LAW REFORM
ADVISORY COMMITTEE
FOR NORTHERN IRELAND

DISCUSSION PAPER No. 5

MATRIMONIAL PROPERTY

BELFAST: THE STATIONERY OFFICE

First published 1999

LAW REFORM ADVISORY COMMITTEE
FOR NORTHERN IRELAND

Matrimonial Property

CONTENTS

Preface

The Law Reform Advisory Committee for Northern Ireland was established in April 1989 by the then Secretary of State for Northern Ireland, the Right Honourable Tom King, MP to "keep the civil law of Northern Ireland under review and make recommendations for its reform".

The Members of the Committee at present are:

The Honourable Mr Justice Girvan (Chairman)
His Honour Judge Burgess (Vice-chairman)
Miss Mary Connolly LLB, Solicitor
Professor Brice Dickson, Barrister
Mrs Ethne Harkness LLM
Mr V Alan Hewitt LLM, Solicitor
Miss Marie McAlister, Barrister
Mr Rory McShane BA, Solicitor
Mr John Thompson QC
Miss Margaret Walsh, Barrister

The Secretary to the Committee is Mr Michael Foster, Barrister and its offices are in Lancashire House, 5 Linenhall Street, Belfast BT2 8AA, Telephone (01232) 542900.

In its First Programme of Law Reform, the Law Reform Advisory Committee identified certain areas of family property law in which it perceived injustices to exist which required reform. These matters did not involve an enquiry into the whole area of matrimonial property, but rather referred only to certain aspects of rights of property. These were:

(a) ownership of a property which represents the family home, that is the principle place of residence occupied as their home by a couple; and

(b) ownership of housekeeping monies.

As the Committee's work progressed, it became clear that its work should also address the ownership of certain jointly enjoyed household goods, and also the position of cohabitants in relation to the rights of ownership of the areas of property being considered.

Ownership of a jointly enjoyed property

As the law stands at the moment, if the family home is in the sole name of the husband, then unless the wife can prove that either:

(a) there was a prior agreement or understanding; or

(b) she has made some form of direct *financial* contribution towards the purchase of the home; or

(c) she has made some other indirect *financial* contribution to its purchase and proves there was an agreement or arrangement showing a mutual intention that the contributions went to create a beneficial interest,

she is deemed to have no legal interest in that property. Therefore, for example, any contribution made by a wife in bringing up the children, or running the household, is not taken into account as representing a "contribution" to the acquisition of the family home.

Even if a wife is able to establish such an agreement or contribution, the extent of her interest could vary depending on the evidence in each case, but again confined to direct or indirect financial contributions. In addition, the nature of any joint ownership (that is as joint tenants – with the survivor taking the whole property; or as tenants in common – where the interest of each party would devolve according to the terms of the deceased partner's will or the rules of intestacy) would also be the subject of determination according to the evidence of the terms of any agreement or undertaking.

There exists no presumption that the family home is jointly owned by the husband and wife, let alone that such ownership is equal and that the home should devolve automatically to the survivor.

While the Matrimonial Causes (Northern Ireland) Order 1978 provides a comprehensive framework for the determination of rights to matrimonial property upon marriage breakdown, there remain areas of potential injustice. One such area would be where a marriage has not broken down, but a third party, such as a creditor, seeks to enforce rights against the family home. In such circumstances the wife would require to establish an interest in accordance with the law as it now stands, otherwise her home and that of the entire family would be vulnerable.

There is also the argument that the nature of the property which is being considered – the family home and its contents – requires its ownership to be placed on a settled and equitable basis which is clear and known to all parties from the outset.

But married couples are not the only vulnerable people. Couples who set up home together frequently do so without providing financial protection, usually for the women who more often than not looks after the children and their home. In the event of the home being in the sole name of the man, the woman will be in the same position as the married woman who regards proving a right in the home, and is therefore subject to the same risks from third parties as the married woman. However, in addition to these difficulties, in the event of that relationship of cohabitation breaking down, the woman has none of the protection of the 1978 Order.

This paper seeks to address these issues and to make provisional proposals in respect of the home of a couple in a particular type of relationship.

Ownership of housekeeping monies

Under the present law, any money given to a wife by her husband for the purposes of housekeeping remains the property of the husband, as does any property purchased by that money. This law dates back many years, and, in the opinion of the Committee, does not reflect how people now live their lives, nor

the nature of marriage today. More and more women are working, and contribute to the running of the home. Marriage is now seen more as a joint undertaking between two equals. This paper addresses the need for change in the law as regards housekeeping monies, and, consequently, certain jointly enjoyed household goods.

The paper is circulated for comment and criticism only and does not represent the final views of the Committee. The Committee would be grateful to receive comments in writing before 30th September 1999.

Please note that it may be helpful for the Committee, either in discussion with others concerned or in any subsequent report, to be able to refer to and attribute comments submitted in response to this paper. Any request to treat all or part of a response in confidence will, of course, be respected. If no such request is made, the Committee will assume that the response is not intended to be confidential.

All correspondence should be addressed to:

Mr M Foster
Secretary
Law Reform Advisory Committee
Lancashire House
5 Linenhall Street
Belfast BT2 8AA

CHAPTER ONE

Introduction

1.1 Consideration of the topic of matrimonial property was initiated because of the impact of the decision in **McFarlane v McFarlane** (1972) NI 59 where a wife had made a substantial but indirect contribution to the funds which assisted her husband in purchasing two houses in his sole name. She had paid for much of the household expenses from her own earnings and worked part-time as a secretary for her husband's business. When she brought proceedings under the Married Women's Property Act 1882 the Northern Ireland Court of Appeal had to decide whether she had any beneficial interest in these properties. It held that she had no beneficial interest in them because there had been no prior agreement, arrangement or understanding between herself and her husband sufficient to show a mutual intention to create such an interest. The rule is no longer applicable in divorce proceedings. As part of its jurisdiction to adjust the property rights of either spouse the Court has been specifically empowered by Article 27(1)(*f*) of the Matrimonial Causes (Northern Ireland) Order 1978 to have regard to the contributions made by each of the parties to the welfare of the family, including any contribution made by the looking after the home or caring of the family. By virtue of the Family Law (Miscellaneous Provisions) Order 1984 the rule has become less material when a husband's creditors are claiming possession of the matrimonial home and the wife is seeking to remain in occupation. So long as her statutory right of occupation has been registered as a matrimonial charge, she is entitled to remain in occupation of the house. There remain cases nevertheless where it may be of significance whether a wife can establish a right to a beneficial interest in the matrimonial home by reason of having made indirect contributions during the marriage.

1.2 In carrying out its work the Committee was greatly assisted by Ms Claire Archbold LLB, Barrister, of the School of Law, Queen's University, Belfast. It became clear to the Committee that the two topics raised somewhat wider issues of interest and importance. Thus in the context of the law relating to housekeeping money the question of jointly enjoyed household goods arose for consideration. In the context of the law relating to indirect contributions in respect of the matrimonial home it became clear that a review of the law necessitated a consideration of the position of unmarried couples who are living in a quasi-spousal relationship.

1.3 This paper is in the nature of a discussion paper. It represents the results of the Committee's work in the investigation into the existing law of Northern Ireland and into the comparison of the law in this jurisdiction with the law in certain other common law jurisdictions. It sets out the views of the Committee in relation to the shortcomings in the existing law and sets out provisional recommendations as to a change in the law. It sets out questions upon which it seeks the views of interested parties. Later in this chapter we summarise our key provisional recommendations.

1.4 In Chapter 2 of the paper we give a brief statistical picture of the social context in which the questions raised by this discussion paper arise. In Chapter 3 we set out a synopsis of the existing law relating to the matrimonial home and in relation to housekeeping and household goods. Chapter 4 provides analysis of the law prevailing in certain other countries (viz Republic of Ireland, Canada, Australia and New Zealand). In Chapter 5 we discuss the current position in respect of the rights of unmarried cohabitants and set out the arguments for and against giving cohabitants the same rights as spouses in relation to our proposed changes in the law. Chapter 6 sets out our criticisms of the existing law and puts forward provisional recommendations for reform and finally, in Chapter 7, we set out specific questions upon which we seek the views of interested parties.

1.5 Summary of provisional recommendations

PART A

In this part the word "property" means all property of a married couple or of qualifying cohabitants other than (a) the principal residence of the married couple or qualifying cohabitants; (b) property acquired wholly or partially for the purposes of business; and (c) any other interest in land (save the principal residence), and interest in any life assurance policy, or contracts of deferred annuities.

Recommendation 1

1.5.1 Where spouses are living together in the same household and

(i) one spouse transfers to the other property which is wholly or mainly for the use of both; or

(ii) one spouse transfers property to both spouses jointly; or

(iii) one spouse purchases property which is wholly or mainly for the use or benefit of both; or

(iv) both spouses jointly purchase property,

the beneficial ownership of the property should vest in both spouses jointly as joint tenants unless the parties expressly agree otherwise.

Recommendation 2

1.5.2 Where spouses are living together in the same household and one spouse transfers to the other spouse property which is not or wholly or mainly for the use or benefit of both, beneficial ownership should vest in the transferee alone.

Recommendation 3

1.5.3 Recommendations 1 and 2 should apply to the property acquired or transferred prior to the parties becoming spouses, provided such property has been acquired or transferred in the expectation of marriage.

Recommendation 4

1.5.4 (a) Recommendations 1 and 2 should apply in relation to qualifying cohabitants;

(b) to qualify as such cohabitants, the cohabitants would:

(i) have to have been living together in the same household for at least a total of two years within a period of the last three years effectively as husband or wife though not being married; or

(ii) have had a child by their relationship and have been living together in the same household effectively as husband and wife though without being married;

(c) upon the parties becoming qualifying cohabitants, this Recommendation should also apply in relation to property acquired or transferred prior to the parties becoming qualifying cohabitants provided such property was acquired or transferred in the context of and for the purposes of a relationship of cohabitants.

PART B

In this part "property" refers to the property in which the parties jointly reside as their home.

Recommendation 5

1.5.5 (a) in the case of a joint residence of spouses or qualifying cohabitants (or if they have more than one residence, their primary residence) and the spouses or cohabitants are living together in the same household and:

(i) one spouse or cohabitant transfers the property to the other; or

(ii) one spouse or cohabitant transfers the property to both spouses or cohabitants jointly; or

(iii) one spouse or cohabitant purchases the property;

(iv) both spouses or cohabitants jointly purchase the property,

the beneficial ownership of the property should vest in both spouses or cohabitants as joint tenants unless the parties agree otherwise expressly IN WRITING.

