’TIL DEATH DO US PART? : COHABITEES AND THE LAW

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I. THE LAW IN IRELAND RELATING TO COHABITEES

Ireland, at present, has no legislation regulating the legal position of heterosexual couples who decide to live together outside of wedlock. The deficiencies inherent in the existing common law approach leads to injustice and unfairly prejudices unmarried couples. A number of Australian States have introduced specific legislation to address some of the issues presented by non-marital relationships. In Part II of this article, these statutory schemes will be critically assessed in light of the proposal for enacting similar legislation in this jurisdiction to address an issue which is no longer a source of “grave embarrassment”.[1]

The issues raised by homosexual partnerships are outside the scope of this work. While it is illogical to draw a distinction on the basis of sexuality of those who cohabit, it is the division of roles[2] characterising heterosexual relationships which is a major cause of women’s inequality before the law. Any attempt to regulate same sex relationships should be achieved by means of separate

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[1] *W. O’R. v. E.H. & An Bord Uchtála* [1996] 2 I.R. 248 at 286 *per* Murphy J.

[2] Typically, the woman works in the home and looks after the family while the man assumes the role of ‘breadwinner’ by working outside the home.

legislation. This is because political resistance towards an activity only recently decriminalised[3] would hamper any attempt to make provision with respect to all categories of cohabitees.[4] It is submitted that it is preferable to achieve law reforms which improve the situation of non-marital heterosexual partners than to accomplish nothing because politicians will not vote for legislation which includes provision for homosexual partners.

Notwithstanding the international trepidation regarding the issue of same sex relationships, many nations and several provincial and municipal governments around the world have enacted legislation to protect sexual minorities against discrimination in employment, housing, access to services, and other areas of public life.[5]

A. Origins of the Common Law Approach

Due to the close personal relationship that exists between married and unmarried couples the thorny issue of separate property entitlements is seldom addressed prior to a breakdown in the relationship. Up until 1989[6] there was no

[3] The 'offence' of engaging in homosexual activity was repealed by the Criminal Law (Sexual Offences) Act, 1993.

[4] The international divisiveness of this political issue is illustrated by the recent controversy in France caused by the proposed enactment of same sex legislation. *Le Pacte Civil de Solidarité* (Civil Pact of Solidarity) was a draft law sponsored by the Socialist Party and offered a form of legal marriage to homosexual couples. Immigration, inheritance, and taxation benefits are included. Adoption rights, however, are not. The first reading of the bill failed in October 1998. For discussion, see *Le Monde* at http://www.lemonde.fr.

[5] Denmark (including Greenland), Norway, Sweden, The Netherlands, Hungary and Iceland have been the most proactive of these countries, enacting nation-wide legislation aimed at reducing discrimination in relation to homosexual marriage, however, some forms of discrimination still remain codified in the laws of these countries. For further information on same sex legislation and the concept of registered partnership see the International Gay and Lesbian Resource Centre at http://www.iglhrc.org.

[6] Under the Judicial Separation and Family Law Reform Act, 1989 (as

statutory power to enable a court to adjust property entitlements in the event of marital breakdown so Irish courts turned to the general law, and in particular to equity, for a cure. The solution proffered was an adapted model of the purchase money or presumed resulting trust. Under this doctrine the law presumes the unexpressed intention of the settlor to be that the beneficial interest in the property in question should result back to him, or if he is dead, to those entitled to his estate.[7] In the absence of rebutting evidence, a presumption of resulting trust will arise when two parties contribute to the purchase of property. The share gained by each is dependent upon the level of their respective contributions. The doctrine demands that either one or the other of the parties contribute with the intention of getting a share in the property so that such a trust will not arise in relation to gifts or loans.

It occurred to equity that, given the nature of some relationships, it would not always be sensible to presume a resulting trust. Accordingly, the presumption of advancement grew up to presume a gift where contributions are made by a father to his child or by a husband to his wife but not vice versa.[8] The rationale here was that a child was considered to be in a position of dependency and when later extended to encompass a wife the same analogy was used.[9] The House of

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amended by the Family Law Act, 1995) upon the granting of a decree of judicial separation the court is given a discretion (to be exercised in accordance with statutorily prescribed criteria) to make a wide range of property adjustment orders.

[7] For discussion of resulting trusts see Delany, *Equity and the Law of Trusts in Ireland* (2nd ed., 1999), p. 133 *et seq.*

[8] While traditionally the presumption does not operate in respect of a married mother and child, it is probable, in light of the constitutional right to equality before the law under Article 40, that a court would find the presumption to arise in such circumstances. It is clear though that advancement will be presumed in the case of a person acting in loco parentis, regardless of gender. See Delany, *Equity and the Law of Trusts in Ireland* (2nd ed., 1999), pp. 160-175.

[9] Symptomatic of this patriarchal attitude to the law, a court will, in the

Lords, in *Tinsley v. Milligan*,[10] have held this presumption not to arise in the context of cohabitees, however, the reasoning of the Court is questionable as it highlights an underlining assumption that cohabitees are to be treated like parties to a commercial venture rather than as partners to a close familial relationship.

B. Irish Common Law Solutions

The special problem created by division of the family home[11] has triggered further development to the purchase money resulting trust. The stereotypical scenario arises where the house is purchased in the sole name of the male partner and a dispute arises over the ownership of the property when the relationship ends or on the bankruptcy or death of one of the partners. While legislation has tempered the rigours of the common law approach in the context of married couples the accumulated jurisprudence is still relevant to property disputes between cohabitees.[12] In resolving the issue Irish courts have preferred a contribution based approach. The decision of the High Court in *C. v. C.*[13] clearly establishes that where property is purchased in one partner's name but the other partner has made direct contributions to the purchase price or to instalment payments on a mortgage, the property will be held on (purchase money) resulting trust to the extent of these contributions.[14] The Supreme Court

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absence of a contrary intention, presume a resulting trust for a wife who advances money to her husband.

[10] [1994] 1 A.C. 340.

[11] The family home is generally the most valuable asset a couple possesses so this area of the law is frequently referred to as "Trusts of the Family Home".

[12] Under s. 15 of the Family Law Act, 1995 and s. 19 of the Family Law (Divorce) Act, 1996 the court is empowered to make property adjustment orders upon a decree of judicial separation or divorce respectively.

[13] [1976] I.R. 254 (Kenny J.).

[14] This has subsequently been approved by the Supreme Court in *McC. v. McC.* [1986] I.L.R.M. 1 where Henchy J. stated that "where the

further stretched the notion of contribution in *McC. v. McC.*[15] to include indirect contributions made to mortgage repayments, Henchy J. stating that:

> When the wife's contribution has been indirect (such as contribution, by means of her earnings, to a general family fund) the court will in the absence of any express or implied agreement to the contrary, infer a trust in favour of the wife, on the grounds that she has to that extent relieved the husband of the financial burden he incurred in purchasing the house.[16]

However, a *de minimis* requirement was added to the effect that a trust will only be "inferred when the wife's contribution is of a size and kind as will justify the conclusion that the acquisition of the house was achieved by the joint efforts of the partners".[17] The obvious issue of quantification of these indirect contributions is broached by ascertaining how much the claimant has contributed to the family fund and this percentage is then taken to represent the claimant's share in the family home.[18] This quantification

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matrimonial home has been purchased in the name of the husband, and the wife has … directly … made contributions towards the purchase price or towards the discharge of mortgage instalments, the husband will be held to be a trustee for the wife of a share in the house roughly corresponding with the proportion of the purchase money represented by the wife's total contribution". However, it should be noted that these circumstances merely give rise to the presumption of resulting trust which can be rebutted by evidence of a contrary intention.

[15] [1986] I.L.R.M. 1.

[16] [1986] I.L.R.M. 1 at 2.

[17] [1986] I.L.R.M. 1 at 2. This allows a court to ignore very minor contributions made by the claimant.

[18] This method of quantification was used by the High Court in *R. v. R.* [1979] I.L.R.M. 1 (McMahon J.).

method was further honed by Carroll J. in *G.N.R. v. K.A.R.*[19] where she said in calculating the figure the court should only take cognisance of what the parties actually contributed to the family fund so that a husband's earnings were reduced by one quarter to reflect the amount he spent exclusively on himself. He accordingly recovered a smaller share in the family home. It is clear that this method of calculation is only applicable where the family home is subject to a mortgage so that a claimant has no redress where the legal owner inherited or was gifted the property.[20]

Where a claimant cannot demonstrate any direct or indirect contributions one might be forgiven for thinking that she can rely on money previously advanced to finance some improvement to the family home in order to secure an interest therein. This notion was exploded by the High Court in *N.A.D. v. T.D.* where Barron J. commented:

> The circumstances in which a wife may contribute to the improvement of the property of her husband may obviously vary considerably between minor decorative improvements at the one end of the scale and

[19] Unreported, High Court, Carroll J., March 1981.

[20] Interestingly Finlay P., as he then was, propounded an unusual doctrine in *W. v. W.* [1981] I.L.R.M. 202. He applied the purchase money resulting trust to the purchase of the equity of redemption from the lending institution. The more conventional view is that the loan represents the purchase price of the house itself. However, by affirming *W. v. W.* in *N. v. N.* [1992] 2 I.R. 116; [1992] I.L.R.M. 127, the Supreme Court (Finlay C.J. relying on his earlier precedent) was in fact holding that paying off any mortgage gives one a share in the property as the bank owns it and the claimant by paying the mortgage instalments is buying it back piecemeal. This would apply to not just married couples or cohabitees but to any two individuals. This can produce anomalous results in practice as where one partner pays money for an improvement to the family home she will not receive an interest (under *N. v. N.*) whereas if a mortgage is taken out to finance the improvement the claimant under Finlay C.J.'s doctrine would receive a half share in the property itself. See further Mee, "Trusts of the Family Home: The Irish Experience" [1993] Conv. 359.

> payment for the erection of an entire dwelling house at the other end. In each case, since the legal and beneficial ownership of the property was already vested in her husband he is entitled at law in the absence of a contrary agreement to take the entire benefit of the improvement.[21]

Thus, where a claimant expends moneys or carries out work on the improvement of a property, the legal ownership of which is vested solely in the other partner, she will be precluded from an equitable share in the property by reason of such contributions unless she can establish that it was specifically agreed that she would gain an interest (i.e. a contract) or that she was led to believe by virtue of the surrounding circumstances that she would be recompensed for it (i.e. an estoppel[22] based action).[23]

It might well be thought by the uninitiated that non-financial contributions to the welfare of the family such as child rearing and housework would be worthy of

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[21] [1985] I.L.R.M. 153 at 162. Here a married couple erected a house on a site owned by the husband which was of comparatively little value. When the relationship failed the wife, unsuccessfully, sought a share in the family home based on her substantial contributions in terms of money and labour towards the building of the house. This received subsequent approval by the Supreme Court in *N. v. N.* [1992] 2 I.R. 116; [1992] I.L.R.M. 127. While Finlay P. felt that where such an agreement is established the remedy should be limited to a right to monetary compensation in *W. v. W.* [1981] I.L.R.M. 202, he later relaxed this viewpoint as Chief Justice in *N. v. N.* to hold that the agreement can give rise to a beneficial interest in the property.

[22] The doctrine of estoppel by encouragement, a species of proprietary estoppel, provides that where a representation is made to the claimant that she will gain an interest in the land if she acts to her detriment, the representor is estopped from denying its accuracy or effectiveness if she so acts. Cf. *Inwards v. Baker* [1965] 2 Q.B. 29; [1965] 1 All E.R. 446.

