The Right to Appropriate the Family Home – A proposal for reform

By Kathryn O’ Sullivan (PhD, LLB)*

Introduction

Throughout the world the home is considered “a site of major importance in people’s lives”. In addition to its obvious financial importance, representing the single most valuable asset owned by many couples, it may also be of deep emotional and sentimental value to its occupants. As a result, reflecting its social, cultural and financial significance, the family home often receives special legislative protection. Indeed, as Professor Fox-O’Mahony notes:

“The idea that the home ought to attract greater protection because it is a meaningful site for family life is a potent one, since…”

In Ireland, in particular, the family home is the subject of important legislative safeguards. While a marriage subsists, the Family Home Protection Act 1976 places vital restrictions on the unilateral disposition of the home where it is in the sole name of one spouse. Moreover, on judicial separation or divorce, the Family Law Act 1995 and the Family Law (Divorce) Act 1996 empower the judiciary to effect an equitable redistribution of property between spouses with special powers afforded to the courts to deal effectively with the family home. However, arguably the most robust legislative protection for the Irish family home arises under the Irish succession law regime.

Pursuant to the Succession Act 1965, the protection of surviving spouses and the family home is prioritised. Unlike many common law jurisdictions, a system of forced heirship protects surviving spouses against disinheritance: irrespective of whether a will exists or not, section 111 entitles a surviving spouse to a specified portion of the deceased spouse’s estate known as the legal right share. 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. On intestacy, section 67 provides that where an intestate dies leaving a spouse and no children, the surviving spouse is entitled to the whole estate. On the other hand, where an intestate dies leaving a spouse and children, the surviving spouse takes two-thirds of the estate. Moreover, endeavouring to protect surviving, non-owning, spouses in the family home, section 56 of the Succession Act 1965 provides such spouses the right to require the appropriation of the family home in fulfilment of the legal right share, share on intestacy or gift under the will to which they are entitled. The rationale for this protection was explained by the Supreme Court in H v O:

* Lecturer in Law, University of Limerick; email Kathryn.osullivan@ul.ie. The author gratefully acknowledges the helpful comments of Una Woods, University of Limerick on an earlier draft of this paper.
“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.”

Although the legislature may be applauded for introducing such protection for surviving, non-owning, spouses in the family home, the current regime nevertheless harbours important weaknesses. Unfortunately, however, the shortcomings of the Succession Act 1965 have not been subject to an in depth critique to date and, with certain notable exceptions, there appears to be a level of disengagement with the 1965 Act generally among academics. Moreover, bucking the current trend across the common law world, there has been no statutory review of the legislation since its introduction.

It is argued that the provisions of the Succession Act 1965 which seek to protect surviving, non-owning, spouses in the family home following the death of the owner spouse ought in particular to be reviewed to ensure their continued effectiveness. The rights conferred by the Succession Act 1965 on the surviving spouse, including the right to appropriate the family home, remain of paramount importance for many individuals. The common perception that all family homes are now co-owned by both spouses is simply a myth. 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’.”

This article considers the practical effect of the provisions governing the appropriation of the family home in Ireland pursuant to the Succession Act 1965. The difficulties which arise in appropriating a family home which is located on agricultural land are highlighted. The article investigates how these shortcomings could be effectively resolved by legislative reform. Among its proposals for reform, it argues that the introduction of a statutory right of residence in certain circumstances would ameliorate the situation for vulnerable surviving spouses.

**Section 56 of the Succession Act 1965: An overview**

Recognising the importance of the family home, section 56 of the Succession Act 1965 provides 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 property in or towards satisfaction of any gift under the will, legal right share or share on intestacy to which they were entitled. 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.”
The scope of the definition was considered in *Hamilton v Armstrong*.\(^{17}\) Here, O’Hanlon J allowed the appropriation of a home 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.\(^{18}\)

The protection afforded to surviving, non-owning, spouses is bolstered by the fact that the right to require appropriation of a home is not affected by specific devises or bequests disposing of the family home to a third party in a will but may still be invoked even if prejudicial to them.\(^{19}\) Moreover, pursuant to section 56(8)(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. Nevertheless, where it is sold, a surviving spouse cannot rely on section 56 against the new purchaser.

