# *Adverse Possession, Unadministered Estates and Co-owners - England and Ireland Compared*

**Conference Paper delivered by Una Woods, Irish Society of Comparative Law Annual Conference, 6 March 2010, Queens University Belfast**[1]

On the death of a landowner, members of his family may become entitled to the land as co-owners under his will or the rules governing intestacies. Many years may pass without anyone taking the steps necessary to administer the estate while one or only some of his successors enjoy possession of the land with or without the tacit approval of the others. The operation of the doctrine of adverse possession in this context gives rise to a number of doctrinal complications and Irish and English law on this issue has become polarised; while the occupying family member may rely on the doctrine of adverse possession in Ireland, in England and Wales he is precluded from doing so.

One English commentator has suggested that it would be unfair to allow a strong willed occupying member of the family to obtain title by adverse possession as a result of the generous attitude of other members of the family.[2] In contrast, Irish commentators view the doctrine of adverse possession as playing a vital social role in updating the land register where a farmer dies intestate leaving a number of children and only one remains in possession of the land. This paper traces the development of the law on this issue in both jurisdictions and examines whether the Irish position is justified in modern times. It concludes by recommending the adoption of a veto approach, similar to that recently introduced in England. This reform would confer added protection on those with co-ownership entitlements under unadministered estates, but if these interests have been abandoned, it would allow the land to be restored to the market.

Adverse possession between co-owners gives rise to theoretical difficulties as one of the basic tenets of co-ownership is unity of possession; therefore possession by one co-owner is deemed to be possession by all of them. Before the enactment of the Real Property Limitation Act 1833 it was only possible for a co-owner who could prove that he had ousted the other co-owners to rely on the doctrine against them. The *First Report of Commissioners on Real Property Report* published in 1829 indicated that it would be desirable to permit a finding of adverse possession between co-owners without proof of an ouster. Section 12 of the Real Property Limitation Act 1933 gave effect to this recommendation and provided that if a co-owner was in possession of more than his share of the land for his own benefit, such possession would not be deemed to be the possession of the other co-owners. While this rule is re-enacted by section 21 of the Irish Statute of Limitations 1957, the English law on this issue diverged with the enactment of the Law of Property Act 1925 and, currently, adverse possession between co-owners is absolutely precluded.[3]

If the co-ownership entitlements arise under an unadministered estate, the operation of the doctrine becomes more complicated as ownership vests for the meantime in the

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[1] Please note that this conference paper is a work in progress.
[2] Miller, 'The administration of estates and adverse possession' (2000) 150 New Law Journal 940, 946.
[3] Sch 1, para 9 of the Limitation Act 1980.

High Court (or the Public Trustee in England) or the deceased's personal representatives.[4] Occasionally, a personal representative who is also entitled to a share in the estate takes possession of the land for the limitation period. In this context, two other rules appear relevant: the personal representative is deemed to hold the estate on trust for those entitled to it under the will or intestacy rules[5] and no limitation period applies to actions to recover trust property in the possession of a trustee.[6] Under Irish law a personal representative is not deemed to be a 'trustee' for the purposes of the running of the limitation period[7] but under English law the definition of a 'trustee' includes a personal representative[8] and therefore a personal representative may never rely on the doctrine of adverse possession against those with entitlements to the estate.

*The development of the law in England*

In England and Wales before the Law of Property Act 1925 came into force many cases were heard which involved one or more co-owners relying on section 12 of the 1833 Act to claim the benefit of the doctrine of adverse possession where they had possessed the property to the exclusion of the other co-owners.[9] In more recent times the Judicial Committee Privy Council has heard a number of cases on appeal from Commonwealth jurisdictions where the law on this issue has remained unchanged.[10]

The entry into force of the Law of Property Act 1925 on January 1 1926 brought about a fundamental change to the legal structure of the co-ownership relationship in England and Wales. From that date the legal title to co-owned property could only be held by joint tenants and a statutory trust for sale was imposed in all cases of co-ownership where such a trust was not expressly created. This resulted in many co-owners holding the land on trust for sale for themselves as equitable tenants in common or joint tenants. The 1925 Act brought about an inadvertent change in the application of the doctrine of adverse possession between co-owners which was highlighted in Re Landi [1939] Ch 828. That case involved one tenant in common receiving the entire rent in relation to the co-owned premises for over 20 years from the end of 1923 onwards. Sir Wilfred Greene MR pointed out that the 1925 Act converted the tenants in common in that case into trustees although they were also beneficiaries. Section 12 of the 1833 Act no longer applied as it contemplates a co-ownership relationship which does not involve a trust; Sir Wilfred Greene MR noted '(t)he language is quite inapt to cover the case of one of two trustees who are also their own beneficiaries.' He concluded that a trustee in possession or receiving rents and profits can never be regarded as doing so for his own benefit and therefore the limitation period cannot run in his favour.