(b) the property to be covered by this Recommendation should include:

(i) property acquired or transferred prior to the parties becoming spouses, provided it was acquired or transferred in the expectation of marriage; and

(ii) upon the parties becoming qualifying cohabitants, property acquired or transferred prior to the parties becoming qualified cohabitants provided it was acquired or transferred in the context of and for the purposes of a relationship of cohabitants.

PART C

Recommendation 6

1.5.6 Recommendations 1 and 2 should not apply to any interests in land (with the exception of the joint residence covered by Part B), life insurance policies or contracts of deferred annuities.

Recommendation 7

1.5.7 Recommendations 1 and 2 should not apply in relation to a transfer or purchase made wholly or mainly for the purposes of a business.

PART D

Recommendation 8

1.5.8 (a) in the case of disputes between cohabitants not covered by the foregoing recommendations (whether or not they are qualifing cohabitants for the purposes of the foregoing recommendations) or between spouses in relation to any property (other than property acquired wholly or partly for business purposes) in deciding the parties' beneficial interests the Court should determine what it considers to be the just division of the beneficial interests taking into account:

(i) the contribution in money and money's worth, direct and indirect, made by the parties towards the cost of acquiring, maintaining, repairing and improving the property;

(ii) the contribution in money or money's worth, direct or indirect, towards the costs of discharging any debt secured on the property;

(iii) any agreement or arrangement, express or implied, made by the parties in respect of their beneficial interest in the property whether prior to the acquisition of the property or during the parties' occupation or use of it or which they might reasonably be expected to have made in the circumstances if they had considered the question of beneficial ownership;

(iv) the degree of economic integration of the parties;

(v) the degree of permanence of the relationship between the parties (in the case of parties who are not married);

(vi) the reasonable expectations of the parties in all the circumstances of the case;

(vii) any benefit accruing to the party with the legal title from the contributions in money or money's worth, direct or indirect, made by the other party;

(viii) any representations express or implied made by either party to the other relating to the title or beneficial ownership in the premises before the acquisition of the property or during their occupation or use of it.

Recommendation 9

1.5.9 Upon a court declaring any beneficial interest, it shall also have all the powers of realisation, postponement and to grant possession as under the provisions of the Matrimonial Causes (Northern Ireland) Order 1978.

CHAPTER 2

Statistical Analysis

2.1 It is useful to gain a statistical picture of the social composition of Northern Ireland, and to contrast it with other jurisdictions in the United Kingdom, in order to gain a picture of the context in which the law operates. Unfortunately a full statistical picture is not available, but the existing figures do provide some useful insights.

2.2 Demographic outline

At the time of the last census, the resident population of Northern Ireland was 1,573,282[1]. This increased to 1,631,800 by 1993[2] and to 1,663,300 by 1996[3]. Estimates suggest that the trend will continue to be upwards[4]. The vast majority of the population have been born in Northern Ireland[5], although for the first time this century, the number of people immigrating into Northern Ireland exceeded the number emigrating from it, a trend which continued until at least 1993[6]. Within Northern Ireland, just over two thirds of the population live east of the Bann, 80% of those living east of the Bann are urban dwellers, compared with only 51% west of the Bann. Population growth in the west was four times that of the east between 1981 and 1991[7].

2.3 Marriage

In 1991, 56·6% of the Northern Ireland population was married, a figure comparable to the Great Britain figure of 56% but higher than the 51·2% of the population of the Republic of

have never been married before. Although the available figures for England and Wales are calculated differently, the Northern Ireland figure seems remarkably low, given that 13·5% of single, divorced or separated men and women in England and Wales were cohabiting in 1987[14]. The most recent figures available for Northern Ireland show no increase in this low figure with similar figures or around 2% of people cohabiting in 1995[15]. In the Analysis of Secondary Data in the Divorce in Northern Ireland Report to the Office of Law Reform, Claire Archbold states that there may be significant under-reporting of cohabiting in Northern Ireland. Some of the suggestions put forward for under-reporting are that "a percentage of cohabiting couples believe themselves to be married (as "common law" husband and wife) or choose to describe themselves as married or do not feel that their relationship is permanent enough to be reported". However, another reason quoted by Claire Archbold is cited in "Reconceptualising Families in Ireland" by Eileen Drew. In discussing the figures in the 1996 Republic of Ireland Census it is suggested that some cohabitants may not wish to report their status to any branch of "officialdom" for fear of losing benefit entitlement. This would appear to be borne out by anecdotal evidence of family law practitioners.

2.5 Divorce

The rate of divorce in Northern Ireland in 1996 was 3·2% per 1000 married population[16], a low figure compared to 13·5% in England and Wales[17]. The statistics indicate a steady rise in the divorce rate, from 1,539 in 1986 to a high of 2,310 in 1991. There has been a stabilisation of the figures since then with figures of 2,280 in 1992, 2,213 in 1993, 2,310 in 1994 and 2,302 in 1995[18]. There is as yet no known cause for this pattern.

Some of the common factors among divorces in Northern Ireland are the same as elsewhere. The highest number of divorces occur between 5 and 9 years of marriage, and over 40% of 1991 divorces involved at least one party who had married under the ages of 21[19]. In Northern Ireland, it is significant that the divorce rate for Catholic marriages (156 per 1000 in 1991) is around half of that of the rest of the population (310 per 1000)[20].

2.6 Birth rates and children

Northern Ireland has a younger population than any other EU country except the Republic of Ireland[21] and Compton attributes this to the higher than average birth rate[22]. The average family size in Northern Ireland is also higher than that in England and Wales; 2·39 children as compared to 1·8 children.

---

14 B Hoggett and D Pearl: The Family, Law and Society (3rd edition) (Butterworths) p. 331
15 Continuous Household Survey 1995-96
16 Annual Report of the Registrar General (1996)
17 1991 figures
18 Annual Report of the Registrar General (1995) Table Z
19 Compton, para 8.45
20 Compton, para 8.44
21 Ibid. Figure 3A
22 The birth rate in 1996 was 14·8 per 1000 population. Annual Report of the Registrar General (1996) Table 1.1

While the birth rate for married couples has decreased markedly over the past twenty years[23], the rate for unmarried women has rocketed. In 1992, 21% of live births in Northern Ireland were to unmarried women, a figure lower than the England and Wales rate of 31·1% and comparable with the Republic of Ireland's rate of 23%[24], but significantly higher than the EU average. By 1996 the figure for Northern Ireland had increased to 25·9%[25], a total of 6,367 children. As only 2,575 of those women who categorised themselves as cohabiting in the 1991 Census had ever had a child, a significant number of the 5,000 children born to unmarried women in 1990 must have been to women withos ritners.nd

However, a breakdown of the work done by women shows that many of these jobs are part-time and that the average female wage in Northern Ireland is only around two-thirds of the average male wage[35]. Similarly, while only one in seven men in employment was working part-time in 1994, three in seven women in employment were doing so[36]. The implications for women who wish to work during marriage of after divorce are particularly worrying, given the low availability of child care facilities.

The statistics for 1995 report that of women in Northern Ireland with pre-school children only 18·1% use a playgroup, and 8·4% a nursery school, compared with 55·2% and 71·8% who would use such provision if it were available. Only 0·3% of women used a nursery provided by their employer[37].

35 Northern Ireland Social Brief (NISRA) (1997) Table 4.4
36 Northern Ireland Abstract of Statistics (No. 13) (PPRU, 1995) Table 11.3, 11.4. These figures are 238,709 men working full-time and 39,213 part-time compared to 157,101 women working full-time and 115,469 part-time
37 Ibid. Tables 5.1, 5.4

CHAPTER 3

General Principles Relating to Family Property in Northern Ireland

3.1 The ownership of the family home in Northern Ireland is governed by essentially the same principles as apply to the ownership of any other real property. The **legal** ownership of land is determined by the names appearing on the title deeds, in the case of unregistered land, and by names appearing on the folio in the case of registered land. The **beneficial** ownership of land is determined in accordance with the principles of equity. Beneficial interests may arise under an expressly declared trust or by implication of law, though in the case of registered land, subject to the exceptions listed in Schedule 5 of the Land Registration Act (Northern Ireland) 1970, they must be registered in order to take priority over other registered interests. In the case of Schedule 5 interests those interests take priority over subsequent registered interests without registration and override those registered interests when accompanied by occupation.

3.2 Co-ownership of the family home may be either on foot of a joint tenancy (in which case the surviving joint tenant takes the whole of the title in the event of the death of the other tenant) or by a tenancy in common (in which case on the death of one tenant in common his or her share in the land passes as part of his or her estate). There may, of course, be more than two joint tenants or tenants in common in respect of land and joint interests may subsist at law or in equity. Where a joint tenancy or tenancy in common exists, a joint tenant or tenant in common may apply to the Court for an order for sale or partition of the lands and where the applicant holds an interest of a half or more in the lands the Court is bound to order a sale rather than partition unless it sees good reason to the contrary (Partition Act 1868 and 1876). The Court now has a power under Article 49 of the Property (Northern Ireland) Order 1997 to impose such stay or suspension or impose such conditions as it thinks fit in relation to an order for partition or sale.

3.3 At common law when a women married her legal existence was incorporated into and consolidated with that of her husband. This meant that the marriage constituted an absolute gift of the wife’s chattels to her husband. Her real property passed under his management and control during their joint lives, although he required her consent to sell the capital. He was entitled to the wife’s income whether from employment or from land. On death her property passed to her heirs and if she predeceased the husband he was entitled to the right of curtsey. As a concomitant of these rights conferred on the husband he owed a duty to provide his wife with the necessities of life. The wife had a right to pledge his credit for necessities of life for herself and her children. Conveyance of property to trustees to the separate use of a married woman allowed her in equity to deal with the property as if she were “feme sole” (single woman), although the terms of the trust could prevent her from dealing with income from the property until it fell due, thereby protecting a gullible or intimidated wife from an unscrupulous impecunious husband.

3.4 The unfairness of the common law principles relating to married women led to agitation for reform which culminated in the Married Women's Property Act 1882, Section 1(1) of which states:

> "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding and disposing, by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a feme sole without the intervention of any trustee."

