TRUSTS OF THE FAMILY HOME: THE IRISH EXPERIENCE

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Introduction

The problem of the beneficial ownership of the family home has troubled courts throughout the common law world. It has proved extremely difficult "to unravel the tangled skein of human association, and apply to it considerations of legal principle."[1] The Irish courts have had an unusually rich experience in this area, since until 1989 there was no statutory power to adjust property entitlements in the event of marital breakdown.[2] Their theoretical approach has been based on a modification of the traditional purchase-money resulting trust. In England in recent years, this resulting trust has fluttered into brightly-coloured life as a "common intention" trust. The Irish specimen is still a creeping thing and an examination of the wealth of Irish case-law could shed light on the largely unexplained metamorphosis which has taken place in England.

Of particular interest may be two recent Supreme Court decisions.[3] In the first of these cases, *L.* v. *L.*,[4] the five judges of the Supreme Court declined to recognise a claim founded on work in the family home, while on the same day, in *N.* v. *N. and C.*,[5] they unanimously accepted a novel conceptualisation of the relationship between the repayment of mortgages and the resulting trust.

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1 *Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685; Heydon, Gummow and Austin *Casebook on Equity and Trusts* (2nd ed. 1982) at p. 616, *per* Glass J.A..
2 Under the Judicial Separation and Family Law Reform Act, 1989, upon a judicial separation the court is given a discretion (to be exercised in accordance with listed criteria) to make a wide range of property adjustment orders. (Although this legislation provides many of the legal trappings of divorce, a referendum to change the provisions of Art. 41.3.2 of the 1937 Irish Constitution would have to precede full legislative provision for divorce). Upon the death or bankruptcy of either spouse, or if (for religious or other reasons) no legal separation is obtained after a marriage has broken up, the rules of equity continue to determine the property rights of the parties.
3 See Mee, "Trusts of the Family Home: Boiling Oil from the Ivory Tower" (1991) 14 *D.U.L.J.* (*n.s.*) 19.
4 [1992] Irish Law Reports Monthly 115.
5 [1992] I.L.R.M. 127.

The Irish Approach

In the mid-1970's the Irish Courts were first called upon to consider claims to a share in the ownership of property on the basis of contributions to its acquisition or improvement. Like their English counterparts, the Irish Courts turned to the law of trusts for a legal framework within which to resolve the problem, also beginning with the purchase-money resulting trust. Following Lord Diplock's judgement in *Gissing* v. *Gissing*,[6] the English courts have eventually transformed this traditional resulting trust into a "common intention" trust, which now seems closer to the principle of estoppel than to the doctrine from which it emerged.[7] Some other jurisdictions have regarded as undignified the pursuit of a "fugitive common intention"[8] and have instead developed the constructive trust as a remedy for unjust enrichment.[9] The Irish courts have not been tempted to invest in either of these new vehicles, preferring to respray the reliable old resulting trust and bump along as before.

C. v. *C.*[10] was the first Irish case to deal directly with the effect of contributions to the acquisition of the family home. Kenny J. held that a wife who had contributed directly to the repayment of mortgage instalments had gained a share in the beneficial ownership based on the proportion borne by her contribution to the total purchase price.[11] His rather vague judgement also suggested that so-called "indirect" contributions, made by a claimant whose earnings go to meet household expenses other than mortgage repayments, would also be capable of generating a trust.[12]

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6 [1971] A.C. 886, 906
7 See *e.g.* Hayton, "The Equitable Rights of Cohabitees" [1990] *Conv*. 370.
8 *Petkus* v. *Becker* [1980] 117 D.L.R. (3d) 257, 269 *per* Dickson J. (Sup. Ct of Canada).
9 See the Canadian cases *e.g. Petkus* v. *Becker supra* and *Sorochan* v. *Sorochan* (1986) 29 D.L.R. (4th) 1, and the somewhat different approach exemplified by the Australian case of *Baumgartner* v. *Baumgartner* (1988) 62 A.J.L.R. 29.
10 [1976] I.R. 254.
11 In calculating the extent of a contribution, the Irish Courts have not in general distinguished between capital and interest when comparing mortgage instalments *inter se*. See *e.g. L.* v. *L.* High Court, unreported, 31 July 1979. However, the formulation of the method of calculation by Carroll J. in *Containercare (Ireland) Ltd.* v. *Wycherly* [1982] I.R. 143, 152 seems to give credit only for the capital element in repayments. The issue awaits closer consideration.
12 [1976] I.R. 254, 257.