However, this approach gave rise to an inconsistency as a beneficial co-owner who was not a trustee[11] could bar the title of the other beneficiaries through adverse possession. This lacuna was closed by section 7(5) of the Limitation Act 1939 which was re-

[4] S10(1) and 13 of the Succession Act 1965; s1 and 9 of the Administration of Estates Act 1925.
[5] S10(3)of the Succession Act; s33(1) of the Administration of Estates Act 1925.
[6] S44 of the Statute of Limitations 1957; s21 of the Limitation Act 1980.
[7] S2(2)(a)(i) of the Statute of Limitations 1957.
[8] S38(1) of the Limitation Act 1980 adopts the definition set out in s68(1)(17) of the Trustee Act 1925.
[9] See *Paine v Ryder* (1857) 24 Beav 151; *Thornton v France* [1897] 2 QB 143; *Glyn v Howell* [1909] 1 Ch 666.
[10] For example, *Paradise Beach and Transportation Co Ltd v Price – Robinson* [1968] AC 1072
[11] An express trust for sale may have been created or the statutory trust may have vested legal ownership in the Public Trustee.

enacted by paragraph 9, schedule 1 of the Limitation Act 1980. This provision makes it clear that one beneficial co-owner cannot be in adverse possession against another regardless of the location of the legal estate. Although co-owned land is now regarded as being held on a trust of land rather than a trust for sale,[12] the law continues to provide that where such land is in the possession of a person entitled to a beneficial interest in the land (and he is not solely or absolutely entitled to the land), no right of action to recover the land shall be treated as accruing during that possession to any person in whom the land is vested as trustee or to any other person entitled to a beneficial interest in the land.

In *Earnshaw v Hartley*[13] the Court of Appeal ruled that paragraph 9, schedule 1 of the 1980 Act also applied in the context of an unadministered estate to prevent time running where one intestate successor possesses the property to the exclusion of others entitled to an intestate share. In that case a son had remained on the farm after his mother died intestate in 1983. He was later joined by his wife, the defendant, and in 1995 the son died. His mother had also been survived by three daughters who obtained letters of administration to their mother's estate in 1998 and sought various forms of relief, including a declaration as to the beneficial ownership and an order for sale. The defendant alleged that the daughters' entitlements had been extinguished by her husband's and her own successive adverse possession of the farm.[14] Counsel for the defendant argued that paragraph 9 did not apply before the grant of administration was extracted as the farm was vested in the President of the Family Division and it was not held on a trust for sale at that time. Nourse LJ refused to apply this literal interpretation to paragraph 9 and stated that although technically the farm was not held on trust for sale the case while it was vested in the President of the Family division it was presumptively so held; it would be artificial to distinguish between the position before and after the grant of administration. In the same vein, counsel for the defendant argued that the siblings did not have a beneficial interest in the land or the proceeds of sale, but only a right to require the mother's estate to be duly administered and to receive a quarter share of the net estate on completion of the administration. Nourse LJ held that it would be equally artificial to suggest that the siblings did not have an interest in the farm which was sufficient for the purposes of paragraph 9.

A personal representative is deemed to be a trustee for the purposes of the Limitation Act[15] and section 21 provides that no period of limitation shall apply to an action by a beneficiary to recover trust property in the possession of a trustee. Therefore, a beneficial co-owner in possession who has extracted a grant of representation will be prevented from relying on the doctrine for two different reasons, because of his or her position as a trustee and as a beneficial co-owner.