3.5 The doctrine of the separate property of husband and wife forms the current theoretical basis of the law in Northern Ireland as in England and Wales. The special nature of marriage and in some cases of a cohabitational relationship has resulted in piecemeal statutory reforms, a brief outline of which is set out below.

Actions Under Married Women's Property Act 1882

3.6 Section 17 of the 1882 Act as amended by section 3 of the Law Reform (Husband and Wife) Act (Northern Ireland) 1964 and Article 16(2) of the Family Law (Miscellaneous Provisions) (Northern Ireland) Order 1984 confers jurisdiction on the County Court and the High Court to make such order with respect to property in disputes between a husband and wife as the Court thinks fit. The jurisdiction extends to former spouses for a period of three years after divorce and to certain formerly engaged couples. Although at one time there was a trend towards using this power to adjust and not merely declare the strict legal and equitable rights of the parties (see for example **W v W** [1951] 2 TLR 1135), the House of Lords in **Pettitt v Pettitt** [1970] AC 77 and the Court of Appeal in Northern Ireland in **McFarlane v McFarlane** [1972] NI 59 definitively decided that the Court's powers under the Act are declaratory only, though the Court retains a discretion as to the manner of the enforcement of the rights. With the wider adjustative powers available to the Court in divorce and judicial separation proceedings, the Married Women's Property Act is less used than it was though it still provides a useful, if limited, remedy in certain circumstances.

The Matrimonial Causes (Northern Ireland) Order 1978

3.7 The power to transfer property between spouses in divorce, nullity and judicial separation proceedings was one of the major innovations of the Matrimonial Causes (Northern Ireland) Order 1978 being one element of the new property regime. The judge's discretion is exercised after consideration of a number of statutory factors:

(a) the welfare of any children of the family;

(b) the income and potential earning capacity of the parties;

(c) their financial needs and responsibilities;

(d) the standard of living of the parties during the marriage;

(e) their age and duration of the marriage;

(f) any disability they may suffer;

(g) any contribution they made or will make to the welfare of the family;

(h) any conduct of the parties which would be inequitable to disregard;

(i) any financial benefit, in particular a pension, to which they will lose entitlement by reason of the divorce; and

(j) whether a clean break is appropriate.

3.8 The judge's powers to make financial provision orders on divorce is not dependant on ownership rights and there is no division between property which can be shared and property which is exempt as in other jurisdictions. Even property which is not referable to the marriage, such as legacies and awards of damages, may be reallocated on divorce.

3.9 The Order does not have any preconceived base line. However, the traditional "one third rule" has been described as "as good a starting point as any" in arriving at a figure (see **Wachtel v Wachtel** [1973] Fam 72 at 94). Although apparently little used in England and Wales, it would appear that the one third rule is still on occasion called in aid in Northern Ireland and it might be argued to be a presumption out of step with modern ideas of marriage as a partnership. However, there is anecdotal evidence from practitioners that in a significant proportion of settlements reached nowadays assets are added together regardless of whether or not they are jointly held assets, and the total sum divided equally between the parties.

Domestic Proceedings (Northern Ireland) Order 1980

3.10 Until early 1999, with the introduction of the Family Homes and Domestic Violence (Northern Ireland) Order 1998, under Articles 18 and 19 of the Domestic Proceedings (Northern Ireland) Order 1980 the magistrates' court was empowered to grant a **personal protection order** in favour of a spouse or cohabitant if their partner had used or threatened violence against them and the court considered that an order was necessary. In the case of a cohabitant the magistrate would have had regard to the length of time for which the parties had been living together and whether there were any children of the relationship. In the same circumstances (and additionally if there had been a breach of a personal protection order) the Court had power to grant an **exclusion order** which excluded the respondent from the matrimonial home (which included properties other than those lived in by parties as husband and wife or cohabitants) for up to six months. Breach of such an order was a criminal offence. The respondent could be prevented from disposing of or interfering with the property and could be required to pay the outgoings on it for the duration of the order. The magistrates' court remedy was not available in respect of cohabitants in England. Overall it would appear that the remedy was sought more frequently in Northern Ireland than in England.

The Family Law (Miscellaneous Provisions) (Northern Ireland) Order 1984

3.11 This Order was based on the Matrimonial Homes Act 1983 in England and Wales which provided for the non-owning spouse a statutory right of occupation in the matrimonial home. From early 1999, the statutory right of occupation will have been replaced by matrimonial home rights set out in the Family Homes and Domestic Violence (Northern Ireland) Order 1998. The rights are not materially different and are set out in 3.14.

The Children (Northern Ireland) Order 1995

3.12 The Court may order a child's parents not only to make periodical payments or pay a lump sum for the child's benefit but also to transfer or settle the specified property. Thus, the Court may secure a child's housing on the breakdown of a relationship between parties. Thus, for example, a non-owning cohabitant who has the care of the child may obtain the benefit of staying in the family home, though such orders are intended only to benefit the child during minority so that an outright transfer of the family home is not an appropriate order.

Property (Northern Ireland) Order 1997

3.13 Under Article 49 of the 1997 Order, without prejudice to Article 309 of the Insolvency (Northern Ireland) Order 1989, where on the request under the Partition Acts of a party interested (including a mortgagee) a court makes an order for partition or sale, the court on the making of the order or at any time before its enforcement may impose such stay or suspension or impose such conditions as in the circumstances of the case it thinks fit and it may revoke or vary such stay, suspension or conditions. It confers an as yet judicially undefined power to qualify an order for sale or division of jointly held property and it may thus enable the Court to qualify to some extent the strict legal rights of parties in respect of jointly held property. Where the share of one of the joint owners of jointly held property has been mortgaged the mortgagee may apply for an order for sale of the property under the Partition Acts, and Article 49 confers upon the Court power to stay or suspend enforcement or impose conditions in relation to such an order.

The Family Homes and Domestic Violence (Northern Ireland) Order 1998

3.14 This introduces, first, the concept of matrimonial home rights which are almost identical to the occupation orders under the Family Law (Miscellaneous Provisions) (Northern Ireland) Order 1984 – see paragraph 3.11 above. Matrimonial homes rights exist where the parties satisfy certain criteria:

(a) that the parties are married;

(b) that one spouse is entitled in general law to occupy the matrimonial home and the other is not; and

(c) that the property in question is a dwelling house used or intended to be used as their matrimonial home.

3.15 The Order gives a spouse who is in occupation the right not to be evicted or excluded from the home without the leave of the court. Where the spouse has a beneficial interest in the home the matrimonial rights are a charge on the estate, which can bind trustees of that estate and has the same priority as if it were an equitable interest at the latest of the several dates set out in the Order.

3.16 Secondly, the Order allows the making of occupation orders which are to be used in cases of domestic violence – replacing exclusion orders under the Domestic Proceedings legislation – but not exclusively so. They can be used to resolve property disputes and extend to a range of persons, including spouses, someone who has matrimonial rights, former spouses (under certain circumstances), cohabitants (referred to as "cohabitees") or former cohabitees. Persons who have legal rights in the property, including matrimonial rights are called "entitled persons", and those who base their applications on the nature of the relationship rather than on their property rights, are called "non-entitled persons". If a former spouse or cohabitee has only an equitable title in the property, he or she can apply either as an entitled person, if their rights are clear, or as an unentitled person, if the right or title rest on such as a resulting or constructive trust, without applying to the court for a decision on those complex property rights, and without any future claim in respect of those rights being affected.

Equitable interests in Family Assets

3.17 An equitable interest may arise under an express trust or may arise from operation of the principles of equity. In the context of matrimonial property no specific difficulties arise in relation to express trusts which are declared either by word or in writing. The subject matter of the trust must be certain, the object of the trust must be certain and the words relied on as creating the trust must have been used in an imperative sense so as to show that the relevant party intended to create a trust obligation. In the case of land, though not in the case of personal property, Section 4 of the Statute of Frauds (Ireland) 1695 requires that the trust be evidenced in writing, signed by some person able to declare the trust or by his Will. The written evidence may come into existence long after the declaration and operation of the trust.

3.18 In relation to trusts arising from operation of law the topic is bedevilled by a confusion in the use of terminology. Trusts other than express trusts have traditionally been categorised as implied, resulting or constructive trusts. There is no universal or eternal meaning agreed for these terms except that they are supposed to be descriptive of all trusts which are not express trusts.

3.19 The starting point of any consideration of the topic is the proposition that equity follows the law and the equitable or beneficial interest will be in the absence of some reason to the contrary belong to the party who has the legal or paper title. There is, however, a presumption that the beneficial title will be held for the party who advanced the purchase

money, the beneficial title "resulting" or coming back to the party who paid for the land. This is a presumption based on the inference that that is what the parties intended. Where the purchase monies have been provided by two or more parties it will be presumed that the equitable interest is held for the parties proportionate to their contribution. The presumption of a resulting trust may be rebutted by any evidence that clearly shows that the purchaser did not intend to take a beneficial interest in the property. Where a contributor is a husband or father (though not a wife or mother) of the legal owner there is a presumption that he intends to make an advancement in favour of his wife or child. This presumption of advancement, which still applies, has been criticised as being an outdated inference of a fact which "an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied to classes of a different social era" (per Lord Diplock in **Pettitt v Pettitt** [1970] AC 777).

3.20 The presumption of a resulting trust will (inter alia) arise from direct contributions to the cash price, contribution to the deposit or legal expenses at the time of the purchase or contribution by being eligible for discount on the purchase price because, for example, of Northern Ireland Housing Executive rules.

3.21 The question as to what equitable interest a party will acquire by making **indirect** rather than **direct** contributions is more difficult. In this context indirect contributions will include financial contributions by a spouse to the family finances which are not directly related to the acquisition of the relevant premises, physical work in the construction or improvements to the premises, work and services provided in running the home and thus freeing up the other party in relation to the money earned by him or her, or the assisting of the other party in running a business or career in such a way as to enable that other party to earn money which can then be used to acquire premises put into his or her sole name. In **Gissing v Gissing** [1971] AC 886 there were differently expressed views as to whether it was necessary to establish a common intention or agreement or arrangement between the parties before an indirect contribution could give rise to an equitable interest.