This was duly accepted in a number of High Court cases[13] before Keane J. introduced an element of analysis in *M.G.* v. *R.D.*.[14] In a careful judgement, he considered the views of Lord Diplock in *Gissing* v. *Gissing*[15] and the decision of the Northern Ireland Court of Appeal in *McFarlane* v. *McFarlane*.[16] In line with English orthodoxy, Keane J. concluded that, without some additional evidence, indirect contributions would not normally suffice to establish the existence of the common intention which was a prerequisite for the creation of the relevant kind of trust.

After the failure of the claim in *M.G.*, there followed an procession of conflicting High Court cases,[17] until *McC.* v. *McC.*[18] came before the Supreme Court. In a short judgement for the Court, Henchy J. stated that:

> [W]here the matrimonial home has been purchased in the name of the husband, and the wife has, either directly or indirectly, 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.[19]

Henchy J. cited none of the Irish (or English) cases in relation to indirect contributions. However he made no requirement of additional direct evidence of a "common intention" as to ownership.[20] Thus, more or less by default, the approach of Keane J. was rejected and has not reappeared in the Irish case-law.[21]

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13 *M.* v. *M.* (1978) 114 Irish Law Times Reports 46; *R.* v. *R.* High Court, unreported, January 12 1979, Binchy *A Casebook on Irish Family Law* (1984) p.268;
L. v. *L. supra*; *Power* v. *Conroy* [1980] I.L.R.M. 31.
14 High Court, unreported, April 28 1981, Binchy *op cit.* p. 272.
15 [1971] A.C. 886, 906.
16 [1972] N.I. 59, referred to with approval by Lord Bridge in *Lloyd's Bank* v. *Rosset* [1991] 1 A.C. 107, 133.
17 Contrast *e.g. F.G.* v. *P.G.* [1982] I.L.R.M. 155 and *S.B.* v. *B.D.* unreported, March 19 1982.
18 [1986] I.L.R.M. 1.
19 [1986] I.L.R.M. 1, 2. Henchy J. continued: "Such a trust will be inferred when the wife's contribution is of such a size and kind as will justify the conclusion that the acquisition of the house was achieved by the joint efforts of the spouses." [*Ibid*]. A very similar formulation is to be found in the dissenting judgement of Edmund Davies L.J. in the Court of Appeal in *Gissing* v. *Gissing* [1969] 1 All E.R. 1043, 1049. Edmund Davies L.J. appears to have dissented only because he felt that the wife's contribution was not sufficient to bring the (now long discredited) "family assets" doctrine into operation. Since in the Irish approach there is no willingness to award equal ownership for a "joint" acquisition, one can only regard this part of Henchy J.'s judgement as creating a *de minimus* requirement which would allow very minor contributions to be ignored. See *C.R.* v. *D.R.*, High Court, unreported, April 5 1984.
20 A trust would be inferred on the basis of indirect contributions "in the absence of any express or implied agreement to the contrary." [1986] I.L.R.M. 1, 2.
21 However note the anomalous decision in *B.* v. *B.* High Court, unreported, April 22 1986, where *McC.* v. *McC. supra* was not cited.