The legislation also includes a number of key provisions endeavouring to ensure the practical effectiveness of right to appropriate the family home. Pursuant to section 56(4), the personal representative has a duty to notify the surviving spouse in writing of the right conferred by the section. Section 56(5)(a) then provides that the surviving spouse 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.\(^ {20}\)

Furthermore, where the share to which the surviving spouse is entitled is less than the value of the home which they seek to appropriate, the Succession Act 1965 affords spouses three possible solutions. First, section 56(9) provides that the surviving spouse may offset the difference in value by making a payment to the estate. Second, section 56(3) provides that if there are infant children, defined as children under 21 years of age, who are entitled to a share in the deceased’s estate, and the surviving spouse is a trustee for them for such shares as they are entitled to, this may be added to the surviving spouse’s share on intestacy, legal right share or gift under the will in order to appropriate the home. If the deceased dies testate, making no provision for their children in their will, the children may apply under section 117 for “proper provision” to be made for them from the estate. Such provision will then be at the discretion of the court\(^ {21}\) who shall consider the application “from the point of view of a prudent and just parent”. In particular, as Finlay CJ held in *CC v WC*, “a positive failure in moral duty” to make “proper provision” must be established.\(^ {22}\)

If successful in their section 117 application, any beneficial share of an infant child, for whom the surviving spouse was appointed trustee, could be added to the surviving spouse’s share to reach the value required to appropriate the home. However, the actual effect on the ownership of the family home, having exercised the section 56(3), is unclear. While the Act is silent on the issue, Spierin argues that where section 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.”\(^ {23}\)

By contrast, however, Brady argues:
“[S]ince 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 section 56.”

The third legislative option to overcome the potential difficulty incurred where the value of the home exceeds the share which the surviving spouse is entitled to receive from the estate, is provided by section 56(10)(b). Pursuant to this section, a surviving spouse may apply to the court to waive the payment due to the hardship which meeting the shortfall would cause. Unfortunately, however, despite the apparent utility of the section, there appears to be a lack of reported judgments arising from applications taken thereunder resulting in higher levels of uncertainty for potential applicants. In addition to the apparent gamble involved in instigating litigation pursuant to section 56(10)(b), financial considerations may also act as a deterrent to potential applicants. Although Elliot v Stamp 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 remains at the discretion of the court. Despite these difficulties, however, it is submitted considerable protection may be provided by the section in an apposite case and it represents a positive addition to the Succession Act 1965.

Notwithstanding the obvious strength of section 56, two important omissions were nevertheless made in its drafting. First, no definition of “appropriation” was included in the 1965 Act. Fortunately, this omission does not appear to have given rise to any serious difficulty or litigation and it is generally considered to refer to the act of devoting or segregating certain property for a particular purpose, person or use. Second, section 56 does not specify the appropriate valuation date of the assets of an estate subject to an appropriation. Nevertheless, this difficulty was recently resolved by the judiciary in the decision of Strong v Holmes. 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.” Holding for the plaintiff, Murphy J noted, “The only operative 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.” 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.”

The most serious weaknesses in relation to the power to appropriate the family home, however, emerge in relation to the restrictions that are placed on the right. It is to these restrictions that we now turn.

Restrictions on the right to appropriate the family home

The Succession Act 1965 places important restrictions on the right to appropriate the family home. Pursuant to section 56(6), these restrictions arise in circumstances:

“(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.”

Section 56(5)(b) then provides that the appropriation of such family homes may 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. Unfortunately, serious difficulties have emerged from the application of these
restrictions, particularly in relation to the appropriation of homes on agricultural land. Indeed,
reflecting on these shortcomings, 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.” Oddly, during the second
stage of the Succession Bill in the Seanad, Minister Lenihan, the then Minister for Justice, stated that
section 56 would apply “mainly” to properties in urban areas. No explanation was given as to why
the Minister felt this would be the case, however the prophecy has proven to be wide of the mark.

A brief analysis of the case law demonstrates the difficulties arising due to these restrictions on
the appropriation of farmhouses. 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 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 key observations in relation to applications for appropriation subject
to the restrictions in section 56. 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.