The Rule in McFarlane v McFarlane

3.22 The law in this jurisdiction was put beyond doubt in the Court of Appeal in **McFarlane v McFarlane** [1972] NI 59. Lord MacDermott stated the principle thus:

> "In the absence of proof to the contrary a spouse who has acquired the legal title of the property purchased with the aid of a substantial monetary contribution from the other spouse will hold the property subject to a beneficial interest therein belonging to the other spouse. This may be the result of some binding agreement between the spouses or it may flow from a resulting trust in favour of the contributing spouse who is without legal title. In certain circumstances this proposition may apply in favour of a spouse without the legal title if that spouse has contributed to the purchase indirectly and in a manner which has added to the resources out of which the property has been acquired;

but if an indirect contribution is to earn a beneficial interest in the property acquired it must be the subject of such agreement or arrangement between the spouses as shows a mutual intention that the contributions or one of the other will go to create a beneficial proprietary interest in the contribution."

3.23 In that case the parties had married in 1944 and separated in 1968. At the time of the marriage the wife was a principal teacher in a primary school and was provided with a free school house. The husband who had no home and no set occupation moved into the school house with his wife. Subsequently he built up a substantial car insurance brokerage, his wife helping with the clerical work. In 1957 the wife gave up teaching to work full-time in the business. In 1959 the husband bought premises which he had previously rented. This property was used as the matrimonial home until 1960. A further house was bought which then became the matrimonial home where the parties lived until they separated in 1968. This later property was also in the husband's name. The wife claimed that she had acquired a one half beneficial interest in the premises.

3.24 In the Court of Appeal both Lord MacDermott LCJ and Lowry J (as he was then) concluded that there was a relevant distinction between direct contributions and indirect contributions if they were to earn a beneficial interest in the property acquired. If indirect contributions are to give rise to a beneficial interest it must be the subject of an agreement or arrangement between the spouses. Such an arrangement was not restricted to a contractual relationship but could include any understanding between the spouses which showed a mutual intention that the indirect contributions of one would go to create a beneficial proprietary interest in the contributor.

3.25 Lord MacDermott gave his reasons for his conclusions:

1. The point was to be settled in relation to the institution of marriage rather than in relation to broken marriages. What either spouse contributes to the family resources will not be contributed with any thought of building up a beneficial interest in one form of property or another. If the parties have actually agreed or arranged that indirect contributions are to give rise to an interest a court of equity will be asked and entitled to say that the holder of the property as a matter of fair dealing, would be bound to hold some or some share of the property on behalf of the contributor and not by way of intruding into the ordinary collaborative course of married life.

2. If the indirect contributions of a spouse for family purposes were put on an equal basis with direct contributions in order to ascertain the resulting beneficial proprietary interest, it would amount, in the absence of any agreement or arrangement between the spouses, to an application of the discredited doctrine of family assets.

3. Where (as in that case) the husband carried on a business in which his wife had no proprietary interest as a partner or otherwise and the husband's business bank account was under his sole control, the wife's indirect contributions, though helping to create a

credit balance, could not raise a trust in her favour unless her interest was sufficiently defined and protected by some agreement between the spouses. Without that her contributions might never have any chance of coming back to her in the form of a proprietary right, for they might be called upon to meet the needs to the business and the demands of the creditors.

4. Upholding a contributor's claim without any basis of an agreement would be to have recourse to a legal fiction, imputing an intention or other state of mind which never existed. The use of legal fiction is no longer an acceptable solution for legal problems.

3.26 Lowry J pointed out that unfair though the result might appear, a non-working wife who was unable to make any indirect financial contributions would have nothing to gain from a decision in favour of the wife in that case:

> "When community of ownership between spouses is not the law it seems unfair to give some wives but not others property rights beyond those of other people in similar circumstances."

In **McFarlane v McFarlane** the Court of Appeal definitively defined the law in Northern Ireland. No appeal lay against the decision to the House of Lords since the case had originated in the County Court.

3.27 In England after **Gissing v Gissing** the Court of Appeal took a less restrictive view. In **Cooke v Cooke** [1972] 1 WLR 518 at 520 Lord Denning, a proponent of the earlier family assets doctrine which had been rejected by the House of Lords in **Gissing v Gissing**, in effect sought to reintroduce the concept indirectly stating that:

> ". . . whenever parties by their joint efforts acquire a property to be used in their joint benefit, the courts may impose or impute a constructive or resulting trust."

3.28 In **Eves v Eves** [1975] 1 WLR 1338 the parties were unmarried. The man told the woman that the house had been put in his name because she was under 21. Her indirect contributions consisted of looking after the couple's children and doing substantial redecoration and renovation works, including breaking up large areas of concrete and demolishing a shed. Lord Denning held that she should be entitled to a one quarter share because the situation was one in which the trustee "has so conducted himself that it would be inequitable to deny to the cestui que trust a beneficial interest in the land acquired".

The Current Approach in England

3.29 After Lord Denning the English Courts began to take a more restrictive view and eventually the question came back to the House of Lords in **Lloyds Bank v Rosset** [1991] 1 AC 107. In that case the wife had made no financial contributions but had done substantial decorating and supervised renovations. The husband had mortgaged the property to the Bank without the wife's knowledge. The wife claimed a beneficial interest in the house which she asserted

overrode the Bank's security so far as her beneficial interest was concerned. In rejecting the wife's claim to an interest, Lord Bridge at 132 stated:

> "The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. A finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once the finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.
>
> In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement for arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as to the basis from which to infer a common intention to share the property beneficially and as to the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do."

In **Lloyds Bank Plc v Rosset** the House of Lords expressly approved and adopted the approach of the Court of Appeal in **McFarlane v McFarlane**.

3.30 There have been few reported decisions in Northern Ireland since the **Rosset** decision. In **Britannia Building Society v Johnston** (unreported, 13th May 1994) Carswell LJ (as he then was) set out the modern approach:

> "The circumstances which are capable of giving rise to a constructive trust of this nature are:
>
> (a) an agreement, or arrangement or understanding reached between the spouses that the property is to be shared beneficially; or
>
> (b) conduct on the part of the claimant amounting to a direct contribution to the purchase price of the property, which gives rise to the inference of such a common intention to share the beneficial interest in the property."

He noted that:

> "(1) In **McFarlane** the Court ruled that direct contribution only can suffice to establish a constructive trust with no agreement; and
>
> (2) In **Lloyds Bank** Lord Bridge had not ruled definitely on the point merely expressing doubt whether other categories of contribution would suffice."

3.31 In England in some cases such as **Midland Bank v Cooke** [1995] 4 All ER 562 and **Drake v Whip** [1996] 1 FLR 826 it may be that the Courts are tending to adopt a somewhat more flexible approach to indirect contributions than Lord Bridge envisaged.

3.32 While in divorce situations the adjustative powers of the court reduce the importance of determining the precise beneficial interests of parties, the question of beneficial ownership of the joint home of spouses and cohabitants still remains important in other contexts such as bankruptcy, pre-divorce disputes, death and financial planning and third party interests (such as mortgage situations).

3.33 Differing views have been taken as to what interest a non-owing party acquires by virtue of contributions in the payments of mortgage instalments. In **McFarlane v McFarlane** [1972] NI at 74 Lowry J (as he then was) stated obiter:

> "It seems that where one spouse claims a beneficial interest in property the legal title of which is vested in the other the claimant must show that he or she has made a pecuniary contribution to the purchase. The contribution may be direct whether it is made in one payment or by instalments and whether it is made before purchase or afterwards (for example, by helping to pay off an overdraft or building society instalments) or partly before and partly afterwards. In such a case the legal owner will be a trustee to the extent of the contributions for the contribution spouse whose beneficial interest in the property will be proportionate to his or her contribution. This may have to be worked out and if the portions cannot be ascertained the maxim equality is equity may be applied."

3.34 In **Cowcher v Cowcher** [1972] 1 All ER 943 Bagnall J considered that the matter was to be determined by an application of the principles of equitable accounting, i.e.:

> "(a) where a fund was being distributed a party could not take anything out of the fund until he had made good what he owed the fund; and
>
> (b) that a party who has discharged another's secured obligation wholly or in part is entitled to be repaid out of the security the sums paid by him."

Approaching the matter in this way a spouse who had discharged the mortgage instalments due by the other spouse would be entitled to be reimbursed those instalments (with interest) out of the proceeds of the sale of the premises. This would effectively give the contributing spouse a security on the property rather than an equitable interest. It is hard to fault the strict logic of the **Cowcher v Cowcher** approach.

Other Proprietary interests and remedies

3.35 Where the legal title to the relevant lands or premises is vested in one party (say the husband or male cohabitee), common law or equity may intervene to protect another party (say the wife or female cohabitee), by other means additional to the imposition of a trust. An important doctrine which may assist a party without a legal interest is that of proprietary estoppel neatly defined by Lord Denning in **Crabb v Arun District Council** [1976] Ch 179:

> "If a person by his words or conduct so behaves as to lead another to believe that he will not insist on his strict legal rights – knowing or intending that the other will act on that belief – and he does not so act, that again will raise an equity in favour of the other and it is for a court of equity to say in what way the equity may be satisfied."

3.36 In **Greasley v Cooke** [1980] 3 All ER 710 the English Court of Appeal eased the way for applicants trying to prove a connection between their reliance and the representations made to them. The court held that once it is shown that a representation was calculated to influence the judgment of a reasonable person the presumption will be that the applicant was so influenced.

3.37 Unlike other estoppels which merely provide a defence, the court has great flexibility in the remedy it grants to give effect to a proprietary estoppel. In appropriate cases it may even direct an out and out transfer of the full title to the property from the paper owner to another party, as happened in the case of **Pascoe v Turner** [1979] 2 All ER 945 in which, because of the circumstances established, the court directed a male cohabitee to transfer the house to his partner. Proprietary estoppel has been raised by a son who worked on his father's farm in reliance on a promise that a power of appointment would be exercised in his favour (**Reidy v McGreevy** (unreported judgment of Barron J in the Irish High Court 19th March 1993)); a women who lived with a family for thirty years, initially as a maid then after she began a relationship with one of the sons as a largely unpaid caretaker, in reliance on a promise that she could look on the house as her home for life (**Greasley v Cooke**); and by a daughter-in-law who had expended money on a house and looked after her elderly father-in-law on the understanding that she would be left the house in his will which was never made (**Re Basham** [1986] 1 WLR). The principles of proprietary estoppel and constructive trusts in the context of marriage and cohabitation cases are closely akin, though a constructive trust gives rise to an equitable proprietary interest whereas a proprietary estoppel confers on the court a power to grant a remedy. From **W A Lees (Concrete) Ltd v Lees** [1992] 11 NIJB 44 it appears than an inchoate equity arising from a proprietary estoppel can bind third parties. At this juncture it must be said that the relationship between constructive trusts and proprietary estoppel has yet to be fully developed.