[23] Cf. *Hibberson v. George* (1989) 12 Fam L.R. 725 where the Supreme Court of New South Wales was prepared to grant a charge over the family home in favour of the claimant to the value of improvements made to the property by her.

recognition by a court seeking to apportion property equitably between former partners. However, judicial practice dictates that work in the family home by a non-income earning partner does not merit a share in the property.[24] While it is illegal to discriminate against women in paid employment, the law's failure to recognise the value of domestic labour is not recognised as a form of sexual discrimination.[25]

Feminist theorists have largely attributed the law's approach to women's work to the public/private dichotomy.[26] Historically women were identified with the home and family while men operated in the public sphere of paid work and political life. Since child rearing and housework occurred in the private sphere of the home it was socially perceived as leisure or pleasure and not constituting 'real work'. Notwithstanding women's increased involvement in paid employment, the private realm continues to be associated

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[24] *Cf.* s. 20(1)(b) of the Property (Relationships) Act, 1984 (NSW) which expressly provides that a court must, when adjusting the interests of the partners in the property, have regard to "contributions made in the capacity of homemaker or parent… to the welfare of the family". Professor Neave has argued that "statutory reforms which recognise the value of domestic labour would carry an important symbolic message, as well as providing fairer rules for the resolution of disputes between particular *de facto* partners". Commentary in Bailey-Harris, "Property Disputes in De Facto Relationships: Can Equity Still Play a Role?", Ch. 7 in Cope (ed.), *Equity: Issues and Trends*, p. 215.

[25] Some provincial Canadian courts had expressed the view that contributions to the welfare of the family were already compensated by benefits conferred on the homemaker by way of accommodation and other support: see, for example, *Stanish v. Parasz* (1989) 25 E.T.R. 227. However, this no longer represents the law in Canada: *Peter v. Beblow* [1993] 1 S.C.R. 980; 101 D.L.R. (4th) 621; (1993) 44 R.F.L. (3d) 329. The current position follows the approach favoured by other provincial courts: see, for example, *Everson v. Rich* (1988) 53 D.L.R. (4th) 470, 474 where the Saskatchewan Court of Appeal commented that no one should expect spousal services for free.

[26] For a discussion of the dichotomy in political thought see Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory*.

with altruism and self-sacrifice. This attitude is perhaps based on the notion that men have always benefited from women's work as child-rearers and home-makers and it may be difficult for a predominantly male judiciary to recognise such conduct as unconscionable. Charlesworth has explained the courts reluctance to expand the contribution doctrine to include non-financial contributions as based upon on "a judiciary who implicitly accept that work given economic value in the market place contributes more to family property than work with no public economic recognition, but significant detriment to those who undertake it".[27] It would seem that the court has shown greater willingness to expand equitable doctrines to recognise the value of work normally done by men, than to recognise domestic contributions.[28] Furthermore, it would seem where a woman has made 'masculine' contributions she will have a greater chance of success in establishing an equitable interest in her partner's property. This is exemplified by the decision in *N. v. N.*,[29] where an identically constituted Supreme Court bench as in *L. v. L.*,[30] held a wife was entitled to a one half beneficial

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[27] Charlesworth, "Domestic Contributions to Matrimonial Property" (1989) 3 A.J.F.L. 147, 155.

[28] For discussion see Professor Neave's commentary on Bailey-Harris, "Property Disputes in De Facto Relationships: Can Equity Still Play a Role?", Ch. 7 in Cope (ed.), *Equity: Issues and Trends*, p. 213 *et seq.*

[29] [1992] 2 I.R. 116; [1992] I.L.R.M. 127. Here the family home, which was in the husband's sole name, had been partly converted into apartments for rent. The court awarded the wife a beneficial interest in the property on the basis of her total management of the bedsitter apartments, the organisation and collection of the rents payable in respect of them and their general maintenance and care. While she did work outside the home as a nurse, she sought the greater share on the basis of her unpaid work in her deceased husband's business.

[30] [1992] 2 I.R. 77 (High Court); [1992] 2 I.R. 101 (Supreme Court); [1992] I.L.R.M. 115. Barr J. in the High Court propounded a brave, if poorly reasoned, doctrine based on Article 41 of the Constitution. He suggested that Article 41 would reward a women who assumes the constitutionally preferred role of wife and mother and who works exclusively in the family home with a half beneficial share therein. The

share in the family home based on unpaid work she carried out in the legal owner's business. Finlay C.J. went on justify this arbitrary distinction by stating "such activities are different from and not to be identified with the activities of a wife and mother in the home".[31]

Delany has observed that while the Legislature has now intervened to an extent to provide wider recognition of the contributions made by spouses who remain at home, the position of cohabitees in these circumstances remains far from satisfactory.[32]

C. Rights of the Irish De Facto Family

The constitutional enshrinement of the family based on marriage has led to a judicial bias against the unmarried cohabiting couple which is reflected both in case law and equitable doctrines. A conservative judiciary has even gone so far as to say that "the public policy of this State ordains that non-marital cohabitation does not and cannot have the

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Supreme Court, in rejecting this proposition as being an usurpation of the role of the Legislature and not based upon existing doctrines, unequivocally held that work in the family home can never earn a beneficial share under the doctrine of resulting trust. Cf. *N. v. N.* [1992] 2 I.R. 116; [1992] I.L.R.M. 127 where, on the same day, the Supreme Court held that work in the legal owner's business (i.e. work outside the family home) would secure an equitable interest in the family home.

[31] [1992] 2 I.R. 116 at 123.

[32] Delany, *Equity and the Law of Trusts in Ireland* (2nd ed., 1998), p. 190-191. See s. 16(2)(f) of the Family Law Act, 1995 which provides that where the courts are called upon to make a property adjustment order on the granting of a decree of judicial separation "contributions ... made ... by looking after the home or caring for the family" are to be taken into consideration. See also s. 20(2)(f) of the Family Law (Divorce) Act, 1996 which mirrors this in respect of divorce by requiring a court to take cognisance of "the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family".

same constitutional status as marriage".[33] In the leading case of *The State (Nicolaou) v. An Bord Uchtála*[34] the Supreme Court held that the words "family" and "parents" contained in Articles 41 and 42 of the Constitution only refer to a family and parenthood based on marriage. Hamilton C.J. unequivocally said that "[a] *de facto* family, or any rights therefrom, is not recognised by the Constitution…"[35]

A torpid Oireachtas has intervened in a piecemeal fashion to remedy injustices caused by the marital biased court. The Guardianship of Infants Act, 1964, for the first time by statute expressly provided for the mother of an 'illegitimate' child to be the guardian of her child and empowered her to appoint a testamentary guardian to so act after her death.[36] The Status of Children Act, 1987, amending the 1964 Act,[37] permits a natural father to become guardian of his child by agreement with the natural mother[38] or by court order.[39] As a consequence, natural parents may now act

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[33] *Ennis v. Butterly* [1996] 1 I.R. 426 at 438; [1997] 1 I.L.R.M. 28 at 38, *per* Kelly J.

[34] [1966] I.R. 567. While the natural mother has been held to have rights under Article 40.3 no such rights have been accorded to the natural father.

[35] *W.O'R. v. E.H. & An Bord Uchtála* [1996] 2 I.R. 248. It has been observed that, prior to the Status of Children Act, 1987 which guarantees identical treatment under the law for children born outside marriage as the law extends to marital children, it was common practice for unmarried mothers to adopt their child so as to place the child in the same legal position to them as a child born within marriage. However, such an adoption, cannot of itself, render the mother and child "a family" within the meaning of Articles 41 and 42 as they do not constitute a marital family: Shatter, *Family Law* (4th ed., 1997), p. 980.

[36] Guardianship of Infants Act, 1964, s. 6(4).

[37] Guardianship of Infants Act, 1964, s. 6(4). See s. 6A as inserted by the Status of Children Act, 1987, s. 12.

[38] S. 2(4) of the Guardianship of Infants Act, 1964 as inserted by s. 4 of the Children Act, 1997.

[39] The position at common law used to be that such a child was a filius nullius with no parents or relations. None of the legal rights and duties

as joint guardians of any children born to them.[40] In respect of financial support the 1987 Act amended the existing law to enable orders to be sought by either parent to require the other to maintain the child.[41] The Family Law (Maintenance of Spouses & Children) Act, 1976, as amended, provides that where it appears to the court that the parent of a dependant child[42] has failed to provide such maintenance for the child as "is proper in the circumstances", the court may order that parent to make either periodic maintenance payments or

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which flowed from the relationship of parent and legitimate child were accorded to him or his parents.

40 However, in the absence of agreement or court order, the mother during her lifetime remains the child's sole guardian.

41 The Illegitimate Children (Affiliation Orders) Act, 1930 which only allowed a mother to obtain a court order to require the father of a child born to her outside marriage to make payments to her towards the maintenance of their child was repealed by the Status of Children Act, 1987. Part IV of the Act amended the Family Law (Maintenance of Spouses & Children) Act, 1976 to enable orders to be sought by either parent to require the other to maintain their child born outside marriage. However, in practice it is usually the mother who seeks maintenance support from the father.

42 "Dependant child" has been defined to mean a child :

> who is under the age of 18 years or, if he has attained that age:
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> (a) is or will be or, if an order were made under this Act providing for periodical payments for his support, would be receiving full-time education or instruction at any university, college, school or other educational establishment and is under the age of 23 years; or
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> (b) is suffering from mental or physical disability to such extent that it is not reasonably possible for him to maintain himself fully.

Family Law (Maintenance of Spouses & Children) Act, 1976, s. 3 as amended by s. 16(1)(a) of the Status of Children Act, 1987 as amended by s. 43(a)(i) of the Family Law Act, 1995 as amended by s. 52(o) of the Family Law (Divorce) Act, 1996.

payment of a lump sum or sums for child support.[43] What constitutes "proper" maintenance is a question of fact to be determined by the court having regard to the circumstances of the individual case and, in particular, the financial resources available to both parents. Furthermore, where a non-marital child is not being "fully maintained" a third party can successfully bring proceedings under the Act.[44] This provision may be relied upon where a child is only being partially maintained by one parent or where neither parent is providing such maintenance as is "proper in the circumstances". As "any person" can institute proceedings there is no statutory bar to preclude the dependant child in question from relying on this provision.[45] There is at present, however, no statutory framework within which a parental support order or maintenance support order in favour of a cohabitee or former cohabitee can be made. Moreover, palimony,[46] as a concept, is not recognised nor provided for by Irish law.[47]

The Domestic Violence Act, 1996, unlike its statutory predecessors,[48] is not confined in its application to spouses

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[43] See s. 21A of the 1976 Act as inserted by s. 21 of the 1987 Act.

[44] See s. 5A(1) of the 1976 Act as inserted by s. 18 of the 1987 Act. It should be noted that a third party order cannot be made against a parent where there is already in force against that parent a periodical payment order obtained by the other parent or where there is in place an agreement providing for a dependant child approved by the court under s. 8(A) of the 1976 Act, unless the parent is not complying with such order or agreement or alternatively the court, having regard to all the circumstances, thinks it proper to do so.

[45] However, it is more usual that the third party be a relative, foster parent or social worker.

[46] An allowance made by one member of an unmarried couple to the other after separation.

[47] *Ennis v. Butterly* [1996] 1 I.R. 426; [1997] 1 I.L.R.M. 28 (Kelly J.). However, an unmarried parent may be entitled to the One Parent Family Payment which is a social welfare scheme.