Even if the beneficial co-owner in possession has not extracted a grant, the decision in *James v Williams*[16] highlights that he could be deemed to an executor de son tort on the

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[12] The Trusts of Land and Appointment of Trustees Act 1996 replaced the trust for sale with a simple trust of land.
[13] [2000] Ch 155
[14] The court never had to consider the arguments advanced by the daughters that their brother's possession had been with their express or implied consent and that during the limitation period he had been out of possession for five years when he went to live with his friend.
[15] See above note 6.
[16] [2000] Ch 1.

basis that he had intermeddled with the estate of the deceased. Although an executor de son tort does not come within the definition of a personal representative,[17] if he is also deemed to be a constructive trustee,[18] which happened in James v Williams, section 21 will apply to prevent time running in his favour. The circumstances in *James v Williams* are similar to those in *Earnshaw*. On the intestate death of the owner, his wife became entitled to the beneficial interest in the family home but she took no steps to administer his estate. She died intestate in 1972 and the property was held on statutory trust for sale for her three adult children: a son, William junior, a daughter Thirza, and another daughter, the plaintiff. The plaintiff had moved out of the property when she got married and only visited from time to time. After the mother died, the plaintiff's siblings made it clear to her that she was unwelcome at the family home and she became estranged from them. From that point onwards, William Junior behaved as if he owned the property. He left the property to Thirza when he died in 1993 and when Thirza died in 1995 it was left to her child, the defendant. The plaintiff sought a declaration that she was entitled to a one third share in the property and an order that the property be sold and the proceeds be divided between them. The defendant contended that her claim was statute barred.

It is unclear why the plaintiff failed to plead paragraph 9 which prevents adverse possession between beneficial co-owners. It is interesting, however, that the conversation in which she was told she was not welcome would have given rise to an ouster under the law which prevailed before the introduction of section 12 of the Real Property Act 1833.[19] In any event, in this case the focus of the parties remained fixed on whether the son as an executor de son tort, was also a constructive trustee; if he was, the parties accepted that the limitation period could not begin to run against him. Counsel for the defendant seemed to accept without question that his behaviour qualified as that of an executor de son tort. The court relied heavily on an article written by Hinks[20] who maintained that anyone who takes possession of the property of a deceased person without the permission of the personal representatives or the court is an executor de son tort regardless of his intentions and state of mind when he took possession. He noted that an executor de son tort can rely on the doctrine of adverse possession unless he is also a constructive trustee. He pointed out that there would appear to be no justification for imposing a constructive trust where the executor de son tort is a complete stranger save in the most exceptional circumstances. This makes sense as otherwise it would never be possible to acquire title by adverse possession against land which formed part of the estate of a deceased owner. On the other hand, Hinks argued that where a brother seeks to establish title by adverse possession against his adult siblings there would appear to be every justification for imposing a constructive trust. Swinton Thomas LJ concluded that the situation before him was one which give rise to such a constructive trust. The brother knew he was not solely entitled to the property when he took possession of it and it would be inequitable to allow him

[17] S68(1)(9) of the Trustee Act 1925.
[18] A trust is defined as including a constructive trust in s68(1)(17) of the Trustee Act 1925.
[19] In *Earnshaw v Hartley* [2000] Ch 155 Nourse LJ commented that the impact of section 7(5) of the 1939 Act, and subsequently paragraph 9, was the re-introduction of the doctrine of non-adverse possession amongst co-owners of land which had applied before the enactment of section 12 of the Real Property Act 1833. However, before 1833, adverse possession was possible between co-owners if an ouster could be proved; since the enactment of the 1939 Act it is clear that adverse possession between co-owners is never possible.
[20] Hinks, 'Executors de son tort and the limitation of actions' Conv [1974] 176.

to take advantage of his decision not to take out letters of administration. Therefore, he was under an equitable duty to hold it for himself and his sisters on constructive trust.

Jourdan argues that the decision in *James v Williams* was *per incuriam* in relation to two matters. First, it was made in ignorance of paragraph 9 and should simply have been decided on the basis that the brother was a beneficial co-owner and so the limitation period could not have run in his favour. Second, the attention of the court was not drawn to an earlier decision of the court of Appeal in Pollard v Jackson which decided that a squatter who took possession of a flat knowing of the owner's death was neither an executor de son tort or a constructive trustee.[21] There seems to be a divergence of opinion on whether simply taking possession of property is sufficient to make a person an executor de son tort. If you assume that it is sufficient, the circumstances in Pollard can be clearly distinguished from those in *Earnshaw* as the squatter in Pollard was a stranger and so would not have fallen within the category of circumstances which Hinks described as giving rise to a possible constructive trust. It should be mentioned, at this point, that if the Law Commission recommendations in its Report on the Limitation of Actions[22] are implemented, it will be possible for a trustee or a personal representative to claim the benefit of the limitation period against a beneficiary. This would stunt the development of *James v Williams* as an authority in this area and a beneficial co-owner out of possession would be restricted to relying on paragraph 9. To summarise, in England and Wales, in all circumstances where co-ownership entitlements arise under a will or on intestacy, it is impossible for either a personal representative or one of those entitled to benefit from the doctrine. Only a stranger to the title can benefit.