In the immediate aftermath of the decision in H v H, however, 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 a single unit. The surviving spouse could be paid her legal
right share in cash from the proceeds. The chief 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. 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 the apparent inconsistency, it is arguable that H v O may be distinguished from H v H due to
the severable nature of the plots in the former case. Consequently, it appears that the actual layout
of the farm could be highly influential in whether a claimant is successful in seeking an appropriation
of a farmhouse. Furthermore, it is clear that irrespective of whether a sale is in fact envisioned for
the property or not, if the appropriation of the home would precipitate a fall in the value of the assets of the deceased or render them more difficult to dispose of, an appropriation of the home cannot take place: no alternative exists. Therefore, it is submitted there are serious gaps in the protection afforded by the right of appropriation as it applies to non-owning spouses in family farmhouses and proposals for reform ought to be considered.

**Appropriation of family homes on agricultural land: A proposal for reform**

While legislative provisions specifically restricting the appropriation of dwellings on agricultural land do not appear to exist in all jurisdictions which permit appropriation of the family home, Ireland is not alone in enacting such measures. 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. It is not, therefore, recommended that all restrictions ought to be removed. Nevertheless, it is clear that an outright prohibition on the appropriation of the family home in the circumstances provided by section 56(5)(b), 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 cases where the family home is located on agricultural land represents a further shortcoming in the legislation.

It is proposed that a multifaceted approach ought to 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 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 offset the loss and thereby retain the family home. 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 offset 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 greater 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. 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 may be employed to provide some protection to a surviving, non-owning, spouse. This approach 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. 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 could 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. 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.

It may be argued that the requirement to obtain the consent of the beneficiary undermines the
protection proposed. Indeed, if this proposal for reform was predicated on providing a surviving
spouse with a “right” to appropriate a farmhouse where such an appropriation would diminish the
value of the assets of the deceased (other than the dwelling), or make them more difficult to dispose
of, as per the current restrictions in section 56(5), the inclusion of a consent requirement would
certainly be problematic. However, this proposal does not intend to extend such a “right” to
spouses. Rather, it seeks to replace the existing blanket restriction which applies where the
appropriation of a farmhouse would give rise to either of the eventualities enumerated in section
56(5) with a more nuanced and practical approach. It provides an alternative solution for non-
owning spouses who wish to remain in the family home located on agricultural land while
simultaneously balancing their rights with those entitled to inherit the property. Moreover, to
provide otherwise, could result in an intolerable situation whereby two parties would be forced to
live together against their will.

The introduction of such a regime incorporating a right of residence 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 in appropriating
the family 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. In this regard, Professor Wylie notes rights of residence are “extremely
common” in Ireland for wills and family settlements. Moreover the Family Law Act 1995 and the
Family Law (Divorce) Act 1996 also empower the judiciary to make an order conferring a right of
residence upon judicial separation or divorce which is regularly 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 has been 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 these 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. Despite these concerns, however, it is submitted that much of the confusion surrounding rights of residence has been removed by the Land and Conveyancing Law Reform Act 2009. As a result, it is contended that the modification of the current law could confer a new lease of life on such rights.

Notwithstanding the improvement of the law in light of the 2009 Act, certain ambiguities do nevertheless remain. Lavan J recognised in 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. However, the court granted the plaintiff injunctions restraining the defendant from preventing her from exercising her right to residence. 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”. Despite this, in the recent case of 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. 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.”

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. Therefore, although 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.

Conclusion

The importance attributed to, and the desire to protect, the family home in the Irish Statute books is striking. Notwithstanding the failure of the Matrimonial Home Bill 1993 and its attempted introduction of an automatic system of equitable co-ownership of the family home, considerable legislative protection for the property does nevertheless exist in Ireland. In particular, 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 by virtue of section 56. As Coughlan notes, the provisions governing the appropriation of the home confer “valuable rights on a spouse irrespective of whether the deceased dies testate or intestate.”60 While it is important to recognise the value of these rights, it is equally important to be alert to the shortcomings of the Succession Act 1965 and potential avenues for legislative reform in order to further consolidate the protection afforded to all family homes in Ireland.