[48] The Civil Liability Act, 1961, Part IV provides that dependants of the

and their children but can also be invoked by former spouses[49] and by persons at risk in other forms of domestic relationships.[50] The Act provides for, inter alia, the making of a barring order where the court "is of the opinion that there are reasonable grounds for believing that the safety or welfare"[51] of the applicant or any dependant child requires that such an order be made. The central feature of a barring order is the prohibition it imposes on a respondent from continuing to reside in or from entering a place in which the applicant or a dependent child resides. In addition, the Act also provides for the making of a safety order where the court "is of the opinion that there reasonable grounds for believing that the safety or welfare" of the applicant or any dependent child requires that such order be made.[52] Shatter has observed that the "safety order was originally conceived as extending to the courts a power to protect an applicant against domestic misconduct not sufficiently serious to require the making of a barring order[53] and misconduct by a person with whom the

deceased may recover damages where the deceased's death is caused by the wrongful act of another, if the act was such as would have entitled the deceased, but for his death, to maintain an action and recover damages against the other. The definition of "dependants" was extended by the Civil Liability (Amendment) Act, 1996, s. 1 to include "a person who is not married to the deceased but who, until the date of the deceased's death, had been living with the deceased as husband or wife for a continuous period of not less than three years". The Domestic Violence Act, 1996 and the Civil Liability (Amendment) Act, 1996 represent the first legislative intervention in the area of non-marital cohabitation in this jurisdiction.

[49] This would include spouses who have had their marriage dissolved by a decree of divorce, or partners who have had their marriage declared a nullity.

[50] The most notable example for present purposes being cohabitees.

[51] Domestic Violence Act, 1996, s. 3(2)(a).

[52] Domestic Violence Act, 1996, s. 2(2).

[53] This is another example of the patriarchal attitude of the law which assumes a certain level violence is to be "expected in the ordinary wear and tear of married life….": *O'B. v. O'B.* [1984] I.R. 182 at 194, *per* Griffin J.

court envisaged the applicant might continue to reside."[54] The provision is somewhat anomalous though, as where a respondent, who is not resident with the applicant at the time of the hearing, is directed "not to watch or beset the place where the applicant resides" he can defeat such court order by moving into the residence concerned.[55] Cohabitees who wish to apply for a safety order or a barring order must satisfy a number of temporal and proprietary requirements. [56] These prerequisites do not apply to married couples. It has been suggested that, due to the restrictive approach of the

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[54] Shatter, *Family Law* (4th ed., 1997), p. 845. Footnotes added.

[55] An applicant can seek an interim barring order where "there is an immediate risk of significant harm to the applicant or any dependent person if the order is not made immediately" and "the granting of a protection order would not be sufficient to protect the applicant or any dependent child": Domestic Violence Act, 1996, s. 4(1). A protection order is effectively an interim safety order which specifically empowers the court to make such order *ex parte* without the service in advance of any court papers on the respondent: Domestic Violence Act, 1996, s. 5(1). The Supreme Court has recently held that an interim barring order made *ex parte* under section 4 of the Domestic Violence Act, 1996 is unconstitutional on the basis that it fails to prescribe a fixed period of relatively short duration during which the order is to continue in force and this deprives the respondent to such an application of the protection of the principle of *audi alteram partem* in a manner and to an extent which is disproportionate, unreasonable and unnecessary (*Keating v. Crowley*, Supreme Court, unreported, 9 October 2002). Both these orders cease to have effect upon the determination by the court of the principal order sought: Domestic Violence Act, 1996, s. 4(4) and s. 5(5) respectively.

[56] An application for a safety order can be made by a person who "is not the spouse of the respondent but has lived with the respondent as husband and wife for a period of at least six months in aggregate during the period of twelve months immediately prior to the application": Domestic Violence Act, 1996, s. 2(1)(a)(ii). Furthermore, a cohabitee seeking a barring order or interim barring order must have lived with the respondent "as husband or wife for a period of at least six months in aggregate during the period of nine months immediately prior to the application": Domestic Violence Act, 1996, s. 3(1)(b). In addition, when seeking a baring order an applicant must demonstrate to the Court's satisfaction that she holds at least a 50% interest in the property. *Cf.* Domestic Violence Act, 1996, s. 3(4).

legislation towards the plight of cohabitees, future unmarried applicants will have to resort to the heretofore defunct injunction to cure domestic misconduct.[57]

Having outlined the deficiencies in applying general law principles to property disputes between couples cohabiting outside of wedlock, the argument for statutory reform would seem compelling. In Part II, the approach of the Australian States' legislatures will be critically assessed in light of their decision to regulate the duties and obligations of *de facto* partners by means of statute. In particular, it will be considered whether this approach would be appropriate in an Irish context, and to what extent, if any, should Irish courts be persuaded by Australian case-law.

II. Legislative Intervention Down Under

A. Non-Statutory Solutions in Other Jurisdictions

Equity has taken divergent approaches in other jurisdictions to the issue of proprietary disputes inter partes. The House of Lords in *Gissing v. Gissing*[58] enunciated the

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[57] Shatter, *Family Law* (4th ed., 1997), p. 875. This was the remedy relied upon by partners prior to the enactment of s. 22 of the Family Law (Maintenance of Spouses and Children) Act, 1976. The major defect with the injunctive remedy is that breach of its provisions is merely contempt of court and does not, of itself, render its subject liable to arrest or criminal prosecution. Committal proceedings must be initiated by the spouse in whose favour the injunction was originally granted. For more detailed discussion on the use of injunctions in family law matters, see Duncan & Scully, *Marriage Breakdown in Ireland*, Ch. 6. An alternative to injunctive relief may reside in s. 10 of the Non-Fatal Offences Against the Person Act, 1997 which criminalizes harassment, an offence which is defined sufficiently broadly enough to encompass violent behaviour perpetrated by one cohabitee against the other. The penalty on summary conviction is a fine not exceeding £1,500 and/or a prison term not in excess of 12 months. On conviction on indictment the sanctions are an unlimited fine and/or incarceration up to a maximum of 7 years.

[58] [1971] A.C. 886 (Lord Diplock). This 'new' remedy bears a striking resemblance to proprietary estoppel. Both require a common intention and a detrimental action in reliance. Hayton has commented that the

"common intention" constructive trust. A claimant of a share in property nominally owned by another must show two things. First, there must have been a common intention, or agreement, as between the nominal owner and the claimant that the latter should have a share in the property. Secondly, the claimant must have acted in reliance upon this common intention. Given these two elements the nominal owner will hold the property on a constructive trust for himself and the claimant in the shares envisaged in the common intention. The necessary intention can be either express or implied, but is supposed to be real and not invented by the judge. However, it seems clear that this rule has little connection with judicial practice as agreements are in reality found or denied in a manner quite unconnected with their actual presence or absence.[59]

In Canada, the leading authority on family property is the decision of the Supreme Court in *Pettkus v. Becker*.[60] The majority judgment, delivered by Dickson J., employs an apparatus of unjust enrichment, which arises where there is an enrichment, a corresponding deprivation and the absence of juristic reason for the enrichment.[61]

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necessary squaring of the circle is to be achieved by dint of the "flexibility" rule which has come to be seen as the leading characteristic of proprietary estoppel: Hayton, "Equitable Rights of Cohabitees" [1990] Conv. 370, 378-379.

[59] See, for example, *Grant v. Edwards* [1986] 1 Ch. 638; [1986] 2 All E.R. 426 (Nourse L.J.). After a thorough examination of the case-law, Gardner concludes that "in both 'implied' and 'express' cases, it seems that if the facts were found accurately, women would get no remedy at all. They only succeed because the judges are prepared to take an inventive approach to the facts, so as to discover a common intention when in truth none exists-certainly when the woman makes a direct financial contribution, and sometimes also where she does not": Gardner, "Rethinking Family Property" (1993) 109 LQR 263, 265.

[60] [1980] 2 S.C.R. 834; 117 D.L.R. (3d) 257. See also *Sorochan v. Sorochan* [1986] 2 S.C.R. 38; (1986) 29 D.L.R. (4th) 1.

[61] The major difficulty with this doctrine is that the recipient of a service can deny he was enriched by it. That is to say he can subjectively devalue its worth. He may argue that, however much the service may have a

In contrast, the New Zealand Court of Appeal in *Gillies v. Keogh*[62] has elicited a fresh doctrine based on the partners reasonable expectations. For a claimant to succeed, it is necessary that she had a reasonable expectation of an interest and that the other partner shared that expectation, or at least knew or should have known of it and did nothing to deny it.[63]

Finally, the Australian High Court has propounded the concept of unconscionability. The joint judgment of Mason C.J., Deane and Wilson JJ. in *Baumgartner v. Baumgartner*,[64] draws upon the rules concerning situations where parties undertake a joint venture,[65] such as a business partnership, and it flounders, without the fault of either party. If a party has contributed resources for the purposes of the venture and with the failure those purposes are no longer viable, it is not permissible (or unconscionable) for the other party to hold onto those resources nonetheless. It has been suggested that the analogy with a commercial venture has fettered the potential development of this doctrine to remedy injustices suffered between partners to a close familial relationship.[66]

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market value, it did not have that value to him, because he did not want it. Money is different. Its worth is the same to everyone. So a payment cannot be subjectively devalued in the way that a service can. See further Gardner, "Rethinking Family Property" (1993) 109 LQR 263, 269.

[62] [1989] 2 N.Z.L.R. 327 (Cooke P.).

[63] [1989] 2 N.Z.L.R. 327, 344. This remedy too has been likened to proprietary estoppel. See Gardner, "Rethinking Family Property" (1993) 109 LQR 263, 278.

[64] 76 A.L.R. 75; (1987) 164 CLR 137.

[65] See *Muschinski v. Dodds* 62 A.L.R. 429; (1986) 160 C.L.R. 583 upon which the *Baumgartner* doctrine is based.

[66] See Bailey-Harris, "Property Disputes Between De Facto Couples: is Statute the Best Solution" (1991) 5 A.J.F.L. 221 and Haines, "Unconscionability in Constructive Trusts and Remedies Thereof" (1991) 5 A.J.F.L. 206. However both unconscionability and unjust enrichment eliminate the need to find the fugitive common intention which plagues

B. Development of a Statutory Model

In the early 1980s the Australian State of New South Wales introduced something novel to the common law world, that of legislation in the area of couples who live together outside of marriage. The pioneering Property (Relationships) Act, 1984 (NSW) was very closely modelled on the report made by the State's Law Reform Commission of the previous year.[67] The Commission expressly rejected both the approach of fully equating the legal consequences of *de facto* relationships with those of marriage, and also that of equating the two institutions for certain purposes. Instead, it favoured the remedying of injustices and significant anomalies in specific areas of the law. It stressed the need to maintain the distinction between marriage and unmarried relationships since the former involves "a public commitment that is not a necessary element"[68] to the latter. Hence the substantive provisions of the 1984 Act, whilst following "broadly the approach enacted by the Family Law Act,"[69] are nevertheless distinguishable in some significant respects.[70] The legislation endows the court with powers of equitable distribution in relation to the property of the cohabitees or *de facto* partners,

the English approach.

[67] New South Wales Law Reform Commission, *Report on De Facto Relationships*, 1983. The Act was originally the De Facto Relationships Act, 1984 but was subsequently renamed to the Property (Relationships) Act, 1984 and amended to apply to a wider range of domestic relationships.

[68] New South Wales Law Reform Commission, *Report on De Facto Relationships*, para 5.67.

[69] New South Wales Law Reform Commission, *Report on De Facto Relationships*, para 7.51, referring to the Family Law Act, 1975 (Cth).