3.38 In certain circumstances the court may conclude that the party having the legal title to premises has granted another party a licence to occupy the premises. Prior to its definitive rejection by the House of Lords in **National Provincial Bank v Ainsworth** [1965] AC 1175 the courts evolved the concept of "the deserted wife's equity" which was considered to be a form of licence coupled with interest and which was binding on third parties. The current position is encapsulated by the Court of Appeal in **Ashburn Anstalt v Arnold** [1989] Ch.1:

> "(1) A contractual licence is not, without more, binding on a third party, even though they take with notice of it; but
>
> (2) appropriate circumstances may give rise to constructive trusts if the conscience of the owner of the land has been affected so that it would be inequitable to allow him to deny the applicant an interest."

3.39 The right of residence is a peculiar feature of Irish land law. The right was frequently used by farm owners in their wills as a way of ensuring a secure old age for their widows. Such a right might be general (charged on the whole land, sometimes coupled with a charge for maintenance) or particular (giving to right to the exclusive use of specified rooms in the house). The precise legal categorisation of the right to residence is debatable. It has been held to give rise to an implied trust (**Lenor v Lenor** [1910] 44 ILTR 155), a right to occupy (**Johnston v Horace** [1993] ILRM 594) and a charge capable of being represented by an annuity (**National Bank v Keegan** [1931] IR 344). In the case of registered lands section 47 of the Land Registration Act (Northern Ireland) 1970 protects the general right of residence, stating that the right is personal but binding on the successors in title of the owner.

Ownership of household goods and housekeeping money

3.40 In general, title to personal property as between spouses and cohabitees will normally depend on who provided the purchase price and whether there has been an effective delivery of the property to the other by way of gift. As with real property there are few special rules of family property although the presumption of advancement comes into play. Evidence that assets were intended to be held jointly would allow different conclusions. Where the parties operate a joint fund such as a joint bank account the presumptions of resulting trusts and advancement will apply. A fund largely supplied by a husband will be owned jointly by the parties as a result of the presumption of advancement whereas presumption of a resulting trust will apply where the fund is supplied by a wife. The presumptions may be rebutted by evidence that, for example, the account was in joint names for some lesser reason (e.g. for the ease of administration – see for example **Heseltine v Heseltine** [1971] 1 WLR 342).

3.41 The common law rule in relation to housekeeping money is that if a husband provides a wife with an allowance out of his income for housekeeping any sums saved from it remain his and he is entitled to any property bought with them. Unless there is evidence that a gift was intended, the wife is deemed to be acting as the husband's agent in spending the money and the surplus of any property brought with it belong to him. In **Hoddinott v Hoddinott** [1949]

2 KB 406 a dispute arose over the ownership of furniture bought with pools winnings where the housekeeping money had been used to enter the pools. Bucknill LJ said:

> "First, I am not at all satisfied that the wife has got any legal interest in the housekeeping money as such. The money belonged to the husband and I should have thought that she held it in trust for him for keeping them both and if the husband decides to take some of it away from the purchase of food and such things to invest it in football pools, it seems to me that in the absence of any contract between them the proceeds or winnings on their housekeeping money also belong to him."

The rule on housekeeping money may be seen as the last vestige of the old common law rules in relation to the relationship between husband and wife in respect of property.

3.42 The Morton Commission ("Royal Commission on Marriage and Divorce" (Cmnd 9678 (1956) paragraph 701) recommended that savings from a housekeeping allowance should belong jointly to the spouses. The Married Women's Property Act 1964 provides:

> "If any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to the husband and wife in equal shares."

3.43 This reform was criticised as perpetuating the stereotype of the bread winning husband who provides for a housekeeping wife, and there are interpretative difficulties and anomalies in the provision. The section does not make clear what types of payments would be classed as an allowance nor whether all purchases such as lottery winnings made up with it will count as property. It is unclear whether payment of mortgage instalments would be regarded as an expense of the matrimonial home.

3.44 The Scottish Law Commission recommended that the Married Women's Property Act 1964 should apply equally between spouses. It also recommended that there should be a statutory presumption that household goods should be owned in equal shares and these provisions made their way into the Family Law (Scotland) Act 1985. Section 25 provides:

> "(1) If any question arises whether during of after a marriage as to the respective rights of ownership of the parties to a marriage in any household goods obtained in prospect of or during the marriage other than by gift or succession from a third party it shall be presumed, unless the contrary is proved, that each had a right to an equal share in the goods in question.
>
> (2) For the purposes of subsection (1) above the contrary shall not be treated as proved by reason only that while the parties were married and living together the goods in question were purchased from a third party, by either party, by either party alone or by both in unequal shares.

(3) In this section “household goods” means any goods (including decorative or ornamental goods) kept or used at any time during the marriage, in any matrimonial home for the joint domestic purposes of the parties to the marriage other than:

(a) monies or securities;

(b) any motor car, caravan or other road vehicle;

(c) any domestic animal.”

Section 26 provides:

> “If any question arises (whether during or after a marriage) as to the right of a party to a marriage to money derived from any allowance made by either party for their joint household expenses or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to each party in equal shares.”

CHAPTER 4

Cohabitants and the Law

4.4 In Chapter 5 we discuss what the Committee perceive to be shortcomings in the existing law as it applies between spouses and we put forward provisional recommendations for changes in the law. It is necessary to consider whether any or all of the proposed recommendations should also apply to cohabitants and, if so, what category of cohabitants.

4.5 As the statistical analysis in Chapter 2 shows, cohabiting relationships are not as common in Northern Ireland as in England and Wales and the vast majority of couples living together do so in a formal spousal relationship. Quasi-spousal cohabitation relationships are now increasingly common in England and Wales and in certain other member states of the European Union such as Denmark. The number of such relationships in Northern Ireland is likely to grow (with the consequences that that will have in relation to property disputes). There are a number of reasons why such relationships are likely to continue to increase. The fall-off in religious observance, a less religious view of matrimony, the increase in divorces and separations, the changes that have occurred in respect of the permanence of marriage and the marriage commitment, the perceived lack of any great financial or fiscal advantage in marriage as opposed to cohabitation, the increase in the number of economically active women and the changes in the pattern of child-bearing and in the age of child-bearing have (*inter alia*) contributed to an increase in the number of such quasi-spousal cohabitation relationships. These factors will apply in Northern Ireland as elsewhere in the United Kingdom.

4.6 Relationships of cohabitation do not conform to an identical pattern. At one end of the spectrum is the case of a couple who live together effectively as husband and wife in a joint family home with a child or children. At the other end may be the case of a couple sharing a sexual relationship, perhaps sharing a base from which to conduct that relationship but primarily leading separate lives, possibly with spouses and children of their own.

4.7 In the case of the former example it would seem likely nowadays that society would regard such a committed relationship as equivalent, or at least very close, to a state of marriage. In the case of the latter example society would still consider such a relationship as irregular and that neither party needs or merits any special legal protection so far as their property rights are concerned.

4.8 If, as we consider, the law should provide certain protections for spouses in relation to their property rights and should draw certain inferences as to their likely intentions, the question arises whether similar protections and inferences should apply in relation to cohabitants.

4.9 The argument against extending them to cohabitants is that by applying those protections and drawing those inferences, society would or might be perceived as equating the cohabitation relationship with marriage, thereby further undermining the married state and contributing to an increase in cohabitational relationships and thereby further weakening the stable family unit which draws it full strength only from the married state. Society, it would be argued, would be placing cohabitation on the same moral and functional plane as marriage.

4.10 However, where parties are living in a committed and stable relationship to the extent of sharing their lives and pooling their financial, emotional and physical resources in the common venture of living together as a unit, it is difficult to justify treating their property rights and interests differently from spouses. Their intentions are likely to be the same and the organisation of their financial affairs will be unlikely to differ to any material degree. If the existing law produces potentially unfair and unreal results so far as married couples and particularly wives are concerned, then the results so far as such cohabitants are concerned are likely to be equally unfair and unreal.

4.11 The extension to cohabitants of the protection and inferences which we provisionally recommend in respect of spouses is not intended to represent a moral judgment on the status of cohabitation as compared to marriage. In reality our provisional recommendations would represent an enhancement of the position of women in relationships. It would be hard to justify the strengthening of the position of women in marriage relationships and leave untouched the position of women in unmarried relationships who are already in a weaker more vulnerable position than wives, in view of the absence of the presumption of advancement and in view of the lack of availability of any appropriate adjustment powers which the Court may exercise in a divorce context.

4.12 We are accordingly of the view that our provisional recommendations should apply to cohabitants who are living in a quasi-spousal relationship, that is to say in a relationship in which a man and a women live together as if they are husband and wife though without having married. It would be necessary to further define the relationship.

4.13 Before such a party could call in aid the protections and inferences which we provisionally recommend for spouses he or she would have to establish that the relationship was, or had been, a stable relationship with a degree of permanence. The definition of this permanence is a matter of judgment but we provisionally consider that before a party to such relationship can rely on the protections and inferences which we provisionally recommend the parties to the relationship must either:

(a) have lived together for a continuous period of at least two years within a period of the last three years in the same household; or

(b) have lived together in the same household and have had a child of the relationship.

In our provisional recommendations set out in Chapter 6 we set out our recommendations as to the application of those recommendations to cohabitants.

CHAPTER 5

The Law in Other Jurisdictions

Republic of Ireland

5.1 In the Republic of Ireland the Courts have taken as their starting point the House of Lords' decision in **Gissing v Gissing**. On direct contributions the law seems to be the same as that applying in Northern Ireland. In relation to indirect contributions a more flexible approach appears to be adopted. In **McC v McC** [1986] ILRM 1 Henchley J, giving the judgment of the Supreme Court, stated (obiter) that:

> "When the wife's contribution has been indirect (such as by contributing 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 ground that she has to an extent relieved the husband of the financial burden he incurred in purchasing the house."