To this end, it is argued that the difficulties arising in relation to the appropriation of family homes on agricultural land must be addressed. After all, it is widely accepted that the restrictions included in sections 56(5) and 56(6) “will cover very many dwellings in Ireland”.61 This article has demonstrated how such issues could be more fairly and effectively resolved by legislative reform. In addition to the inclusion of provisions allowing surviving spouses to offset any loss in value caused by an appropriation of the family home, the introduction of a statutory right of residence, providing surviving spouses the opportunity to reside in the home in situations where it would not unduly prejudice the rights of those entitled to inherit the farm, represents a simple yet effective solution to the problems presented by the current application of the 1965 Act. Moreover, the overall effect of the proposals presented here would be to reduce the need for recourse to the courts. While an application to the court could be made to determine a dispute as to whether the appropriation would diminish the value of the land or would render it more difficult to dispose of, 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 afforded to the judiciary.

It is submitted the implementation of these proposals would fill a substantive gap in the legislation as it is currently framed and would considerably enhance the protection afforded to non-owning spouses who wish to appropriate a family home on agricultural land.

---

2 ibid, 203 (citations omitted).
3 The depth of protection afforded to the family home in other jurisdictions is often far shallower than under the Irish regime. For a discussion of the inter vivos protections of the family home against unilateral disposition in Ireland, British Columbia and England and Wales, see this author’s forthcoming article “Protection against Unilateral Dispositions of the Family Home – An Irish Perspective” (2013) 27(3) Int’l J L P & F. Moreover, on death, Ireland is one of the few common law countries which operates a system of forced heirship to prevent disinherance. When combined with the right to appropriate the family home, discussed below, this has the potential to provide considerably greater protection than is available in many common law jurisdictions such as British Columbia and England and Wales which both operate a system of discretionary provision to protect against disinherance.
4 See s 3 of the 1976 Act. S 28 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 extends almost identical restrictions on the unilateral disposition of the family home to civil partners.
5 See s 9 of the 1995 Act and s 14 of the 1996 Act.
6 See s 10 of the 1995 Act and s 15 of the 1996 Act.
7 Article 43.1.2° of Bunreacht na hÉireann provides: “The State ... guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.” However, no constitutional impediment was considered to exist to the introduction of the Succession Act 1965 since its provisions, which afforded considerable succession rights to spouses as discussed below, were introduced in furtherance of the protection of the family and, particularly, widows pursuant to Article 41. For more discussion of the rationale for the succession rights of spouses see this writer’s article, “Spousal Disinheritance Protections under Irish Law: A Proposal for Reform” (2012) 41(3) Comm L W Rev 246.
In many ways the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 brings the legal position of spouses and civil partners closer together with regard to succession rights. For example, s111A of the 1965 Act as inserted by s 81 of the 2010 Act and s 67A of the 1965 Act as inserted by s 73 of the 2010 Act extend similar though less comprehensive rights to civil partners on testacy and intestacy while s 56 of the 1965 Act as amended by s 70 of the 2010 Act extends the right to appropriate the home (discussed in detail below) to civil partners. However, despite appearances, “the succession provisions in relation to civil partners also contain a number of striking departures from equality”, see John Mee, “Succession and the Civil Partnership Bill 2009” (2009) 14(4) CPU 86 (referring to the equivalent provisions of the Act when in Bill stage). For more discussion of the succession provisions applicable to civil partners, see John C.W. Wylie, Irish Land Law (4th edn Tottel 2010) Chapter 14.

This article refers only to the law as it applies to spouses. However, aspects of the proposal for reform advanced below may also be relevant to remedy the weaknesses inherent in the application of the provisions to civil partners.

8 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.

9 [1978] 1 IR 194 at 209, 210 per Henchy J.


12 Proposals for the reform of the protections against spousal disinheritance in Ireland aimed at securing the family home for surviving, non-owning, spouses were discussed by this writer in “Spousal Disinheritance Protections under Irish Law: A Proposal for Reform”, note 7.

13 See ibid which highlights situations which may give rise to a home being solely owned. In circumstances where the home is held in a tenancy in common it is also possible serious difficulties may be encountered in the appropriation of the home assuming the deceased’s interest is not left to the surviving spouse.


15 Discussed in detail below.

16 See also s 55 of the Succession Act 1965 which contains a more general power of appropriation exercisable by the personal representative.

In relation to s 56, the limitation of the right to appropriate only to dwellings in which the surviving spouse was “ordinarily resident” at the time of the deceased’s death, could cause difficulty for certain deserving claimants. If a claimant 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 the owning spouse left his share to a third party, his successor could
apply for an order for the sale of the property under s 31 of the Land and Conveyancing Law Reform Act 2009. As the non-owning spouse has no right to appropriate his successor's share of the home under s 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 s 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. 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.