[70] It has been noted that "where the details of the State authority provisions do not follow those contained in the Family Law Act, 1975 (Cth), the increasing trend is for the interpretation of those provisions by the State Supreme Courts to follow closely that adopted by the Family Court of Australia in an equivalent context": Bailey-Harris, "Property Disputes in De Facto Relationships: Can Equity Still Play a Role?", Ch. 7 in Cope (ed.), *Equity: Issues and Trends*, at 227.

confers limited maintenance rights and has other provisions concerning the enforceability of private agreements. Equitable doctrines still have a role to play and indeed are preserved by the legislation,[71] however, in practice are only invoked where the legislation does not apply.[72] The statutory models adopted in New South Wales and other state jurisdictions[73] do not fully equate *de facto* relationships with marriage in terms of their legal consequences in the property sphere. The overall result is that the relief afforded by the statutory schemes is generally wider than that under general law principles, primarily because a broader range of contributions can be taken into account in the division of property under the statutory schemes and a greater range of ancillary powers exist.

Whilst other States have enacted similar laws,[74] it is the New South Wales statute law that will form the primary subject matter of this essay as its jurisprudence has been a major source of guidance for the other provincial jurisdictions. It is worth noting at this juncture that the *de facto* relationship legislation is by no means a comprehensive law on *de facto* partners. Many important areas of New South Wales family law relating to *de facto* partners, such as guardianship of children and obligations to support

[71] Property (Relationships) Act, 1984 (NSW), s. 7. For discussion of general or common law remedies see Part I.

[72] For example, the Act has no applicability to same sex couples.

[73] See note 74 *infra*.

[74] See, for example, De Facto Relationships Act, 1991 (NT), Domestic Relationships Act, 1994 (ACT), De Facto Relationships Act, 1996 (SA). However, due to political pressure at the time of the bill, the Property Law (Amendment) Act, 1987 (Vic) only accords real proprietary rights to *de facto* partners upon the termination of their relationship. Parties wishing to invoke the court's adjustive jurisdiction in respect of chattels or personalty must have resort to the general law.

children,[75] and claims against the estate of a deceased partner,[76] are covered by other legislation.

C. Scope of De Facto Relationships Legislation

A *de facto* relationship is defined by reference to the paradigm of marriage and "means the relationship between *de facto* partners [that] being the relationship of living or having lived[77] together as husband and wife on a bona fide domestic basis although not married to each other".[78] Where the partners have no children, it must be shown that they lived

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[75] Family Law Act, 1975, (Cth), Part VII; Child Support Assessment Act, 1989 (Cth).

[76] Family Provision Act, 1982 (NSW); Wills, Probate and Administration Act, 1898 (NSW).

[77] It should be noted, however, that in order to be eligible to ground an action under this legislation either of the parties to the application must have been "resident within New South Wales on the day on which the application was made [and] that:

> (i) both parties were resident within New South Wales for a substantial period of their domestic relationship, or
>
> (ii) substantial contributions of the kind referred to in section 20(1)(a) or (b) have been made in New South Wales by the applicant.

[For discussion of s. 20 of the 1984 Act see *post*.]
(2) For the purposes of [(i)], the parties to an application shall be taken to be resident within New South Wales for a substantial period of their *de facto* relationship if they have lived together in the State for a period equivalent to at least one-third of the duration of their relationship": Property (Relationships) Act, 1984 (NSW), s. 15.

[78] Property (Relationships) Act, 1984 (NSW), s. 3. This should be contrasted with the broader definition afforded by s. 3 of the Domestic Relationships Act, 1994 (ACT) which provides that a "'domestic relationship' means a personal relationship (other than a legal marriage) between 2 adults in which 1 provides personal or financial commitment and support of a domestic nature for the material benefit of the other". Not only can same sex couples avail of the Australian Capital Territory's legislation but also other categories of cohabitees, for example, an aunt and niece who live together.

together in such a relationship for a period of at least two years in order to avail of the legislation.[79] The rationale behind such provision is to dissuade frivolous claims being made by parties who are not *de facto* partners. The difficulty in prescribing a minimum period of cohabitation is that it is inherently arbitrary. Whether or not there was in existence a *de facto* relationship between parties to the application should be a question of fact to be answered by a court in the individual case and it is submitted that the issue should not be determined merely by establishing that the parties cohabited for the statutorily prescribed period.

Provision is also made for an applicant who has made "substantial contributions" which would otherwise go uncompensated[80] or if she has care and control of a child of the respondent. An application under the Act must be made within two years from the date on which the *de facto* relationship ended unless the applicant can demonstrate that "greater hardship would be caused to the applicant if that leave were not granted than would be caused to the respondent if leave were granted".[81] Furthermore, the Court

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[79] Property (Relationships) Act, 1984 (NSW), s. 17. The statutory relief is also subject to another temporal limitation which stipulates that the relationship must have been in existence at the date on which the Act came into operation. Cf. the equivalent provision in the South Australia Act which demands that the relationship have been in existence for a period of three years: De Facto Relationships Act, 1996 (SA), s. 9.

[80] De Facto Relationships Act, 1996 (SA), s. 17(2)(b)(i). This would appear to be a statutory precursor of the unconscionability principle enunciated by the High Court in *Muschinski v. Dodds* 62 A.L.R. 429; (1986) 160 C.L.R. 583 and later broadened in *Baumgartner v. Baumgartner* 76 A.L.R. 75; (1987) 164 C.L.R. 137. For discussion of the unconscionability principle in Australian law, see Parkinson, "Doing Equity Between De Facto Spouses: From *Calverley v. Green* to *Baumgartner*" (1988) 11 Adelaide L.R. 370.

[81] De Facto Relationships Act, 1996 (SA), s. 18(2). This provision perhaps affords too much discretion to a judiciary who are often "prepared to take an inventive approach to the facts" and it is submitted that a less discretion orientated test would be better suited in an Irish context. See further Gardner, "Rethinking Family Property" (1993) 109

is under an obligation to ensure, as far as practicable, that its order "will finally determine the financial relationships between the parties to a domestic relationship and avoid further proceedings between them".[82] As under the Family Law Act, 1975 (Cth), proceedings for adjustment of property rights under the New South Wales legislation cannot be commenced after the death of a party,[83] but only continued where an application has already been made prior to death.[84]

D. Real Property Adjustment between De Facto Partners

The report of the NSW Law Reform Commission on De Facto Relationships was the basis for the Act, and the views of the Commission provide a valuable insight into the background and purposes of the legislation.[85] It found the pre-existing law, applying ordinary concepts of property, trust and contract law to the intimate circumstances of *de facto* relationships, often led to injustice. The major deficiency identified by the Commission was a failure on the part of the general law to adequately recognise two types of contributions to *de facto* relationships, namely that of indirect financial and non-financial contributions to the acquisition, conservation or improvement of assets, and financial and non-financial contributions to the welfare of the other partner

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L.Q.R. 263, 265.

[82] De Facto Relationships Act, 1996 (SA), s. 19. This certainly contrasts with the variability over finality approach championed by the Irish courts. See, for example, the judgment of McGuinness J. in *C.N. v. R.N.* [1995] 1 Fam. L.J. 14 (Ciruit Court).

[83] *Skene v. Dale* [1990] V.R. 605.

[84] Property (Relationships) Act, 1984 (NSW), s. 24; Family Law Act, 1975 (Cth), s. 79(8).

[85] New South Wales Law Reform Commission, *Report on De Facto Relationships*, Part IV, and, on property adjustment in particular, ch. 7. While this report has been relied upon by, *inter alia*, Powell J. in *D. v. McA.* (1986) 11 Fam. L.R. 214, the majority of the New South Wales Court of Appeal in *Evans v. Marmont* 21 Fam. L.R. 760; [1997] N.S.W. LEXIS 774, *20 were of the opinion that "the role of the court, however, is to interpret and apply the 1984 legislation".

or children.[86] The solution recommended by the Commission, for a discretionary adjustment of property interests, has its origins in an analogy with the Family Law Act, 1975 (Cth) and in particular that legislation's recognition of the parties' contributions in making property orders. In fact the Commission thought

> ... the most appropriate means of ensuring that a wide range of contributions is taken into account [was] to follow broadly the approach adopted by the Family Law Act…[because] in general the financial arrangements, or the variety of financial arrangements, made by *de facto* partners appear to be similar to the arrangements, or variety of arrangements, made by married couples.[87]

The central section of the New South Wales Act is section 20(1) which deserves close attention and provides:

> On an application by a party to a domestic relationship for an order... to adjust interests with respect to the property of the parties to the relationship or either of them, a court may make such order adjusting the interests of the partners in the property as it seems *just and equitable having regard to*:

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[86] New South Wales Law Reform Commission, *Report on De Facto Relationships*, 147.

[87] New South Wales Law Reform Commission, *Report on De Facto Relationships*, 149-150. Case law has turned on the comments of the Commission and the wording of s. 20 and this has led to much uncertainty in litigation as to how a particularly constituted court will determine an application under s. 20 of the 1984 Act. For discussion see Chisholm, Jessep, and O'Ryan, "De Facto Property Decisions in NSW: Emerging Patterns and Policies" (1991) 5 A.J.F.L. 241 and the judgment of Gleeson C.J. in *Evans v. Marmont* 21 Fam. L.R. 760; [1997] N.S.W. LEXIS, *5 *et seq.* which seems to have settled the matter, however, note the comments of Mason P. at *39 *et seq.*

> (a) the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them, and
>
> (b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the parties to the relationship to the welfare of the other party to the relationship or to the welfare of the family constituted by the parties and one or more of the following, namely:
>
> (i) a child of the parties,
>
> (ii) a child accepted by the parties or either of them into the household of the partners, whether or not the child is a child of either of the parties.[88]

In contrast, section 79, the equivalent provision of the Family Law Act, 1975 (Cth) provides, *inter alia*:

> (1) In proceedings with respect to the property of the parties to a marriage or either of them, the court may make such order as it considers appropriate altering the interests of the parties in the property, including an order for a settlement of property in substitution for any interest in the property and including an order

[88] Emphasis added. *Cf.* s. 15 of the Domestic Relationships Act, 1994 (ACT) and s. 11 of the De Facto Relationships Act, 1996 (SA). Irish courts are, however, subject to much wider provisions in the context of judicial separation and divorce (see s. 16 of the Family Law Act, 1995 and s. 20 of the Family Law (Divorce) Act, 1996).

requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage, such settlement or transfer of property as the court determines ...

(2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

…

(4) In considering what order (if any) should be made under this section in proceedings with respect to any property of the parties to a marriage or either of them, the court shall take into account-

(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them…

(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them…

(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including

> any contribution made in the capacity of homemaker or parent;
>
> (d) the effect of any proposed order upon the earning capacity of either party to the marriage;
>
> (e) the matters referred to in sub-section 75(2) so far as they are relevant.[89]

Parkinson[90] observes that while the New South Wales legislation mirrors the Family Law Act in making all the property available for distribution, however it was acquired, there is a fundamental difference between the two Acts: the future needs of the *de facto* parties, and of any children, are irrelevant to the property adjustment process.

By contrast, under the Family Law Act, there is a two-stage process. First, the court considers the variety of contributions to each of the parties, including "homemaker" contributions. Typically, a couple who have built up their assets over a number of years are likely to be considered to have contributed equally to the property, although there is no legal presumption to this effect.[91] At the contribution stage,

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[89] S. 75(2) lists a wide range of matters, including the income, property and financial resources of the parties, their age and health, their capacity for appropriate gainful employment, needs arising from self support and child care and certain other responsibilities, the extent to which the marriage has affected the earning capacity of the applicant, the extent to which a party has contributed to the other's financial position, and "any fact or circumstance which … the justice of the case requires to be taken into account".