*Recent reforms and other remedies*

The Land Registration Act 2002, which radically reduced the scope of the doctrine of adverse possession in relation to registered land, leaves intact the circumstances which prevent time running in the first place and, as the law currently stands, neither a trustee nor a beneficiary can claim the benefit of the doctrine against another beneficiary. However, time may run against a trustee if the beneficiary is solely entitled.[23] In its discussion of the exceptions to the veto system the Law Commission mentioned that a person solely entitled by will or intestacy would qualify as a person entitled to be registered as proprietor for some other reason.[24] Therefore, the doctrine is retained to update the register where a person solely entitled to the unadministered estate can prove possession of the land for at least 10 years. An adverse possession application may prove to be less costly and more expedient than extracting a grant.

Although a person entitled to a co-owner's share in an unadministered estate is precluded from relying on the doctrine of adverse possession, if he can prove that the deceased owner or the other beneficial co-owners represented to him that he would have some interest in the land and he relied on that representation to his detriment, he may be entitled to a remedy under the doctrine of proprietary estopple; the court may even order that the property be transferred into his sole name. Recent restrictions

[21] *Adverse Possession* (Butterworths Lexis Nexis, 2003) at para 31.13.
[22] LC270 (2001).
[23] Para 9, sch 1 of the Limitation Act 1980.
[24] See *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com no 271, 2001), para 14.43.

imposed on this doctrine in the context of commercial transactions[25] do not appear to have impacted on the doctrine's potential to provide a remedy in the context of an informal testamentary disposition.[26] Alternatively, he may be in a position to apply for provision under the Inheritance (Provision for Family and Dependants) Act 1975 if he can prove that the will or intestacy rules failed to make reasonable provision for his maintenance. Such a claim must be brought within six months of the extraction of the grant of representation although the court may extend this time period.

If neither remedy is applicable, the beneficial co-owner in possession of the land who wishes to be registered as the sole owner will be forced to secure disclaimers or releases in relation to the beneficial shares of the other co-owners. If the land has increased in value since he went into possession his bargaining power will have decreased. As one court succinctly put it often only the 'smell of oil' in previously valueless land rekindles an interest in its ownership.[27] If such negotiations fail, a personal representative or any of the co-owners can apply for an order for the sale of the property and the division of the proceeds between them.[28] If the other beneficial co-owners have abandoned the land and cannot be traced it may be possible to register the remaining co-owner as the sole owner pursuant to a Benjamin Order. Alternatively, the land can be sold, and provided the statutory pre-conditions of overreaching are met, the purchaser will take the land free of the interests of the absent co-owners which attach instead to the capital money. Although adverse possession is often regarded as playing an essential role in restoring abandoned land to the market, the doctrine is unnecessary in this context. The overreaching mechanism facilitates its release onto the market and their share of the sale proceeds may be preserved for the absent co-owners in a separate account or distributed to the remaining co-owner pursuant to a Benjamin Order.

*The development of the law in Ireland*

A number of issues which had obfuscated the law in this area have recently been clarified by Irish caselaw and legislation. First of all, where only one or some of the persons entitled to an intestate share took or remained in possession after the death of the owner doubts arose in relation to the impact of their entitlements as next-of-kin on the operation of the doctrine of adverse possession. A strong line of early authority developed which suggested that on the expiry of the limitation period such possessors took their own shares as tenants in common but acquired the shares of those out of possession as joint tenants. The rationale being that before the estate is distributed the next-of kin have specific equitable interests as tenants in common in the intestate's estate and so on the expiry of the limitation period they would have extinguished the legal title in respect of their own shares but the entire title of those out of possession. The adverse possessors would take the shares of those out of possession as joint tenants, as if they were strangers to the title. This approach would obviously make it very difficult to trace the title as the ruling in *Christie v Christie*[29] demonstrates. In that case, a farmer had died intestate and was succeeded by his wife and five children. His

