connor P, Key Issues in Irish Family Law (Roundhall 1988)


Preston N, ‘A Lasting Legacy’ (2005) 155 NULJ 1594


Reid D, ‘From the Cradle to the Grave: Politics, Families and Inheritance Law’ (2008) 12 Edin LR 391

Rheinstein M, ‘Division of Marital Property’ (1976) 12 Williamette LJ 413

Rhys E (ed) Ancient Law (1917)

Ryan K W, An Introduction to Civil Law (Law Book Company of Australasia 1962)

Sanfey M, ‘Consenting Adults: The Implications of Bank of Ireland v Smyth’ (1996) CLP 31


Shannon G, Divorce Law and Practice (Roundhall 2007)
-- ‘Editorial’ (2008) 11(1) IJFL 1


-- ‘Open Sesame for Divorce’ Irish Times (Dublin, 18 February 1997)


Ward P, Divorce in Ireland, Who should bear the cost? (Cork University Press 1993)
-- ‘The Path to Divorce’ (1994) 12 ILT 29
Willis S, ‘Reforming Inheritance Law—Providing for the Non-Marital Family’ (2002) 7(3) CPLJ 58

  -- ‘Unilateral Severance of Joint Tenancies–The Case for Abolition’ (2007) 12(2) CPLJ 47
  -- ‘Property and Trust Law (Irish Monograph)’, International Encyclopaedia of Law Series (Kluwer Law
  2011)


Wylie J C W, ‘An Irish Perspective on Protecting a Non-owning Spouse in the Home’ in Franklin
Meisel and others (eds) Property and Protection: Legal Rights and Restrictions—Essays in Honour of
Brian W. Harvey (Hart Publishing 2000)
  -- Irish Land Law (4th edn Tottel 2010)

Yeates N, ‘Gender, Familism and Housing–Matrimonial property Rights in Ireland’ (1999) 22(6)
Womens Stud Int’l Forum 607


**Reports**

  - **Official State Reports**

Central Statistics Office, Women and Men in Ireland 2011 (Stationery Office 2012)

Central Statistics Office, This is Ireland: Highlights from Census 2011, Part I (Stationery Office 2012)


Department of Justice, Marital Breakdown—A Review and Proposed Changes (PL 9104, 1992)


Report of the Commission on the Status of Women (Stationary Office 1972)


Report of the Joint Oireachtas Committee on Marriage Breakdown (Stationary Office 1985)

  - **European Reports**

Commission, ‘On Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including
the Question of Jurisdiction and Mutual Recognition’ (Green Paper) COM (2006) 400 final

Martin F, ‘Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private
  <www.pedz.uni-mannheim.de/daten/edz-k/gdj/03/ireland_report_en.pdf> accessed 23 June 2012

- Independent Reports


Law Reform Papers

- Australia


- *Canada*


- *England and Wales*


Law Commission for England and Wales, *Intestacy and family provision claims on death* (Law Com No 331–2011)

- *Ireland*


- **Northern Ireland**
  

- **Scotland**
  
  
  

**Parliamentary Debates**

Dáil Deb 11 May 1937, vol 67

Dáil Deb 2 December 1964, vol 213

Dáil Deb 15 December 1964, vol 213

Dáil Deb 25 May 1965, vol 215

Dáil Deb 14 July 1965, vol 59

Dáil Deb 25 May 1976, vol 291

Dáil Deb 23 February 1994, vol 439

Dáil Deb 8 March 1994, vol 440

Dáil Deb 23 March 1994, vol 440

Dáil Deb 27 June 1996, vol 467

Seanad Deb 11 June 1925, vol 5

Seanad Deb 1 July 1976, vol 84

Seanad Deb 1 March 1989, vol 122

Seanad Deb 27 October 1993, vol 137

Select Committee on Legislation and Security Deb 18 May 1994

**Websites**


Courts Service, ‘Statistics’


Permanent TSB/ESRI ‘House Price Index’ <www.permanenttsb.ie/aboutus/housepriceindex/> accessed 3 January 2012