[90] Parkinson, "The Property Rights of Cohabitees - Is Statutory Reform the Answer?", ch. 21 in Pearl, Bainham and Pickford (eds.), *Frontiers of Family Law* (2nd ed., 1995), p. 301.

[91] *Mallet v. Mallet* 52 A.L.R. 193; (1984) 156 C.L.R. 605. Usually, an equal sharing on the basis of contribution would not occur if one party had brought in significant assets to the marriage at its inception, or had inherited substantial property, or had been engaged in entrepreneurial activity which generated wealth.

initial percentages of the total wealth of the parties are allocated, and then a further adjustment is considered to take account of the parties' future needs. Where there is only a moderate amount of property, the custodial parent will often get a substantial adjustment in his or her favour.[92]

These respective approaches are based upon a partnership model, in the context of marriage, and a restitutionary model in respect of *de facto* partners. Implicit in the jurisprudence of the Family Court of Australia is the notion of marriage as a social and economic partnership[93] in which the husband and wife may well make quite different contributions to the welfare, happiness and financial support of the family unit, while both contribute equally in their respective spheres. The Family Law Act dictates that the parties are to be treated as having together acquired property during the course of the marriage (and any period of cohabitation which preceded it). The court then proceeds on the basis that it is their property, and that the state of legal title is irrelevant except in so much as it may demonstrate an inequality of contribution between them.

In contrast, the restitutionary approach takes as its starting point the existing legal title and considers whether the contributions of the other party to the acquisition, maintenance and improvement of that property, or her home-making role generally, justifies an alteration of that legal title in favour of the other partner.[94] The net effect of

[92] Parkinson, "The Property Rights of Cohabitees - Is Statutory Reform the Answer?", ch. 21 in Pearl, Bainham and Pickford (eds.), *Frontiers of Family Law* (2nd ed., 1995), 307-308.

[93] The treatment by the general law of *de facto* partners (and married partners prior to legislation) based on the analogy of a commercial partnership has been criticised as inappropriate for parties to an intimate relationship who pay cursory deference to legal titles in property prior to the breakdown of the relationship. For discussion see Gardner, "Rethinking Family Property" (1993) 109 LQR 263.

[94] See s. 20(1) of the Property (Relationships) Act, 1984. Very similar issues of approach have arisen concerning the law of unjust enrichment in Canada. Under these principles of unjust enrichment, the court is required

these approaches is that a successful married litigant can expect to gain a percentage share in the property (usually the family home) as she has contributed to a social and economic partnership whereas her *de facto* counterpart, in a similar factual scenario, can only recover reasonable recompense for the value of services provided less the value of the benefits she has received.[95]

The early jurisprudence[96] indicated a restitutionary approach to resolving disputes inter partes. In *D. v. McA.*, Powell J. said that the court:

> … should proceed, first, to identify, and value, the assets of the parties; second, to determine whether any, and, if so, what contributions of the type contemplated by s[ection] 20(1)(a), (b) have been made by each partner; third, to determine whether, in the circumstances, the contributions of the applicant has already been sufficiently recognised and compensated for; and finally, to determine what order is called for in order that the applicant's contributions

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to ask whether the defendant has been enriched by the contributions of the plaintiff, whether there has been a corresponding deprivation to the plaintiff, and whether there was a juristic reason for that enrichment. The practical problem in applying these principles to cohabitees is that typically they confer benefits upon each other. See, for example, *Peter v. Beblow* 101 D.L.R. (4th) 621; (1993) 44 R.F.L. (3d) 329.

[95] The court in *Black v. Black* (1991) 15 Fam L.R. 109 (Powell J.) addressed the difficult question of quantification by analogy with the cost of obtaining such services commercially. Note, however, that Mason P. in *Evans v. Marmont* 21 Fam.L.R. 760; [1997] N.S.W. LEXIS 774, *49 (NSW CA) commented it would "appear that *Black v. Black* … no longer represents the law in this State".

[96] *Roy v. Sturgeon* (1986) 11 Fam L.R. 271 (Powell J); *Wilcock v. Sain* (1986) 11 Fam L.R. 302 (Young J.); *Dwyer v. Kaljo* (1987) 11 Fam L.R. 785 (Hodgson J.); *Myers v. Myers* [1987] DFC 95-056 (Brownie J.); *Lipman v. Lipman* (1989) 13 Fam L.R. 1 (Powell J.). It should be noted, though, that these are all first instance cases.

> be sufficiently recognised and compensated for.[97]

While it is clearly appropriate for the court to commence by identifying and valuing the property and determining what contributions the partners have made, the third and fourth stages have proved more problematic. Stage three, it has been suggested, is both a departure from the wording of section 20, which requires the court to make orders that are just and equitable having regard to the partners contributions, and also unnecessary as the court will take into account what benefits or 'compensation' the plaintiff has received as part of the process of determining what order is just and equitable.[98] Stage four is objected to for similar reasons.[99] "Under section 20 the question is not 'what order is called for in order that the plaintiff's contributions be sufficiently recognised and compensated for', but what order is just and equitable having regard to the contributions of both partners".[100] More recent case law[101] has departed,

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[97] (1987) 11 Fam. L.R. 214.

[98] For discussion see Chisholm, Jessep and O'Ryan, "De Facto Property Decisions in NSW: Emerging Patterns and Policies" (1991) 5 A.J.F.L. 241, 248. They also contend that the third stage is confusing as it requires a court to single out whether the plaintiff has received compensation for his or her contributions when it should be equally necessary, in considering what is just and equitable, to consider what benefits the defendant has received. Furthermore, one can often regard the same thing either as a contribution made by one party or a benefit (or compensation) received by the other, and to this extent stage three invites a court to consider the defendant's contributions (or the plaintiff's compensation) as a separate matter, however the Act makes it clear that both partners' contributions are to be taken into account.

[99] Chisholm, Jessep and O'Ryan, "De Facto Property Decisions in NSW: Emerging Patterns and Policies" (1991) 5 A.J.F.L. 241, 248.

[100] Chisholm, Jessep and O'Ryan, "De Facto Property Decisions in NSW: Emerging Patterns and Policies" (1991) 5 A.J.F.L. 241, 248.

[101] *Thompson v. Badger* (1989) 13 Fam L.R. 559 (Young J.); *Stone v. Wright* (1989) 13 Fam L.R. 584 (Cohen J.); *Davey v. Lee* (1990) 13 Fam L.R. 688 (McLelland J.); *Parker v. McNair* [1990] DFC 95-087

without comment, from the four-stage approach to favour merely identifying and establishing the value of the property and the partners' interests in it, assessing their contributions, and then determining what is just and equitable having regard to those contributions. Critics have welcomed this new trend and suggest, as there is no definitive ruling on the matter, it is open to judges at first instance to decline to apply the four-stage approach.[102]

A second area of divergence in judicial thinking stems from the wording of section 20. The absence of a prospective component in the De Facto Act, to cater for the future needs of parties, has led some judges to take a contextual approach when interpreting the Act whereas others have preferred to remain loyal to the text itself. Contributions in the capacity of homemaker are not easily valued in monetary terms and the presence of this fact has led the court to sometimes recognise such contributions merely "in a token way but [not] in a substantial way".[103] These discrete trains of thought are represented by the decisions in *Dwyer v. Kaljo*[104] and

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(McLelland J.); *Briggs v. Scott* (1990) 14 Fam L.R. 31 (Bryson J.); *Ryan v. Hopkinson and Overhall* (1990) 14 Fam L.R. 151 (Bryson J.).

[102] Chisholm, Jessep and O'Ryan, "De Facto Property Decisions in NSW: Emerging Patterns and Policies" (1991) 5 A.J.F.L. 241, 250. In addition, it has been suggested that the High Court of Australia would say that it would be impermissible to treat the four-stage approach as a legal requirement since to do so would fetter the discretion given by the State legislature. Cf. *Mallet v. Mallet* (1984) 9 Fam. L.R. 449 (HC). More recently, Hodgson J., in *Dwyer v. Kaljo* (1987) 11 Fam. L.R. 785, 793 (Sup. Ct. NSW) opined "if one considers the plaintiff's contributions and nothing else, this cannot conceivably lead to any view of what is just and equitable in the circumstances".

[103] *Mallet v. Mallet* (1984) 9 Fam L.R. 449 (HC). This case concerned the evaluation of contributions as homemaker and parent under the Family Law Act, 1975 (Cth.) but it is generally agreed that the same considerations arise in relation to *de facto* relationships. See for instance the comments of Powell J. in *Roy v. Sturgeon* (1986) 11 Fam L.R. 271, 288 and of Young J. in *Wilcock v. Sain* (1986) 11 Fam L.R. 303, 311.

[104] (1992) 27 N.S.W.L.R. 728; 15 Fam.L.R. 645, Mahony J.A., dissenting.

Wallace v. Stanford.[105] In *Dwyer* the plaintiff was a young woman who lived six years in a *de facto* relationship with a wealthy middle-aged man. At first instance Hodgson J., applying the four-stage test enunciated in *D. v. McA.*[106] awarded her $50,000, noting that she had enjoyed a luxurious lifestyle, received numerous expensive gifts and had travelled with Mr. Kaljo on overseas holidays.[107] On appeal, the majority,[108] increased the award to $400,000 and hinted that they would have been prepared to award a higher sum, if she had asked for it in her application.[109] Of greater relevance is the dicta of the court to the effect that a claim under the New South Wales legislation is not in the nature of a quantum meruit claim for the reasonable value of the appellant's services (i.e. the restitutionary model), nor was the rate of wages ordinarily paid to housekeepers an appropriate starting point (i.e. the approach espoused in *Black v. Black*).[110] Instead the court should make an order that "seems just and equitable".[111]

Handley J.A. went on to say:

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[105] (1995) 37 N.S.W.L.R. 1; 19 Fam.L.R. 430, Handley J.A., dissenting.

[106] (1987) 11 Fam. L.R. 214.

[107] She had sought an award of $400,000.

[108] Mahony J.A. dissenting.

[109] (1987) 11 Fam. L.R. 214, 660, *per* Handley J.A.

[110] *Black v. Black* (1991) 15 Fam L.R. 109 This approach would appear to have been overruled by the Court of Appeal in *Evans v. Marmont* 21 Fam.L.R. 760; [1997] N.S.W. LEXIS 774, *7 who commented that "it would not now be contended that contributions of a *de facto* partner as homemaker and parent should be regarded as in some way inferior to the corresponding contributions of a spouse…. [and] [i]t would not be suggested that an appropriate way to value the contributions of a homemaker or parent is by reference to wage levels applicable to a domestic servant, or any other commercial provider of corresponding services or benefits".

[111] Property (Relationships) Act, 1984 (NSW), s. 20(1).