5.2 After **McC v McC** it appears that indirect contributions will give rise to an equity without agreement and it has been held that non-financial contributions to a husband's business (**HD v JD** 31st July 1981 (unreported)), or managing a block of rented flats (**EN v RN** [1992] 2 IR 116) will give rise to an equity. Unpaid work in a business will suffice without agreement for it relieves the husband of the financial burden of paying someone else to do it. In **BL v ML** [1992] 2 IR 77, however, the Supreme Court held that domestic work in the house has never been recognised as giving rise to an equity.

5.3 There are divided views in the Irish Courts as to whether unmarried couples should be treated like married couples. In **Magill v Snodgrass** [1979] IR 283 the Court held that when the parties were not married indirect financial contributions would not give rise to a trust without evidence of common intention whether from words or conduct. In the later case of **Power v Conroy** [1980] ILRM 31 the Court did not treat the absence of agreement as material and effectively held that cohabitees and married couples should be treated in the same manner.

Canada

5.4 Several state legislatures in Canada have moved from the traditional principle of the separation of property to a variety of systems involving some aspect of community of property. The Courts too have shown a degree of radicalism not seen in England or Northern Ireland.

5.5 In **Murdoch v Murdoch** [1975] SCR 423 and **Rathwell v Rathwell** [1974] 14 RFL 297 the Supreme Court adopted the "common intention" approach of Lord Diplock in **Pettitt**. In both cases strong minority judgments urged the development of a remedial constructive trust doctrine imposing a constructive trust not because the trust had been created, but because the

defendant would otherwise by unjustly enriched. In the later Supreme Court judgment in **Pettkus v Becker** [1980] 2 SCR 834 the Court developed the concept of unjust enrichment to provide a cohabitant with a remedy by way of a share in the property where there had been no established common intention relating to the proprietary interest in the property. Dickson J stated:

> "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."

5.6 Following a number of Court decisions at provincial level developing the principles of constructive trust, Dickson J was able to give the unanimous judgment of the Supreme Court in **Sorochan v Sorochan** [1986] 2 SCR 36, a case in which a cohabitant had contributed her labour for a number of years in preserving and maintaining a farm and doing all the domestic labour although her partner already owned the property prior to cohabitation. In that case it was clearly stated that the fact the contributions were in no way referable to acquisition did not render the unjust enrichment theory of constructive trusts any less applicable.

5.7 In the case of **Peter v Beblow** [1993] 1 SCR 980 the plaintiff and her four children moved in with the defendant and his two children and cohabited for twelve years. She looked after all the children, cooked, cleaned and undertook a number of projects relating to the property, in addition to working part-time outside the house. She used her earnings towards discharging household bills. The case clarified **Pettkus** in several ways. Unpaid performance of household duties in a relationship were held to be an unquestionable enrichment of the other party and a corresponding deprivation would almost inevitably follow even though the applicant was provided with rent free accommodation and a subsidised lifestyle.

5.8 It might be argued that the domestic duties were rendered out of natural love and affection and the applicant had no reasonable expectation of a property interest. However, **Peter v Beblow** is significant in that it refused to hold household and childcare services unworthy of recognition, but as a matter of policy held that in the absence of contrary intention an inference should be drawn that parties in a marital or quasi-marital relationship expected to share in the assets created. Therefore, if domestic work or services are shown the inferences of enrichment, deprivation and absence of juristic reason are all on the side of a plaintiff and the burden of rebutting the inferences will fall on a defendant.

5.9 This position has been criticised. It has been pointed out that domestic services could be rendered as part of the spousal duty of support and not as a benefit conferred in the reasonable expectation of an interest. It might equally be argued that the natural love and affection of the property owning spouse could not reasonably give rise to an inference that they intended to keep all the property for themselves and that the mutual sharing of services

and property is a reasonable expectation of marriage. The question arising from **Peter v Beblow** is what will render a relationship tantamount to spousal. It has been suggested that intimacy, economic integration and permanence of the relationship, perhaps characterised together as a form of domestic vulnerability to economic or emotional damage, may be the sort of features which will be developed.

5.10 Quantification of the award in these cases will be on the basis of the value of the surviving property, although where monetary compensation is awarded in lieu of the property right it may be that the value of the services actually received will be used as a basis for calculation. One aspect of the remedial constructive trust which may make it less appealing is that as a remedy it does not exist until created by the Court and will not therefore take priority over the property owner's prior creditors. Despite a statement by Cory J in the Supreme Court in **Rawluk v Rawluk** [1990] 1 SCR 70 that the constructive trust arose from the date of contribution, the Canadian view of this truly remedial nature may be recognised by a statement by the same judge in the later case of **Peter v Beblow** that where the third party rights will be affected by the imposition of a trust, the monetary remedy may be more appropriate.

Australia

5.11 Until 1995 the Australian Courts followed the English example in searching for common intention in relation to equitable interests in family property disputes (see for example **Muchinski v Dodds** [1985] 160 CLR 583). In 1985 the Australian Courts began to enunciate a doctrine of unconscionability. In **Muchinski v Dodds** Dean J, using the analogy of a joint commercial venture, applied a general equitable principle which:

> "operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that the other party should so enjoy it . . . equity will not permit the other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him to do so."

Where the parties to a relationship pool their resources in pursuit of a common goal such as the purchase of a house, and title to the property does not reflect these joint contributions, it will be unconscionable for the party with the benefit of the legal title to deny the other a share of the property which accords with the extent of his or her contributions or in other words to retain the proceeds of the other party's contribution to the joint relationship.

5.12 The principle was applied by the High Court of Australia in the leading case of **Baumgartner v Baumgartner** [1987] 164 CLR 137 in which a de facto wife made contributions towards the family home pooling her income with that of her partner. The Court quantified her share on the basis that equality is equity and the parties had lived

benefit can be labelled unconscionable or contrary to equity or manifestly unfair . . . these ideas may be seen as but the application in a particular field of the equitable jurisdiction to interfere where the assertion of strict legal rights is found by the Court to be unconscionable."

CHAPTER 6

Criticisms of the Existing Law and Recommendation for Reform

Housekeeping Money and Household Goods

6.1 In relation to the law relating to housekeeping money the current law is outdated and decidedly weighted against women. It is a hangover from the past and existing rules fail to appreciate the impact of the separate property doctrine in the Married Women's Property Act 1964 (see Kahn Freund "Inconsistencies and Injustices in the Law of Husband and Wife" (1953) 16 MCR 35). It disregards the reality of modern married life and the way in which couples manage their affairs and organise their finances. In the case of half the married couples in Northern Ireland it appears that where both parties work the wife will normally use her earnings to pay household expenses. As long ago as 1972 research found that half of those surveyed thought that savings from housekeeping money should be jointly owned and half should belong to the wife. The unfairness of the current rule is accentuated by the fact that when a wife makes a transfer to a husband for household purposes it seems that it will become his (**Edward v Cheyne** (No. 2) [1888] 13 App Cas 385).

The Reform of the Law in Great Britain

6.2 In England the Morton Commission recommended that savings from a housekeeping allowance should jointly belong to the spouses. The statutory enactment in the Married Women's Property Act 1964 sought to rectify the shortcomings in the law but the reform has been criticised as being based on the stereotype of a breadwinning husband who provides for a housekeeping wife. The section contained a number of interpretational difficulties and anomalies. The section does not make clear what types of payments will be classed as an allowance nor whether all purchases (e.g lottery winnings) made with the money will count as property. Nor is it clear, for instance, whether payment of mortgage instalments would be regarded as an expense of the matrimonial home.

6.3 The Scottish Act, based on the recommendations of the Scottish Law Commission (Scot Law Comm No. 86), goes further than the English Act. It applies equally between spouses and it recommends that there should be a statutory presumption that household goods should be owned in equal shares unless the contrary is shown. The contrary is not treated as proved by reason only that while the parties were married and living together the goods were purchased by either party alone or by both of them in unequal shares.

The Recommendation of the Law Commission

6.4 The Law Commission in its Report on Matrimonial Property in 1988 (Law Comm No. 175) found the Scottish solution attractive and came up with the recommendations along similar

lines though extended into a wider field and technically somewhat different. They recommended that transfer of property by one spouse to the other for their joint use or benefit should give rise to joint ownership of the property subject to a contrary intention on the part of the transferring spouse known to the other spouse. They further recommend that the purchase of property (with some exclusions) by one or both spouses for their joint use or benefit should give rise to joint ownership of their property subject to contrary intention on the part of the purchasing spouse known to the other spouse.

6.5 Clause 1 of the draft Matrimonial Property Bill in Appendix A to the Law Commission Report provided:

(1) Where the parties to a marriage ("A" and "B") are living together in the same household and:

(a) A transfers to B property which is wholly or mainly for the use of both A and B;

(b) A transfers property to A and B jointly;

(c) A purchases property in which is wholly or mainly for the use or benefit of both A and B; or

(d) A and B jointly purchase property;

beneficial ownership of the property shall vest in A and B jointly.

(2) Where the parties to a marriage ("A" and "B") are living together in the same household and A transfers to B property which is not wholly or mainly for the use or benefit of A and B beneficial ownership of the property shall vest in B alone.

(3) Sub-sections (1)(a) to (c) and (2) above do not apply where A has a contrary intention and that intention is known to B.

(4) Sub-section (1)(d) above does not apply where either A or B has a contrary intention and that intention is known to the other.

The draft Bill makes clear that the provision does not apply in respect of the transfer or purchase of property wholly or mainly for the purposes of a business.

Options for Reform

6.6 It seems to the Committee that there are four options for the reform of this complex area of the law. The first option would be to make no change in the law. This we reject. The second option would be to follow the approach of the English Act with or without modifications. The third option would be to follow the wording of the Scottish Act with or without modifications. The fourth option would be to follow the recommendations of the Law Commission as set out in the report with or without modifications.

6.7 We have already touched on the shortcomings of the English Act which we do not consider to remedy adequately our perceived shortcomings in the existing law. The Scottish Act, on the other hand, seems to us to be a decided improvement on the provisions of the English Act. The Scottish Act, however, gives rise to a presumption only, unless the contrary is proved. As pointed out by the Law Commission in its 1988 Report the precise effect of a presumption and the extent of evidence necessary to rebut it has been a cause of much controversy. On one view a presumption is of value only if there is not evidence at all of the fact to be presumed or if after all the evidence has been given weight of the testimony is so evenly balanced that the trier of fact is unable to reach a decision without calling in aid the presumption. Introducing a presumption does not produce the clarity applicable to a definite rule. The Scottish Act does not create ownership but says that one can presume certain property to be jointly owned if it is not possible to prove the true intention of the parties.