[25] See *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55.
[26] As demonstrated by the recent House of Lords decision in *Thorner v Major* [2009] UKHL 18. See Mc Farlane and Robertson ,'Apocalypse averted; proprietary estoppel in the House of Lords' [2009] LQR 535.
[27] *Quates v Griffin* 239 So 2d 803 (Miss. 1970).
[28] S14 of the Trusts of Land and Appointment of Trustees Act 1996.
[29] [1917] 1 IR 17.

wife would have been entitled to a third share in the farm and each child was entitled to a 2/15th share as tenants in common. The wife and two of his children remained in possession and when the mother died the court noted that each child, including those in possession, would have become entitled to a 1/5th of her third, ie another 1/15th share in the entire farm. On the expiry of the limitation period the two children in possession held 3/15ths each as tenants in common and became entitled to the remaining 9/15ths of the farm as joint tenants. Section 125(1) of the Succession Act 1965 now clarifies that where two or more persons are entitled to shares in land forming part of the estate of a deceased person as co-owners and any of them enter into possession they shall be deemed as between themselves and those who do not enter to have acquired title by possession as joint tenants and not tenants in common, notwithstanding any rule of law to the contrary. For the purposes of the running of the limitation period, those entitled to a testate or an intestate share in the estate are effectively treated as strangers with no rights in the estate.

Section 125 only applied prospectively and therefore failed to clarify the legal position in relation to the estate of a person dying before 1 January 1967 when the 1965 Act came into force. In *Maher v Maher*[30] O Hanlon J acknowledged that the weight of Irish authority was in favour of the view that the next of kin remaining in possession should be regarded as tenants in common in relation to their own shares. However, he found the authorities to the contrary more persuasive and noted that the caselaw on this issue is not consistent. He ruled that where some of the next of kin of a deceased owner remain in possession to the exclusion of others, their possession of the entire property is adverse to the claims of the other next of kin and the personal representative and on the expiry of the limitation period they acquire title as joint tenants. He was not prepared to distinguish between the character of their occupation in relation to the shares claimed by them in their capacity as next of kin and the shares of the other next of kin which they were in the process of extinguishing. In the Supreme Court decision in *Gleeson v Feehan*[31] Keane J finally put this matter to rest by endorsing the approach taken by O'Hanlon J and overruling any contrary authorities. Keane J concluded that it was contrary to elementary legal principles to regard the next of kin of an intestate or those entitled to the residuary estate of a deceased person as being the owners in equity of specific property. They are only entitled to a right in the nature of a chose in action to the payment to them of the balance of the estate after the debts have been discharged, a right which can be enforced against the personal representative. It was unnecessary and inappropriate to analyse the ownership of the deceased's estate in terms of who is entitled to the legal estate and who is entitled to the equitable estate. He was satisfied that the possession of one of the next of kin and another person following the death of the owner was adverse to the title of the President of the High Court, in whom the entire estate was vested pending the raising of representation.[32] On the expiry of the limitation period they acquired title as joint tenants and on the death of the next of kin, the surviving joint tenant became the sole owner.

Section 125(2) clarifies that subsection 1 will apply even if one of the persons entitled to a share in the deceased's land entered into possession as a personal representative or subsequently took out a grant of representation to the estate of the deceased. As has already been mentioned, section 123 clarifies that a personal representative shall not be

[30] [1987] ILRM 542.
[31] [1993] 2 IR 11.
[32] This approach contrasts sharply with the approach taken in *Earnshaw v Hartley*.

a trustee for the purposes of the Statute of Limitations. Therefore, section 44 of the 1957 Act which imposes no time limit on actions to recover trust property in the possession of a trustee does not apply to actions against a personal representative in possession. Also, the definition of a trustee for the purposes of the Statute of Limitations does not include a constructive trustee and therefore, in sharp contrast to the English position, if the court deems the person who took possession to be an executor de son tort and a constructive trustee for those entitled to the estate this will not prevent the limitation period from running in his favour.