> The power to make a just order must therefore authorise orders to remedy any injustice the applicant would otherwise suffer because of his or her reasonable reliance on the relationship (a reliance interest) or his or her reasonable expectation from the relationship (an expectation interest). The section would also authorise orders which restored to the applicant benefits rendered to the other partner during the relationship or their value (the restitution interest).[112]

Accordingly the applicant's reliance by giving the "best years of her life" to the relationship and her expectations resulting from the lifestyle they had enjoyed in the course of the relationship justified the amount sought.[113] This approach seems to accord more with the partnership model found under the Family Law Act, 1975 (Cth) in respect of marital breakdown. In *Wallace* Mahony J.A., this time in the majority, refused to entertain a claim under the 1984 Act on the basis of the wider "just and equitable" test enunciated in *Dwyer*. The issue finally came before a

[112] (1992) 27 N.S.W.L.R. 728 at 744. He also felt that "[t]here is no reason to treat the words 'just' and 'equitable' as synonymous and every reason to do otherwise….In my opinion the court is authorised to apply equitable principles by analogy….Equitable considerations would enable the court in appropriate cases to order a *de facto* partner to account for a share of profits derived from increases in the value of his or her assets during the relationship" (at 744-745). This would be an untenable position in the Irish context as it involves reading in general law remedies to statutory provisions. Cf. the strict literal rule of statutory interpretation in the field of taxation legislation as evidenced in *Inspector of Taxes v. Kiernan* [1981] I.R. 117 and the strong presence of the separation of powers doctrine in the Irish Constitution. For discussion see Morgan, *Constitutional Law of Ireland* (2nd ed., 1990), p. 33 *et seq*. Indeed, the Court of Appeal in *Evans v. Marmont* 21 Fam.L.R. 760; [1997] N.S.W. LEXIS 774, *24 found Handley J.A.'s approach "to broaden the scope of the enquiry well beyond that contemplated by the legislature".

[113] The dissenting judge adopted the restitutionary reasoning of earlier cases.

specially constituted Court of Appeal in *Evans v. Marmont*[114] where *Dwyer* was distinguished on its own particular facts in favour of the approach in *Wallace*. The court explained its decision as follows:

> It was not the intention of the New South Wales Parliament in 1984 to equate *de facto* relationships with marriage, or to make the same provisions with respect to the *de facto* partners as the Family Law Act, at the time, made with respect to married people. There are some similarities between the provisions of the Family Law Act and those of the De Facto Relationships Act.[115] There are also differences. Those differences are substantial, conspicuous, and deliberate….There are at least two major reasons for the differences. The first relates to the limited purpose of the New South Wales Act…..[116] The second relates to the essential legal nature of marriage, which is referred to in the Family Law Act (s[ection] 43) as an institution, and which is given by that Act its common law meaning as being "the union of man and woman to the exclusion of all others voluntarily entered into for life". Marriage involves matters of legal status and public commitment. Included in the formal commitment undertaken by people who marry, and reflected in s[ection] 72 of the Family Law Act, is a mutual undertaking by each party to maintain the other to the extent of

[114] 21 Fam.L.R. 760; [1997] N.S.W. LEXIS 774, *per* Gleeson C.J., Mason P. and Meagher J.A.

[115] Now the Property (Relationships) Act.

[116] The long title stated that it was "an Act to make provision with respect to *de facto* partners".

> their respective abilities and needs. No such commitment need be involved in a *de facto* relationship….[117]

The Court of Appeal in *Evans* also expressed its disapproval of Handley J.A.'s notion, in *Dwyer v. Kaljo*,[118] that a judge may, when determining an application under section 20 of the 1984 Act, have regard to factors other than those contained in paragraphs (a) and (b)[119] if he is of the opinion that to do so would be "just and equitable" in the circumstances of the case.[120]

Meagher J.A. stated:

> [Section] 20 enables a court to "make such order adjusting the interests of the partners in the property as it seems just and equitable having regard to" two specified factors. Those two factors both relate to the contributions, direct and indirect, made by each of the partners to either the property or the welfare of

[117] 21 Fam.L.R. 760; [1997] N.S.W. LEXIS 774, *20-*21, *per* Gleeson C.J. Footnote added.

[118] (1992) 27 N.S.W.L.R. 728.

[119] See section on *Real Property Adjustment Between De Facto Partners*, *ante*.

[120] This concept effectively allows a judge to have regard to what ever factors he considers appropriate alongside the explicitly enumerated ones contained in s. 20. This runs contrary to the more popular view that parliament has vested a discretion in the court as to what weight should be attached to each factor. Gleeson C.J. in *Evans v. Marmont* 21 Fam.L.R. 760; [1997] N.S.W. LEXIS 774, *18 succinctly summarised the argument as turning upon the interpretation of s. 20. "Should the words 'having regard to' mean just the factors contained in para (a) and (b) or should it mean 'having regard, amongst other things, to', as though there were a para (c) which referred to any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account or that the section should be read as though it ended with the words 'just and equitable'." The Court of Appeal preferred the former so that the purposive element introduced by *Dwyer* has been given its quietus.

> them both. As a matter of English that can only mean that the court may have regard to each of the two factors and not to any other factors. In particular it precludes the court, in a s[ection] 20 application, from having any regard to fault, needs, maintenance, compensation, expectation damages, reliance damages, or quasi-equitable damages. In *Dwyer v. Kaljo* (1992) 27 NSWLR 728 ... and in *Wallace v. Stanford* (1995) 37 NSWLR 1 ... Handley J.A. departed from these principles and enunciated a theory that in making an order under s[ection] 20, a judge may take into account anything that he wishes. This fallacy seems to have infected Priestley J.A. in *Dwyer v. Kaljo*, and again in *Theodoropoulos v. Theodosiou* (1995) 38 NSWLR 424. However, not surprisingly, Handley J.A.'s views have not received universal acclamation ... Now [that] they have been given their quietus ... in this case ... I observe without regret their passing.[121]

Gleeson C.J., less trenchant in his criticism, observed that:

> the reference to 'adjustment' of property interests does not sound like an invitation to engage in an unbound exercise in distributive justice… [and] more significantly, there is no mention in the [1984] Act of matters, relevant to means and needs, of the kind referred to in the Family Law Act, s. 75(2)….[122]

The court concluded by attaching "importance to the grammatical structure of s 20…. [and the fact that] [t]he

[121] 21 Fam.L.R. 760; [1997] N.S.W. LEXIS 774, *75.

[122] 21 Fam.L.R. 760; [1997] N.S.W. LEXIS 774, *22-*23.

power is to make such order adjusting property interests as seems just and equitable having regard to (a) and (b)".[123]

In summarising this section the comments of Mason P. are worthy of note:

> … it seems to me that the sounder construction of "having regard to" is that the words do not limit the court's consideration of what seems just and equitable to do under s 20(1) exclusively to the matters set out in paras (a) and para (b) of the subsection. Rather, I think the subsection requires a court to give principal weight to the matters mentioned in those paragraphs but that other matters relevant to what is just and equitable between the partners may be taken into account.[124]

It is submitted that the approach of Mason P. is to be preferred in an Irish context, to that of the majority in Evans, to take account of an exceptional factor which would be unjust and inequitable should it be excluded from consideration.[125] However, this should indeed be an exceptional factor as "unbound… distributive justice"[126] is an all too familiar feature of Irish family law.[127] Finally, it is interesting to note that in the other Australian States who have adopted *de facto* relationship legislation the equivalent provision to section 20 of the New South Wales Act is

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[123] 21 Fam.L.R. 760; [1997] N.S.W. LEXIS 774, *25, *per* Gleeson C.J.

[124] 21 Fam.L.R. 760; [1997] N.S.W. LEXIS 774, *69.

[125] As would be the case if the provision is read literally. Mason P., referring to consequences that would be excluded upon a narrow interpretation of s. 20, comments that "the harshness of such corollaries should cause anyone to pause at the decisional crossroads in addressing this opaque section", 21 Fam.L.R. 760; [1997] N.S.W. LEXIS 774, *47.

[126] 21 Fam.L.R. 760; [1997] N.S.W. LEXIS 774, *22.

[127] See, for example, McGuinness J. in *C.N. v. R.N.* (No. 2) [1996] I.F.L.R. 1 (Circuit Court).

considerably broader and includes a catch-all provision along the lines of the Family Law Act, 1975 (Cth).[128]

E. Financial Adjustment Between De Facto Partners

Orders for maintenance are governed by Division 3 of Part III of the 1984 Act. In contrast with spousal maintenance

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[128] See, for example, s. 15 of the Domestic Relationships Act, 1994 (ACT) which provides, inter alia:

> (1) On application by a party to a domestic relationship, a court may make an order adjusting the interests in the property of either or both of the parties that seems just and equitable to it having regard to-
>
> (a) the nature and duration of the relationship;
>
> (b) the financial or non-financial contributions made directly or indirectly by or on behalf of either or both of the parties to the acquisition, conservation or improvement of any of the property or financial resources of either or both of them;
>
> (c) the contributions (including any in the capacity of home-maker or parent) made by either of the parties to the welfare of the other or any child of the parties; [and]
>
> (e) *such other matters, if any, as the court considers relevant.* [emphasis added].

and s. 11 of the De Facto Relationships Act, 1996 (SA) which provides:

> (1) In deciding whether to make an order for the division of property under this Part, and if so the terms of the order, the court:
>
> (a) must consider the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners to:
>
> (i) the acquisition, conservation or improvement of property of either or both partners; or
>
> (ii) the financial resources of either or both partners; and
>
> (b) must consider the contributions (including homemaking or parenting contributions) made by either of the de facto partners to the other partner or to children of the partners or either of them; and
>
> (c) must have regard to the terms of any relevant cohabitation agreement; and
>
> (d) *may have regard to other relevant matters.* [emphasis added].

under the Family Law Act, 1975 (Cth), the New South Wales legislation closely restricts the availability of maintenance between domestic partners.[129] Under section 27 of the 1984 Act, a court, on application for a maintenance order, may only award such maintenance where it is satisfied as to either or both of the following:

> (a) that the applicant is unable to support himself or herself adequately by reason of having the care and control of a child of the parties to the relationship or a child of the respondent, being, in either case, a child who is, on the day on which the application is made:
>
> (i) except in the case of a child referred to in subparagraph (ii) under the age of 12 years, or
>
> (ii) in the case of a physically handicapped child or mentally handicapped child under the age of 16 years,[130]
>
> (b) that the applicant is unable to support himself or herself adequately because the applicant's earning capacity has been adversely affected by the circumstances of the relationship and, in the opinion of the court:
>
> (i) an order for maintenance would increase the applicant's earning capacity by enabling the applicant to undertake a

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[129] Property (Relationships) Act, 1984 (NSW), s. 26 which expresses the general principle that "a party to a domestic relationship is not liable to maintain the other party and neither party is entitled to claim maintenance from the other except as provided in this division".

[130] *Cf.* the wider definition of 'dependant child' contained in the Irish Family Law (Divorce) Act, 1996, s. 52 (o) as outlined in Part I, *supra*.

> course or programme of training or education, and
>
> (ii) it is, having regard to all the circumstances of the case, reasonable to make the order.[131]

The discretion of the Court is further guarded by section 27(2) which lists a number of statutory criteria to which a court is obliged to have regard when determining whether or not to make an order for maintenance, and in fixing any amount to be paid pursuant to such an order. These criteria are:

> (a) the income, property and financial resources of each party to the relationship (including the rate of any pension, allowance or benefit paid to either party to the relationship or the eligibility of either party to the relationship for a pension, allowance or benefit) and the physical and mental capacity of each party to the relationship for appropriate gainful employment,
>
> (b) the financial needs and obligations of each party to the relationship,
>
> (c) the responsibilities of either party to the relationship to support any other person,

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[131] This provision, to a limited extent, recognises the role division undertaken by the partners. Chisholm, Jessep and O'Ryan, "De Facto Property Decisions in NSW: Emerging Patterns and Policies" (1991) 5 A.J.F.L. 241, 264 suggest that the purpose of the law is to make a property adjustment that will appropriately compensate for the economic effects of the relationship. The nature and extent of the adjustment will depend on the individual circumstances of the relationship.