6.8 The Law Commission in its Report preferred the solution that when the money is paid by either spouse to the other or used to buy property and the payment or purchase is for common purposes the money or property would be jointly owned subject to a contrary intention on the part of either spouse. The question of how a contrary intention could be established was found to be a difficult one and the Law Commission considered six possible approaches, namely, express agreement with some formality, express agreement without formality, implied agreement, contrary intention notified to the other spouse, contrary intention known to the other spouse and contrary intention not known to the other spouse.

6.9 The Law Commission ultimately rejected the view that an express agreement to the contrary should be established, accepting the counter-argument that this would effectively impose co-ownership on the paying spouse who would only be able to escape co-ownership if the agreement of the other spouse could be secured. The Law Commission concluded that a contrary intention made known to the other spouse at the time of acquisition or transfer would be sufficient to enable the acquiring or transferring party to retain the proprietary interest.

6.10 Interlinked with the Law Commission’s recommendations was the proposal that the presumption of advancement should apply to both spouses (See para 4.19 of the Report).

6.11 The Scottish Act applies not only to housekeeping money but also to household goods, excluding money, securities, motor cars, caravans or other vehicles and domestic animals. The Act contained specific provision dealing with housekeeping money. The Law Commission recommendations would apply to any property which is wholly or mainly for the use of A and B jointly, use being defined as including enjoyment or consumption. The Law Commission recommendation excludes the joint residence (to which we shall turn shortly), life insurance policies and contracts for a deferred annuity. For reasons which will become apparent we do not consider that the exclusion of the joint home is justified but would be in agreement with the Law Commission’s recommendations in respect of other land (including secondary residences), policies of life insurance and contracts for a deferred annuity.

Provisional Recommendations – Housekeeping money and household goods

6.12 We consider that the Law Commission recommendations will produce a fairer and more workable result than either the English or Scottish Acts and our provisional view is that the law should be changed in line with the Law Commission recommendations.

6.13 We have carefully considered the question of how a contrary intention should be established on the part of the acquiring or transferring party so as to enable him or her to retain sole beneficial ownership in the relevant property. We consider that the argument in favour of it being sufficient for the acquiring or transferring party to make known a contrary intention to the other party is strong and on balance we conclude that it would be fair and reasonable to infer joint ownership unless the acquiring or transferring party makes known a contrary intention to the other party.

The Joint Residence

6.14 In this context we use the term "joint residence" rather than the term "matrimonial home" to refer to the joint home of both spouses or cohabitants. Where the parties have more than one house we use the term to refer to their principal joint residence. Secondary residences would be excluded from our recommendations. On occasion the joint residence may have attached to it land covering an extensive area, for example farm land. It would be necessary to define what is included within the concept of the "joint residence". Some assistance can be found in the provisions of s.222 of the Taxation of Chargeable Gains Act 1992 whereby a dwelling house for the purposes of that legislation includes land which is occupied and enjoyed with the residence up to a permitted area of 0·5 of a hectare, though where the area for the reasonable enjoyment of the dwelling house is larger than 0·5 of a hectare having regard to the size and character of the dwelling house that larger area shall be the permitted area. We provisionally recommend that the joint residence should be defined as including such area of land occupied and enjoyed with the dwelling as is required for the reasonable enjoyment of the dwelling having regard to its size and character.

6.15 In relation to the existing law established in **McFarlane v McFarlane** and **Lloyds Bank v Rosset** we consider that the law produces an unsatisfactory and unconvincing result. The decisions are premised on the proposition that the question of beneficial ownership between spouses should be determined on the same basis as if they were strangers. The nature of the relationship between spouses and cohabitants differs from that between parties acting at arms length because it is of the very nature of such spousal and quasi-spousal relationships that the parties, while the relationship subsists, more frequently than not do not focus on the consequences of their actions. This point is highlighted by Lord MacDermott in **McFarlane v McFarlane** in which he stressed that during the subsistence of the marriage their activities owe more often than not "all part of a joint and unselfish adventure". It is a reality of life that parties normally enter into marriage or cohabitation relationship without any precise appreciation of the legal consequences of the relationship or on their property rights and this continues during the subsistence of the marriage. At the stage of divorce parties

retrospectively focus on their legal rights and remedies. The difference between spousal and quasi-spousal relationships on the one hand and other ordinary commercial and social relationships on the other calls for a difference of approach in relation to determining their intentions or to ascribing presumed or deemed intentions to them.

6.16 The doctrine of family assets has been discarded. Lord MacDermott considered that the only remaining way of upholding an indirect contributor's claim without any basis of agreement would seem to be to have resource to some kind of legal fiction as by imputing an intention or other state of mind which may never have existed or by implying some stipulation or agreement which was never made. He considered that just as the use of fiction is no longer an acceptable solution for the problems of industrial relationships, it should not be acceptable in dealing with proprietary issues between spouses. The strength of this point is weakened when one bears in mind the presumption of advancement by a husband in favour of his wife but not between a wife on favour of her husband or between cohabitants. The presumption of advancement is itself nowadays a somewhat fictional implication as indeed is a presumption of a resulting trust which contradicts the apparent legal title.

6.17 Experience shows that the current law is weighted against the wife or female cohabitant. Where a joint residence is acquired it is increasingly frequently the case that the property will be put into joint names of the spouses. Where it is not it will be most often found to be vested in the name of the husband or the male cohabitant. Although increasingly the female partner in a spousal or quasi-spousal relationship will be engaged in full-time or part-time work outside the home, because of (inter alia) past discrimination practices and consequences the statistical likelihood is that the women's income will be less than that of her male partner. This results in her having less money to contribute either to the acquisition of the house (by direct contributions or by way of contributions to the mortgage payments) and less money to make indirect contributions.

6.18 As Lowry LJ in **McFarlane v McFarlane** pointed out, even if the current law were different in the case of indirect contributions, this would provide no remedy for the wife who is unable to make financial indirect contributions yet who provides services in the home. He correctly stated that it seems unfair to give to some wives but not to others property rights beyond those of others in similar circumstances. Any change in the law should seek to achieve a fair and equitable result between husbands and wives (and, we would argue, cohabitants) but also one which is fair to wives as a class.

Options for Reform

6.19 The Committee consider that (subject to one modification) the Law Commission's recommendations in their draft Bill, if applied to the joint residence, would provide a neat and workable solution to the problems and inequities created by the current state of the law, certainly so far as the future is concerned. Empirical research would tend to show that women are making a greater financial contribution to the running of the home and family. The law as it presently stands help to perpetuate and underpin a past inherently discriminatory system.

6.20 The Law Commission, however, in its Report concluded that the changes it recommended in the law should apply to land. It would appear from the report that the majority of the Commission would have supported the extension of the principle to land. However, the Law Commission decided against recommending that it should apply to land, apparently because real property, in its view, raised peculiar considerations different from those raised by personal property, and that a recommendation proposing a change in the law which would extend joint ownership of the matrimonial home would be controversial and might attract inappropriate opposition. It further considered that virtually all matrimonial houses are now purchased in joint names and spouses are more likely to receive legal advice when purchasing their home than when purchasing other property.

6.21 The Committee, however, are presently not convinced that these are compelling reasons to justify treating the joint residence differently from other property which would be covered by the recommended changes in the law which we provisionally propose in respect of personal property.

6.22 As the law currently stands where the joint residence is put into the name of one only of the parties (usually the husband) it will be because either:

(a) the parties have actually considered the question and are ad idem that the property should belong to the party in whose name it appears on the title; or

(b) the parties have failed to address their minds to the question.

6.23 Where the parties have actually considered the position and are agreed on the result then our recommended changes in the law would not affect the position. Where the situation, however, is that the parties have not turned their minds to the question, our recommendation would reverse the current law and effectively require the parties to address the question as to what their true intentions are. We consider that the proposed new law would approximate more closely to the intention of the parties who, according to the statistics when they actually consider the question of title to the matrimonial home, normally decide to have it vested in joint names.

6.24 In the case of the joint residence we consider that the presumption of equal beneficial ownership as joint tenants should apply unless the parties expressly agree to the contrary. For the avoidance of conflict as to what was or was not agreed and having regard to the special requirements of real property law in relation to written evidence, we provisionally recommend that an express agreement to the contrary must be evidenced in writing.

6.25.1 The recommendations should clearly cover property transactions taking effect after the date of commencement of the legislation giving the effect thereto. The question then arises as to property already vested. Without some mechanism the legal position will remain as it is and past and present injustices will continue. Indeed, it could take a long time for all matrimonial and cohabitants' property to be covered by the new provisions.

There are strong arguments against giving retrospective effect to the provisional recommendations we have made to this point. First, to impose a statutorily inferred equality of ownership on parties who organised their affairs on the then existing law could be seen as intrinsically unfair. In the future parties will be able to contract out of the inferred equality of ownership. Past parties had no opportunity to contract out since there was nothing out of which they could contract. The retrospective enforcement of equality would thus put existing owners in a worse position that those who enter into future property transactions in full knowledge of the newly inferred equality.

Secondly, retrospectively depriving parties of their legal and beneficial rights and property without compensation would be a major interference with the private rights of property and may well represent a disproportionate interference which would be unlawful under the European Convention on Human Rights. It is true that under the Matrimonial Causes (Northern Ireland) Order 1978, in the context of dissolution of marriages the courts are given property adjustment powers which may effectively be seen to retrospectively affect rights of ownership. Such powers are however exercised in the context of the entirety of the married person's property and in the context of the application a number of factors which the courts are directed to take into account.

However, as we have commented, without some mechanism or legislative provision many injustices, which these proposals seek to address, will continue to prejudicially affect many parties to marriages and in the relationship of cohabitees. Notwithstanding the possible argument on disproportionate interference, could the legislation be made retrospective with a right being given for a party to apply to disapply the inference of equality, inter alia on the basis that it does not reflect the agreement of the parties at the time of vesting? After all, future parties will, by agreement, disapply the inference should they so wish.

Alternatively, could the power of the court under the present law be expanded to take into account the inference of equality? This question of possible extensions of the courts' powers in other circumstances is addressed below.