Finally, section 126 of the Succession Act has given rise to confusion and controversy in this area. It replaced section 45 of the 1957 Act which imposed a 12 year limitation period on actions in relation to any entitlements in the estate of a deceased person. The new limitation period is six years unless the right of action was fraudulently concealed, in which case section 71 of the 1957 Act applies. This amendment was clearly designed to speed up the clarification of title to land which forms part of an unadministered estate. However, a lacuna in the application of the new limitation period was highlighted by the High Court decision in *Drohan v Drohan*[33] and the subsequent the Supreme Court decision in *Gleeson v Feehan*. The court, in both instances, ruled that section 126 only applies to actions brought by those entitled to a share in the estate and not to actions brought by the personal representative. Therefore, following an intestate death, if a grant has not yet been extracted and one of the next of kin has been in possession, another can extract a grant and rely on the 12 year limitation period to bring an action. It remains unclear whether the next of kin are then entitled to insist that the personal representative vests their shares in them given their limitation period has expired.

In the aftermath of the *Gleeson* case, practitioners called for reform in this area and the Law Reform Commission in a report published in 2003[34] recommended that a uniform limitation period of 12 years should be applied to claims by beneficiaries and by personal representatives. The Commission acknowledged that a return to a 12 year limitation period in all cases arguably abandons the policy behind section 126 which was to quieten titles as soon as possible after the owner's death and thereby benefit those who remain on to run the family farm or business. However, the recommended approach would lead to greater simplicity and consistency within the general law of adverse possession and remove the anomalies which have arisen since the passing of section 126. Section 126 provides that the limitation period commences on the date that the right to receive the share or interest accrued and as this has also been a source of confusion and debate, the LRC recommended legislative clarification that the right of action should be deemed to accrue on the date of death.

These recommendations have yet to be implemented. Keating has criticised the primary recommendation of an increase in the limitation period and argues that personal representatives should be brought within the scope of the original amendment. In his opinion a limitation period of six years is in keeping with the general policy against delay in the administration of estates.[35] In Keating's experience beneficiaries are not coy when it comes to claiming shares or interests in estates and he notes that

[33] [1984] IR 311.
[34] Law Reform Commission, *Report on Land Law and Conveyancing Law (7): Positive Covenants* (n 69) Ch 6.
[35] Keating, *The Law and Practice of Personal Representatives* (Round Hall 2004) para 9.19.

any tardiness may be remedied by the citation process. Although he was of the opinion that beneficiaries are rarely undone by sloth, the experience of Land Registry officials seems to suggest otherwise. Over 1,000 adverse possession applications are made in relation to registered land on an annual basis and an internal survey recently conducted revealed that over 50% of these involved adverse possession between family members. Objections are received in relation to the majority of applications and the most frequent objector is one who claims to be entitled to a share on intestacy or under the will of the deceased owner. Of course, once the limitation period has expired, such an objection has no legal basis and will not prevent registration in the absence of another valid ground for objection, for example, proof that the objector continued to engage in acts of possession, that the applicant was not in possession or was in possession pursuant to an express or an implied licence.

Where only one or some of the next of kin enter into or remain in possession following the death of the deceased owner, those out of possession are clearly in a very precarious position as the law currently stands. Any licence agreement which renders the possession consensual and non-adverse should be recorded in writing to avoid future misunderstandings and solicitors consulted by such next of kin need to bear in mind the different limitation periods in order to avoid the possibility of a negligence claim.

*A critique of the Irish Approach*

It is frequently argued that the doctrine of adverse possession is necessary in Ireland because it performs a valuable social function in rural areas where historically will-making was uncommon, emigration was widespread and grants of representations were rarely extracted in relation to small farms. The doctrine allows the register to be updated many years after the death of the registered owner by an application pursuant to section 49 of the Registration of Title Act 1964 where only one or some of the children of the deceased farmer remained in possession of the farm while the others left to work and live elsewhere. A section 49 application avoids the inconvenience and expense of executing a deed of family arrangement for the purposes of releasing the intestate shares of the other children or extracting multiple grants if there was more than one death on the title. The role played by the doctrine in this context was acknowledged in the Oireachtas debates which preceded the enactment of the Succession Act 1965 and the reduction of the limitation period to six years in respect of claims to the estate of a deceased person was clearly intended to promote reliance on the doctrine to resolve a problem perceived to be peculiar to rural Ireland at the time. More recently, in its third party submission to Grand Chamber in the Pye case, the Government of Ireland outlined this role played by the doctrine in facilitating the intergenerational transfer of farms in Ireland and argued that the doctrine represented a proportionate means of achieving this legitimate aim justifying any potential interference with the property rights of owners.