(d) the terms of any order made or proposed to be made under section 20 with respect to the property of the parties to the relationship, and

(e) any payments made, pursuant to an order of a court or otherwise, in respect of the maintenance of a child or children in the care and control of the applicant.[132,133]

Interim maintenance or maintenance pending suit may be granted where it appears to the court that the applicant is in immediate need of financial assistance[134] while periodic maintenance expires upon the child in question (or youngest of the children, as the case may be) attaining the prescribed age.[135]

Where the maintenance is payable on foot of an order made in respect of a *de facto* partner, it suspends three years after the day on which the order was made or four years after the day on which the relationship ceased as the case may

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[132] Should there be any child or children in the custody and care of the applicant the court must have regard to the amount of maintenance (if any) already secured by the applicant for the dependant child or children when deciding whether to award the *de facto* partner herself maintenance.

[133] Subsection 3 of s. 27 of the 1984 Act provides that "in making an order for maintenance, a court shall ensure that the terms of the order will, so far as is practicable, preserve any entitlement of the applicant to a pension, allowance or benefit." This stipulation envisages the court taking cognisance of the applicable social welfare schemes in place when making such orders so as to preserve the applicant's entitlements under these schemes.

[134] S. 28 of the 1984 Act.

[135] Twelve years of age, or in the case of a physically handicapped child or mentally handicapped child, sixteen years of age. Where a maintenance order is made pursuant to s. 27(1)(a) the order ceases to have effect on the day on which the party to the relationship in whose favour the order was made ceases to have care and control over the child or children of the relationship: Property (Relationships) Act, 1984 (NSW), s. 33.

require, whichever is shorter.[136] Maintenance will generally cease to have effect on the death[137] of either of the *parties* to the relationship or upon the marriage or remarriage (as the case may be) of the *de facto* partner in whose favour the order was made.[138] A maintenance order can, however, be varied where it is demonstrated to the court's satisfaction that, since the order was made or last varied, the circumstances of either[139] of the parties to the relationship has so changed or the cost of living has changed to such an extent, as to justify its so doing.[140]

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136 Property (Relationships) Act, 1984 (NSW), s. 30. Where the court has made an order for periodic maintenance for a duration falling short of the maximum period permissible in accordance with s. 30, the party, in whose favour the original order was made, may apply for an extension. However, the court cannot grant such extension unless it is satisfied that there are circumstances which justify its so doing and then cannot extend the order beyond the maximum period permissible under s. 30: Property (Relationships) Act, 1984 (NSW), s. 37.

137 In addition, where, before an application under s. 27 is determined, either party to the application dies, the application shall abate: Property (Relationships) Act, 1984 (NSW), s. 31.

138 Property (Relationships) Act, 1984 (NSW), s. 32(1)(c).

139 *Cf.* the position in Ireland regarding maintenance clauses in separation agreements. While the recipient spouse can institute proceedings, under the Family Law (Maintenance of Spouses and Children) Act, 1976, to secure a larger sum than provided for under the agreement there is no such statutory provision for the maintenance paying spouse (usually the husband) to seek a variation downwards of the amount payable. Thus, in the absence of a variation clause in the separation agreement, the maintenance paying spouse's liability continues to subsist and for as long as he fails to comply with the maintenance provisions contained in the agreement his financial debt will continue to accumulate and be enforceable under the ordinary laws of contract. For discussion see Shatter, *Family Law* (4th ed., 1997), p. 325, para 7.61 *et seq.*

140 Property (Relationships) Act, 1984 (NSW), s. 35. Where the court is so satisfied it may elect to discharge the order, to suspend the operation of the order wholly or in part and either until further order or until a fixed time of the happening of some future event. Alternatively, it may revive wholly or in part an order previously suspended or increase or decrease the amount payable under such order.

F. Cohabitation and Separation Contracts

While there is a natural resistance among most cohabitees to formalise their relationship, the New South Wales legislature has expressly provided for the legitimate creation of domestic relationship agreements or contracts. Such an agreement permits the parties to a relationship to contract out of the general financial regime contained in Part III of the 1984 Act and has been defined as:

> an agreement between 2 persons (whether or not there are other parties to the agreement):
>
> (a) that is made in contemplation of their entering into a domestic relationship, or while they are in one, and
>
> (b) which makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters ...[141]

A termination agreement differs to the extent that it is "made in contemplation of the termination of a domestic relationship that exists" or existed between the parties.[142] However, should the relationship not be "terminated within three months after the [termination] agreement was made" it is deemed a domestic relationship agreement.[143] Any public policy which would normally render an agreement of this type void is expressly overridden in addition to providing that the general law of contract will prevail upon these

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[141] S. 44 which also provides that 'financial matters', in relation to the parties to a relationship, means matters with respect to any one of the following:

> (a) the maintenance of either of the parties,
> (b) the property of those parties or either of them,
> (c) the financial resources of those parties or either of them.

[142] Property (Relationships) Act, 1984 (NSW), s. 44.

[143] Property (Relationships) Act, 1984 (NSW), s. 44.

agreements.[144] Such agreements are limited to the extent that they cannot usurp the role of the court in regard to the custody, access or maintenance of any child of the parties to the relationship.[145]

In order to be a valid agreement capable of acting as a bar to proceedings (under Part III of the Act) a number of prerequisites must be satisfied. Firstly, the agreement must be in writing.[146] Secondly, it must have been signed by the party against whom it is sought to be enforced.[147] Thirdly and finally, the agreement must be accompanied by a solicitor's certificate stating that, before the agreement was signed, the solicitor had advised the party independently of the other.[148] A perennial problem with agreements made prior to or at the start of any domestic relationship (married or informal) is that circumstances and events occurring during intervening years may render the terms of the agreement unjust and inappropriate when the relationship subsequently breaks down after a long period of time. To meet this difficulty the New South Wales legislation

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[144] Property (Relationships) Act, 1984 (NSW), ss. 45-46.

[145] Property (Relationships) Act, 1984 (NSW), s. 45(2).

[146] Property (Relationships) Act, 1984 (NSW), s. 47(1)(b).

[147] Property (Relationships) Act, 1984 (NSW), s. 47(1)(c).

[148] Property (Relationships) Act, 1984 (NSW), s. 47(1)(d) which also provides that the solicitor must advise the party, "independently of the other ... as to the following matters:

> (i) the effect of the agreement on the rights of the parties to apply for an order under Part 3 [i.e. an application for a property adjustment order],
> (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement, and
>
> (e) that the certificates referred to in paragraph (d) are endorsed on or annexed to or otherwise accompany the agreement".

If these prerequisites are shown not to have been complied with, then by virtue of s. 48, the agreement will not act as a bar to proceedings under the Act.

empowers the court to vary or set aside the terms of a domestic relationship (but not a termination)[149] agreement where "the circumstances of the parties have so changed since the time at which the agreement was entered into that it would lead to serious injustice if the provisions of the agreements… were… to be enforced."[150] It has been suggested that "the attraction of cohabitation contracts is that parties are free to make their own arrangements and thereby exclude the statutory regime [and this] very attraction [is] diminished if those parties know that a court can subsequently at its discretion alter the agreed terms, and thus in effect reintroduce the general statutory regime through a back door".[151] Periodic maintenance paid on foot of a cohabitation or separation agreement ceases to be payable upon the death of either partner.[152] However, in the absence of evidence of a contrary intention, provisions "relating to property and lump sum payments may, on the death of one of the partners, be enforced on behalf of, or against, as the case may be, the estate of the deceased partner."[153]

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[149] The rationale for this exception is that a separation agreement is made in contemplation of the termination of the relationship and as such the proprietary interests of the partners have already been determined. A possible solution for *de facto* partners wishing to prevent their cohabitation agreement from being varied would be to revoke the original agreement, under s. 50 of the 1984 Act (or the equivalent provision under the other jurisdictions' legislation), and draw up a fresh separation agreement.

[150] Property (Relationships) Act, 1984 (NSW), s. 49(1). It is not possible to contract out of this provision: Property (Relationships) Act, 1984 (NSW), s. 49(2).

[151] Bailey-Harris, "Property Disputes in De Facto Relationships: Can Equity Still Play a Role?", Ch. 7 in Cope (ed.), *Equity: Issues and Trends*, p. 215, 238.

[152] While it can be covenanted that such periodic maintenance will continue to be paid, upon the death of the paying partner, by his estate the corollary in respect of a deceased recipient partner is not permissible: Property (Relationships) Act, 1984 (NSW), s. 51.

[153] Property (Relationships) Act, 1984 (NSW), s. 52.

The position in this jurisdiction has long been that cohabitation contracts are "illegal and unenforceable as a matter of public policy".[154] The rationale for such a stance is that a cohabitation agreement would be injurious to morality and marriage.[155] One might be forgiven for assuming that a modern court would depart from these antiquated public dictates. However, the recent High Court decision in *Ennis v. Butterly*[156] suggests that these anachronistic views are still guarded jealously by a conservative minded judiciary. Here a breach of (cohabitation) contract claim was dismissed by Kelly J. He appears to have justified his approach on a dual basis. The first proposition advanced by the learned judge was to suggest that enforcing a cohabitation contract would afford a similar status in law to that enjoyed by a marriage contract. Mee disagrees and explains the difference between the two as residing in the public/private dichotomy. A marriage contract is a "public matter, gaining for the parties the constitutional protection of Article 41".[157] Furthermore, "[s]uch a contract also triggers a wide range of legislative provisions applying only to those who are formally married".[158]

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[154] *Ennis v. Butterly* [1996] 1 I.R. 426 at 439, *per* Kelly J.

[155] *Beaumont v. Reeve* (1846) 8 QB 483. For discussion see Pawlowski, "Cohabitation Contracts - Are they Legal?" (1996) 146 N.L.J. 1125.

[156] *Ennis v. Butterly* [1996] 1 I.R. 426; [1997] 1 I.L.R.M. 28 at 38, per Kelly J.

[157] Mee, "Contract Law - Public Policy for the New Millennium" (1997) 19 D.U.L.J. 149, 156.

[158] Mee, "Contract Law - Public Policy for the New Millennium" (1997) 19 D.U.L.J. 149, 156. For example, married spouses require the express consent of the other spouse to create a mortgage over the family home by virtue of the Family Home Protection Act, 1976. The Succession Act, 1965 accords special rights to a spouse upon the death of the other. Furthermore, spouses who decide to judicially separate or divorce are entitled to apply to the court for a variety ancillary orders under the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996 respectively. These avenues are unavailable to couples who cohabit outside of wedlock.

> A cohabitation contract, on the other hand, is no different from any other private contract enforceable between any two individuals in the State, neither gaining for the parties any constitutional rights nor bringing them within the scope of the comprehensive code of Irish legislation regulating the rights of married people.[159]

One might argue that to enforce such agreements would create an inducement not to marry, however, the United States federal courts have convincingly countered this proposition. In *Marvin v. Marvin*[160] Tobriner J. opined that to refuse any remedy to an unmarried claimant would "cause the income-producing partner to avoid marriage and thus retain the benefit of all of his or her accumulated earnings".[161] Although the court recognised:

> the well-established public policy to foster and promote the institution of marriage[,]… [it was felt that] perpetuation of judicial rules which result in an inequitable distribution of property accumulated during a non-marital relationship is neither just nor an effective means of carrying out that policy.[162]

The second proposition underpinning Kelly J.'s reasoning was that it is contrary to public policy to enforce a contract between two people who are living together in quasi-matrimony. Mee comments that while "it is certainly true that, in the past, the social disapproval of cohabitation

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[159] Mee, "Contract Law - Public Policy for the New Millennium" (1997) 19 D.U.L.J. 149, 156-157.