18 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”. See Simon McDonald, “Appropriation as a Means of Satisfying the Legal Right Share?” (1999) 4(3) CPLJ 62, 67.

19 S S5(2) of the Succession Act 1965.

20 Spierin, note 10, notes at 174, “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 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.

21 Subject to the limitation that any provision for a child cannot affect the surviving spouses’ legal right share, upon application by a child under s 117, where the court is of the opinion that the deceased parent has failed in their moral duty to make proper provision for them in accordance with their means, the court may order that such provision shall be made for the child out of the estate ‘as the court thinks just’. 1990] 2 IR 143 at 148. For a summary of the legal principles applicable by the court in s 117 applications, see Re ABC’s Estate [2003] 2 IR 250.

22 Spierin, note 10, at 169.

23 Brady, note 10, at 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.

24 Brady, note 10, at 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.

25 [2008] IESC 10

26 [2010] IEHC 70. See also Estate of Denis Kennedy v Breda Kennedy (HIC 26 January 2007).

27 ibid at 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.

28 ibid at 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.”

29 ibid at 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, note 9, 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.

30 Although the restrictions cover other buildings or business premises also, the focus of this article is placed on the right to require appropriation of a dwelling located on agricultural land.

31 Brady, note 10, at 226.


33 [1978] IR 138. For analysis of this decision, see Brady, note 10, at 224-226. 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.

34 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.
Note 9. This case was commenced in the High Court the same day as Kenny J gave his judgment in *H v H*, note 33.

Note 9, per Henchy J.

For instance, British Columbia’s Wills, Estates and Succession Act 2009 contains no such restriction.

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.

This is exacerbated by the considerable delays in the hearing of probate cases.

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 Wylie, note 7, at 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. However, this is an informal solution currently not recognised by statute. Moreover, pursuant to these proposals, beneficiaries of the estate may well be more likely to agree to such an arrangement. By offsetting the right of residence against the legal right share, share on intestacy or gift under a will, it may incentivise the arrangement for such beneficiaries who may otherwise be reluctant to allow a surviving spouse a right of residence.


See s 10(1)(a)(i) of the 1995 Act and s 15(1)(a)(i) of the 1996 Act. An analysis of the Courts Service statistics shows a constantly high level of rights of residence orders. For example, the total number of judicial separation orders granted in the Circuit Court in 2011 was 1,006 and the total number of property orders recorded was 1,212 (this apparent anomaly may be explained by the fact that more than one property order may be made in an individual case). Of these, 253 rights of residence were awarded. This equates to 20.87% of all property orders made. See Court Service, “Annual Report 2011” <https://www.courts.ie/Courts.ie/library3.nsf/AllWebFiles/1EAFACCE24F980257AE0037FCC9/$FILE/Courts%20Service%20Annual%20Report%202011.pdf> accessed 05 September 2012.


Wylie, note 7, at 1104. For more on these difficulties, see 1104-1111.

Lyall, note 44, at 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.”

*ibid*, at 532.

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, note 7, at 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 Wylie, note 7, at 559-560. See also the Explanatory Memorandum of the Land and Conveyancing Law Reform Act 2009, at 6.

[1993] ILRM 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, note 47, observes: “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.”
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.

Lyall, note 44, at 531.


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, note 7, at 1107-1109. Coughlan, note 47, analysed the decision in Johnston v Horace, note 52, 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 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.”

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

See Re Article 26 of the Constitution & in the matter of the Matrimonial Home Bill, 1993 [1994] 1 ILRM 241. The Supreme Court unanimously found the Bill to be unconstitutional as it infringed on the authority of the family.

While considerable protection is afforded by the Family Home Protection Act 1976 and the Succession Act 1965, the weakest protection afforded to the home arises on marital breakdown pursuant to the Family Law Act 1995 and the Family Law (Divorce) Act 1996. Unfortunately, however, a discussion of these shortcomings is outside the scope of this paper.

Paul Coughlan, 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 its discussion paper that a right of appropriation be introduced in the jurisdiction on intestacy. It 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 report 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 Scottish Law Commission, Report on succession, note 11, at 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.

Spierin, note 10, at 170.