It is submitted that the role played by the doctrine in this context is no longer significant. The traditionally casual approach to the administration of estates comprising agricultural land has declined over recent decades, probably due to the advent of EU grants. On the death of a farmer, his family will wish to ensure that any outstanding entitlements under the single farm payment scheme are paid into his estate and they will be conscious of the need to transfer the ongoing entitlements. These entitlements pass separate to the land and in the absence of a specific bequest, they pass

to the residuary legatee. The Department of Agriculture requires the submission of a grant of probate or a grant of administration intestate and a valid herd number to secure the transfer of inherited entitlements. Frequently, waivers are also submitted to allow the entitlements to be transferred to the person who is inheriting the farm. Once the grant has been extracted, it is a fairly simple matter to update the land register. The widespread belief that reliance continues to be placed in modern times on the doctrine of adverse possession to update the ownership of farms is inaccurate.[36] If this peculiarly agricultural justification has become obsolete, it is necessary to consider whether adverse possession should continue to play the same role in the context of unadministered estates. Is it unfair to allow the occupying sibling to extinguish the rights of those out of possession?

Although it is difficult to make generalisations in this area, it could be argued that the moral entitlement of an applicant who has entered or remained in possession of the family home following the death of a parent is not as strong as that of a child who had been raised to take over a farm and perhaps forgone an education and adequate pay during the lifetime of the parent. It is easy to imagine a situation where absent members of the family were content to allow a sibling to continue to occupy the family home but failed to appreciate that their interests were in danger of being extinguished by neglecting to formalise the arrangement; the potential for misunderstanding renders absent members extremely vulnerable.

The Law Reform Commission recently recommended the introduction of certain reforms in relation to the doctrine of adverse possession which necessitated a court application and purported to limit the doctrine's operation so that it would no longer operate unfairly. Although these recommendations appear to have been shelved indefinitely, they are still of interest as the Commission envisaged a continuing role for the doctrine in the context of unadministered estates. Under the proposals, the court would be permitted to grant a vesting order if the adverse possession application related to land comprised in a deceased person's estate and it is reasonable to assume that an order in favour of the applicant would accord with the deceased's wishes.[37] The introduction of an approach which appears to require the court to guess at the subjective views of the deceased owner seems unwise, especially when the doctrine of proprietary estoppel provides a much more stable basis for the grant of a remedy in such circumstances and also allows the court more flexibility in its response.[38] It should also be noted that a child who feels that he has not been adequately provided for under his parent's will is entitled to bring a section 117 application within six months from the extraction of the grant, although unfortunately this remedy is not available if the parent dies intestate.

The introduction of a qualified veto system, similar to that introduced in England by the Land Registration Act 2002 would dramatically improve the position of landowners and those with entitlements under unadministered estates to withstand claims by

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[36] This has been informally confirmed by Land Registry officials.

[37] The court would also have the option of ordering the payment of compensation. These recommendations were criticised as they would increase costs and clog up the courts unnecessarily as the Land Registry procedure has been operating successfully to date.

[38] Alternatively, the court may order specific performance of a contract to leave certain property to a person in consideration of providing free labour on that property during the owner's lifetime as recently occurred in *McCarron v McCarron* [1997] 2 ILRM 349.

adverse possessors. In formulating the exceptions to the veto rule, it is submitted that it is would not be necessary to preserve the doctrine's traditional role in updating the title to land following a death on title, except if the applicant is solely entitled under the owner's will or the intestacy rules and therefore also entitled to be registered as the owner of the land on that basis. If those with entitlements under an unadministered estate do not exercise their veto, because they have no objection to the registration of the applicant as owner or they have abandoned their interests, the application would proceed. Therefore, in the doctrine would continue to play a limited role in tidying up unadministered estates. However, if the veto is exercised, the adverse possessor would have to seek releases from the objectors or an alternative more appropriate remedy. As has already been mentioned, a claim under the doctrine of proprietary estoppel or a section 117 application may be an option. It would be important to ensure that adequate alternative remedies are available, and therefore it is submitted that section 117 of the Succession Act should be extended to intestate deaths and the court should be given a discretion to extend the deadline for bringing such an application.