[160] (1976) 18 Cal (3d) 660, cited in Mee, "Contract Law - Public Policy for the New Millennium" (1997) 19 D.U.L.J. 149, 154 *et seq.*

[161] (1976) 18 Cal (3d) 660 at 683, referring to *In re Marriage of Cary* (1973) 34 Cal. App. (2d) 345, 353.

[162] (1976) 18 Cal (3d) 660 at 683.

led to judicial support for the public policy argument…. social attitudes to cohabitation have changed radically".[163] This is evidenced by the recent report of the Constitutional Review Group who state that "an exclusively marriage based definition of the family… no longer accords with the social structure in Ireland". [164] They propose the inclusion in Article 41 of an additional constitutional guarantee "to all individuals of respect for their family life whether based on marriage or not".[165] "It seems somewhat ironic that three days before Kelly J. decided *Ennis*, Murphy J. in *W.O'R. v. E.H. & An Bord Uchtála*[166] had expressly recognised the change in modern attitudes to cohabitation[167] and Denham J. had quoted an earlier dictum where Finlay C.J. had referred, with no apparent disapproval, to a case where a child was "nurtured… in a situation bearing nearly all of the characteristics of a constitutionally protected family".[168] Mee,[169] in advocating its rejection as future precedent, suggests that "the proper approach on the facts of *Ennis* would have been to determine whether any element of the consideration for the alleged contract consisted of a payment

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[163] Mee, "Contract Law - Public Policy for the New Millennium" (1997) 19 D.U.L.J. 149, 157.

[164] *Report of the Constitutional Review Group*, 1996, p. 332. Cf. the views of Kelly J. in *Ennis v. Butterly* [1996] 1 I.R. 426 at 438, where he felt that "cohabitation does not and cannot have the same constitutional status as marriage". Canadian courts have interpreted the Canadian Charter of Rights and Freedoms as preventing discrimination against cohabiting couples as compared with married couples. See, for example, *Miron v. Trudel* (1995) 124 D.L.R. (4th) 693 (SCC).

[165] *Report of the Constitutional Review Group*, 1996, p. 336.

[166] [1996] 2 I.R. 248.

[167] [1996] 2 I.R. 248 at 286.

[168] *J.K. v. V.W.* [1990] 2 I.R. 437 at 447. See also Mee, "Contract Law - Public Policy for the New Millennium" (1997) 19 D.U.L.J. 149, 157-158.

[169] Mee, "Contract Law - Public Policy for the New Millennium" (1997) 19 D.U.L.J. 149, 166.

for a sexual relationship".[170] Support for this approach can be found in the Supreme Court of California's decision in *Marvin*[171] where it held that "express contracts between non-marital partners [should be enforced] except to the extent that the contract is explicitly founded on the consideration of meretricious[172] sexual services".

To overcome the problematic issue of consideration Townsend and Baker[173] propose that a cohabitation contract should be made in a deed under seal thus removing the allegation that consortium forms the consideration in such agreements. The other main problem[174] in this area would be the presumption against the creation of legal relations which arises in the context of familial agreements.[175] This can, however, be rebutted by careful drafting of the agreement to elicit a clear intention that the parties were *ad idem* as to its binding affect. Finally, should an agreement be founded on meretricious consideration, it has been suggested that that the court must determine whether this aspect of the contract is

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[170] Mee, "Contract Law - Public Policy for the New Millennium" (1997) 19 D.U.L.J. 149, 157-158.

[171] (1976) 18 Cal (3d) 660, at 665. This was referred to by Kelly J. in *Ennis v. Butterly* [1996] 1 I.R. 426 at 437 but he declined to follow its persuasive authority.

[172] "Meretricious" implies something which "pertained to and encompassed prostitution". See the discussion in *Marvin v. Marvin*, (1976) 18 Cal. (3d) 660 at 683 *per* Tobriner J.

[173] Townsend and Baker, "Living together - the Thorny Question" (1998) 148 N.L.J. 779. However, the performing of housework and providing the defendant with companionship should in principle suffice as adequate consideration. Cf. the Australian Capital Territory legislation which permits the creation of cohabitation (and separation) agreements between any two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other: Domestic Relationships Act, 1994 (ACT), ss. 31-37.

[174] However, uncertain terms and the possible existence of undue influence will also undermine the enforceability of these agreements.

[175] The presumption of not intending to create legal relations in a familial context needs to be rebutted.

severable and if it is found not to be then the contract, as a whole, cannot be enforced.[176]

G. Domestic Violence and Harassment

Section 53 of the New South Wales Act provides that a court may, on application made to it by a party to a domestic relationship or in any proceedings between parties to a domestic relationships, whether under Part III or otherwise, grant an injunction:

> (a) for the personal protection of a party to a relationship or a child ordinarily residing within the same household as the parties to the domestic relationships or who at any time ordinarily so resided,
>
> (b) restraining a party to the relationship:
>
> (i) from entering the premises in which the other party to the relationship resides, or
>
> (ii) from entering a specified area, being an area in which the premises in which the other party to the relationship resides are situated,[177]
>
> (c) restraining a party to the relationship:
>
> (i) from entering the place of work of the other party to the domestic relationship, or
>
> (ii) from entering the place of a child referred to in paragraph (a), or
>
> (d) relating to the use or occupancy of the premises in which the parties to the relationships reside.

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[176] Mee, "Contract Law - Public Policy for the New Millennium" (1997) 19 D.U.L.J. 149, 159.

[177] Note the temporal and proprietary prerequisites to relief for Irish *de facto* partners under the Domestic Violence Act, 1996. For discussion see Part I, *supra*.

A party who "knowingly fails to comply with a restriction or prohibition specified in the order" is liable on (criminal) conviction to imprisonment for six months[178] He may also be found guilty of contempt of court.[179]

H. Final Analysis: Conclusions

This article has attempted to summarise the current law in Ireland relating to those who elect to cohabit together outside of wedlock. In particular, the approach of Irish courts to the issue has been assessed and the inherent deficiencies in judicial practice highlighted. The argument for statutory reform has been canvassed largely by a critical analysis of New South Wales' pioneering legislation. While statutes, in general, have the advantage of certainty of statement of principle, they cannot in reality be said to possess much certainty as to the outcome in any particular matter. This is because the systems of property adjustment which have been created in New South Wales and other jurisdictions, like that under the Family Law Act, 1975 (Cth), are highly discretionary in their nature.[180] The court is given power to make such adjustment of property as seems just and equitable, taking into account of a variety of contributions. It is worth noting that the lack of predictability of outcome inherent in any discretionary system was strongly criticised by the Australian Law Reform Commission in the context of the operation of section 79 of the Family Law Act, 1975 (Cth).[181,182] In retort, some commentators feel that should the existing equitable doctrines be extended, in particular to

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[178] Property (Relationships) Act, (NSW), s. 54.

[179] See s. 54(2) of the 1984 Act which expressly preserves the common law offence.

[180] This is true also of Irish legislation in the area. *Cf.* the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996.

[181] Report No. 39, Matrimonial Property, Canberra 1987.

[182] For discussion see Bailey-Harris, "Property Disputes in De Facto Relationships: Can Equity Still Play a Role?", Ch. 7 in Cope (ed.), Equity: Issues and Trends, p. 226.

entertain claims based solely on domestic and parenting contributions to the welfare of the family, the need for statutory reform would be rendered obsolete.[183] It is submitted, with respect to those that hold this view, that this is both idealistic and fallacious and largely based upon an optimistic notion of the law in practice. It is unlikely, certainly in an Irish context, that a judiciary that was unwilling to entertain such claims prior to statutory intervention in the area of spouses[184] would now be willing to accord rights to a family unit openly recognised as inferior to the family based on marriage.[185] In addition, most cases are resolved at first instance by judges whom are less familiar with the intricacies of effluxing equitable doctrines and more concerned with the exigencies of the matter before them.

H. Final Analysis: Recommendations

This essay has argued that statutory reform is the preferred solution to the issue of cohabitees in this jurisdiction. However, any future legislation should address a number of themes. The first of these relates to the enforceability of cohabitation contracts. An agreement between two independently advised *de facto* partners (or former *de facto* partners in the context of a separation agreement) should act as a bar to litigation.[186] The law should

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[183] Bailey-Harris, "Property Disputes in De Facto Relationships: Can Equity Still Play a Role?", Ch. 7 in Cope (ed.), *Equity: Issues and Trends*, p. 239.

[184] See, for example, the decisions of the Supreme Court in *L. v. L.* [1992] I.R. 77; [1992] I.L.R.M. 115 and *N. v. N.* [1992] 2 I.R. 116; [1992] I.L.R.M. 127.

[185] *Ennis v. Butterly* [1996] 1 I.R. 426 at 438; [1997] 1 I.L.R.M. 28 at 38 *per* Kelly J who stated "the public policy of this State ordains that non-marital cohabitation does not and cannot have the same constitutional status as marriage".

[186] It is important that both partners are aware of the consequences of such agreement and freely consent to be bound by its provisions. 'Freely consent' in this context requires that there be no evidence of duress or undue influence which would render the contract void.

recognise and respect the autonomy of two individuals to determine their own affairs upon the breakdown of the relationship and should not impose patriarchal notions to render such agreements void.[187]

Secondly, any legislation purporting to regulate property disputes between *de facto* partners should be based upon the applicable legislation applying to married spouses[188] only to the extent that the definition of a *de facto* relationship is based on the paradigm of marriage, that being the relationship of living or having lived together as husband and wife on a bona fide domestic basis. When parties enter a marriage they do so consciously, knowing that they are entering a voluntary union of one man and one woman for life and that there are obligations, both moral and legal, with respect to each other and their property. Many people in our society deliberately choose not to enter into that marital relationship. Some do it because they value marriage so highly they do not wish to, at least initially, take on the full responsibilities of that state. Others deliberately do not do it because they have already had an unfortunate experience with marriage. To construe any *de facto* relationship legislation so that the parties who have deliberately refused to enter into marriage are to be deemed for all purposes as if they had gone through the ceremony of marriage completely defeats those common intentions.[189]

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[187] See *Ennis v. Butterly* [1996] 1 I.R. 426; [1997] 1 I.L.R.M. 28 at 38, per Kelly J. Mee, "Contract Law - Public Policy for the New Millennium" (1997) 19 D.U.L.J. 149, 159-160 suggests that *Ennis* could be distinguished in future cases by a court seeking to uphold a cohabitation agreement. However, it is submitted that, given the judiciary's resistance to non-marital relationships, the best hope offered to cohabitees is by Parliament whose constitutional role is one of policy maker and not law interpreter.

[188] The Family Law Act, 1995 and the Family Law (Divorce) Act, 1996.

[189] Which would be ironic as many of the equitable doctrines purport to have principal regard to the actual "common intention" of the parties. See also *Wilcock v. Sain* (1986) 11 Fam L.R. 303 (Young J.).

In conclusion, Irish family law lacks certainty of outcome. The often irreconcilable case-law has led to the public perception of family law as very much dependent on 'the judge on the day' and not upon the clear and certain legal principles which characterise other areas of the law. A statute based system embodying a measure of guided judicial discretion would both re-align the contours of our legal system with that of our progressive brethren 'down under' and satiate the need for some semblance of predictability of outcome in contentious family law proceedings.