The Committee has not reached a provisional view on the issue of retrospective effect and welcomes in particular the views of consultees on this topic.

6.25.2 There will be a number of situations where a different regime would be required to deal with property vested in spouses and cohabitees at the date of the legislation. First will be the situation where cohabitees do not qualify under the proposed legislation. Secondly there will be situations in which parties have expressly agreed to the vesting of property in the sole name of one of the parties but where the other makes contributions to the acquisition of the house or indirect or makes improvements thereto – and where, in the absence of agreement or arrangement under the existing law, he or she would not acquire any interest from indirect contributions. Thirdly, as discussed above, there will be the position which arises with property already vested in circumstances if the legislation is not made retrospective.

6.25.3 In dealing with such situations a number of options for the future arise for consideration.

6.25.3.1 One option would be to leave the law as it is and leave it for the courts to develop the principles of equity to fill the existing shortcomings in the law. The House of Lords has very recently restated the law in **Lloyds Bank v Rosset** in terms which confirmed the approach in **McFarlane v McFarlane**. It seems unlikely that there will by any change of approach in the near future. There is nothing in the House of Lords' ruling to suggest that the courts in this jurisdiction will develop or feel free to develop the principles of unconscionability or unjust enrichment which have developed in Australia and Canada and which could form the basis for a fairer development of the law in respect of spouses and cohabitants.

6.25.3.2 A second option would be to modify the law as in England to reflect the narrow change in the law effected by Section 37 of the Matrimonial Proceedings and Property Act 1970. That section provided:

> "It is hereby declared that where a husband and wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having been acquired by virtue of his or her contribution a share or an enlarged share, as the case may be in that beneficial interest of such an extent as may have been then agreed or in default of such agreement as may seem in all the circumstances just to any court before which the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or in any other proceedings)."

6.25.3.3 A third option would be to reverse the burden of proof in cases of indirect contributions made by a spouse or cohabitant in respect of the funding of the acquisition or maintenance of the matrimonial home. At present the onus lies on the spouse without the legal title to establish an agreement or arrangement arising from some form of discussion conferring an equitable interest. As we noted in the Irish case of **McC v McC** [1986] ILRM 1 in the Irish Supreme Court, the Irish courts will infer a trust where there has been an indirect contribution, in the absence of any express or implied agreement to the contrary, effectively reversing the onus of proof as compared to the law in Northern Ireland.

6.25.3.4 A fourth option would be to confer upon the court, in the event of a dispute between the parties, a power to determine the parties' beneficial interests taking into account a range of matters such as direct and indirect contributions, any express agreement or implied arrangement between them and any agreement or arrangment which might reasonably have been made in all the circumstances of the case. It would be necessary to define the factors which the court should take into account in determining the parties' beneficial interests.

6.25.4 Our provisionally preferred view is that in the situations not covered by our Recommendations, for whatever reason, in determining the parties' beneficial interests in the joint residence in the event of dispute, the court should be directed to consider a number of factors which it should take into account in arriving at its determination of the parties' share in the beneficial interest in the premises.

6.25.5 As the law stands at the moment the function of the court in the event of dispute is to determine the beneficial interest of the parties apparently on a fairly rigid basis having regard to the direct contributions of the parties and to the indirect contributions where the latter are backed by an understanding or an arrangement between the parties that the indirect contributions are to confer a beneficial interest. The rigidity of this approach is often more apparent than real, since in assessing the actual quantum of the beneficial interests the court takes a broad brush approach and recognises the impossibility of a mathematically precise quantification of the beneficial interest of the party making contributions.

6.25.6 We consider that the court should have greater flexibility in determining whether and to what extent a party has an equitable claim to a beneficial interest in the joint residence. We consider that the court should be directed to take into account:

(a) the contribution in money and money's worth, direct and indirect, made by the parties towards the cost of acquiring, maintaining, repairing and improving the premises;

(b) the contribution in money or money's worth, direct and indirect, made by the parties towards the costs of discharging any debt secured on the premises;

(c) any agreement, understanding or arrangement, express or implied, made by the parties in respect of their beneficial interest in the premises whether prior to the acquisition of the premises or during the parties' occupation of them or which they might reasonably be expected to have made in the circumstances if they had considered the question of beneficial ownership;

(d) the degree of economic integration of the parties;

(e) the degree of permanence of the relationship between the parties (in the case of parties who are not married);

(f) the reasonable expectations of the parties in all the circumstances of the case;

(g) any benefit accruing to the party with the legal title from other contributions in money or money's worth, direct or indirect, made by the other party;

(h) any representations, express or implied, made by either party to the other relating to the title or beneficial ownership of the premises before the acquisition of the premises or during the occupation of them.

6.25.7 The court's function in determining the equitable interest of the parties, however, would not be the same as the property adjusting power vested in the court in divorce proceedings in which the court can adjust, and thus vary, the parties' beneficial interests. It may be objected that the conferring on the court of wider powers of finding a beneficial interest would confer too wide a discretion on the court and might result in an undesirable increase in litigation. The factors which the court would take into account are closely akin to the matters which the courts take into account in Canada and Australia which apply the principles of unjust enrichment and unconscionability. The Canadian and Australian experiences do not appear to suggest that our recommendation would be either unworkable or create undesirable litigation.

6.26 The recommendations to date have dealt with the question of determining the interests which parties, be they spouses or cohabitants, have in the property which the Recommendations address. The question of the rights of the parties to realise those interests also has to be considered. Where an application is made by a co-owner under the Partition Acts 1868 and 1876, the normal rule is that the court *will* make either an order for partition or sale depending on the nature of the premises and the extent of the interest in the premises (see **Northern Bank v Beattie** [1982] 18 NIJB and **Glass v McManus** [1996] NI 401). In **Fraser Homes v Fraser Houses (N.I.)** [1998] NI 214 the court held that the equitable jurisdiction is not of a discretionary nature but may be ousted in certain circumstances. Where an application is brought by a co-owning spouse or the mortgagee or chargee of a spouse's interest, Murray J in **Northern Bank v Beattie** considered that the same principles applied as in the case of other non-spousal owners. In **Ulster Bank v Carter** the court left open the question whether the court could decline to make an order under the Partition Acts 1868 and 1876 in the case of an application by a spouse or mortgagee or chargee of a spouse. Article 49 of the Property (Northern Ireland) Order 1997 confers a power on the court to impose a stay, suspension or conditions "on the making of an order" under the Partition Acts 1868 and 1876. We consider that the legislation should make clear that the court has a general power to decline to make an order under the Partition Acts 1868 and 1876, at least in the case of applications brought by spouses or the mortgagee or chargees of spouses. In the case of such applications we consider that the court, in deciding how or if to exercise its powers under the Partition Acts 1868 and 1876, should be directed to have regard to the matters directed to be taken into account under the provisions of the Matrimonial Causes (Northern Ireland) Order 1978.

Application of our Recommendations to Cohabitants

6.27 (a) Housekeeping money and household goods

We consider that qualifying cohabitants should have the benefit of the provisional recommendations which we propose in respect of spouses in relation to housekeeping money and household goods. Qualifying cohabitants would mean those passing the test of a stable relationship. To so qualify we propose that they should have been living

together for at least two years in the previous three years or have had a child as a result of the relationship. We suggest that our provisional recommendation should apply in respect of monies and other assets transferred or acquired at any time during the relationship including the period before that test of stability is passed, and indeed prior to the relationship commencing, but acquired in contemplation of that relationship.

(b) The Joint Residence

Property acquired before the cohabitants have passed the test of stability referred to above property rights should, upon the cohabitants becoming “qualified cohabitants” be determined in accordance with our recommendation of an inferred joint equal beneficial interest as joint tenants, subject to any express contrary agreement evidenced in writing.

CHAPTER 7

Questions for consultees

7.1 Chapter 6 of this Paper sets out the Committee's provisional recommendations for reform of the law. The Committee is, however, anxious to obtain the views of all interested parties and bodies on the topics raised in this paper. Without prejudice to the generality of views which consultees may wish to express, the Committee in particular seeks the views of interested parties on the following questions:

(1) Do consultees agree with the Committee's view that the existing law relating to spouse's interests in housekeeping money and property acquired out of such money or savings therefrom is outdated and requires reform?

(2) Do consultees agree with the Committee's view that in addition to altering the law in respect of housekeeping money, the law in relation to other property transferred or acquired for joint purposes should be at the same time be amended along similar lines?

(3) Do consultees agree with the Committee's recommendations that where spouses are living together in the same household and:

(a) one spouse transfers to the other property which is wholly or mainly for the use of both; or

(b) one spouse transfers property to the other spouses jointly; or

(c) one spouse purchases property which is wholly or mainly for the use or benefit of both; or

(d) both jointly purchase property,

the beneficial ownership of the property should vest in both spouses jointly in equal shares as joint tenants unless the parties expressly agree to the contrary?

(4) Do consultees consider that rather than requiring that the parties should expressly agree to the contrary it should be sufficient for the party transferring or acquiring the property to express a contrary intention to the other party or would consultees suggest an alternative?

(5) Do consultees agree with the Committee's view that the presumption of advancement in favour of a wife by a husband but not vice versa is outdated and requires reform?

(6) Do consultees agree with the Committee's recommendation that where spouses are living together in the same household and one spouse transfers to the other property which is wholly or mainly for the use or benefit of both beneficial ownership should vest in the transferee alone?

(7) Do consultees agree with the Committee's view that the existing law as stated in **McFarlane v McFarlane** [1972] NI 59 in relation to the beneficial interest which indirect contributions will give to a spouse in the joint home produces an unfair result?

(8) Do consultees agree with the Committee's provisional recommendation that in the case of the joint residence acquired by spouses for their joint occupation the premises should be held upon trust for the spouses in equal shares as joint tenants unless the parties expressly agree to the contrary by an agreement evidenced in writing?

(9) Do consultees think that the operation of any proposed change should apply retrospectively, provided that the rights of third parties are properly protected?

(10) In the case of a joint residence not covered by the provisional recommendation referred to above do consultees agree with the Committee in its provisional recommendation that in the event of dispute in determining the parties' beneficial interests the court should determine what it considers to be a just division of the beneficial interests taking into account the factors listed at recommendation 8 above?

(11) Do consultees consider that the law should be changed in some other manner and if so how?

Printed in the United Kingdom for the Tactica Solutions
Dd. 601903 C2. 5/99. 14567