The share awarded to the claimant in the Irish cases has almost always[22] been directly proportional to the amount contributed. Given the clear implicit rejection of the English approach, one must conclude that these decisions are explicable within the traditional resulting trust framework.[23] Along the lines suggested by Lord Reid in *Gissing* v. *Gissing*,[24] direct and indirect payments towards the mortgage are being treated as equivalent to the provision of part of the purchase price and therefore as attracting the presumption of resulting trust. Provided that the appropriate intention is present or may be presumed, such contributions will generate a proportional share in the ownership.[25]

A New Departure

Irish law took a strange turn in *W.* v. *W.*,[26] where Finlay P. attempted a comprehensive statement of the principles applicable to this area of law. Having explained that contributions to mortgage repayments could generate a share in the beneficial interest, he added this explanation:

> It is not expressly stated in the decisions to which I have referred,[27] but I assume that the fundamental principle underlying this rule of law is that the redemption of any form of charge or mortgage on property in truth consists of the acquisition by the owner or mortgagor of an estate in the property with which he parted at the time of the creation of the mortgage or charge, and that there can be no distinction in principle between a contribution made to the acquisition of that interest and a contribution made to the acquisition of an interest in property by an original purchase.[28]

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22 Occasionally the Irish courts have, without reasoned explanation, departed from their strict approach. See for example *A.L.* v. *J.L.* High Court, unreported, February 29 1984, where Finlay P. (now C.J.) invoked unspecified "equitable principles" to justify his decision (at p.4 of his judgment).
23 The Irish Courts have been non-committal in their use of terminology, generally referring to the "resulting or constructive" trust. For an attempt to distinguish the two sorts of trust in Irish law, see *N.A.D.* v. *T.D.* [1985] I.L.R.M. 153, 160-161 *per* Barron J..
24 [1971] A.C. 886, 896-897.
25 The shares are calculated on the basis of the ratio of the respective contributions to the family fund. See *e.g. R.* v. *R. supra* n.13, where McMahon J. based the calculation on the gross earnings of a married couple who had organised their tax liability to their common advantage. In *G.N.R.* v. *K.A.R.* High Court, unreported, November 25 1981, Carroll J. credited a husband, who had developed an extravagant life-style of which his wife disapproved, with a reduced contribution to the family pool.
26 [1981] I.L.R.M. 202.
27 *Heavey* v. *Heavey* (1977) 111 I.L.T.R. 1; *C.* v. *C.* [1976] I.R. 254; and *McGill* v. *S.* [1979] I.R. 238.
28 [1981] I.L.R.M. 202, 204-205.

Speaking for the Supreme Court in the recent case of *N.* v. *N.*,[29] Finlay C.J. quoted this passage and confirmed that he "would adhere to that view."[30] The suggestion seems to be that in creating a mortgage a borrower has parted with an estate in the property and that, as the loan is repaid, he is buying back that estate from the lender. It is to this "purchase" of the equity of redemption, rather than to the purchase of the house, that Finlay C.J. applied the purchase-money resulting trust doctrine. The effect of this understanding of the law is that contributions towards the redemption of any mortgage or charge over property, whether or not the money borrowed was used for the purchase of that property, can generate a resulting trust for the contributor. Thus in *N.* v. *N.*,[31] a claimant who helped to repay various mortgage loans, taken over a period of years for different purposes, was held to be entitled to a one-half share in equity, despite the fact that the initial purchase price had been entirely paid in cash by the legal owner.

This is certainly an interesting conceptualisation of the relationship between the resulting trust and the repayment of mortgages.[32] However it seems to involve a basic misunderstanding. The reason why the repayment of a mortgage (whether direct or indirect) has been held to be capable of generating a resulting trust must be that *where the purchase price is represented by the mortgage loan* those payments can be seen as equivalent to the provision of the purchase price. Departing from established doctrine, Finlay C.J.'s argument in *N.* v. *N.* was that when a person contributes to the repayment of a loan, he or she gains a share, not in what was purchased with the help of the loan, but in the *security* for the loan.[33] Serious anomalies are created by the fact that Finlay C.J.'s trust is triggered simply by

29 [1992] I.L.R.M. 127.
30 *Ibid*, 132.
31 *Supra*.
32 In assessing the possible relevance of this development to English law, it is important to consider the neglected question of the relationship between the old purchase-money resulting trust and the modern "common intention" analysis. Hayton ("The Equitable Rights of Cohabitees" [1992] *Conv*. 370, 382) argues that in England contributions to mortgage repayments can still give rise to a purchase-money resulting trust. On another view, any extension of the older doctrine to cover events after the time of the purchase is now unnecessary given the scope of the "common intention" analysis. See text to notes 67-68 *infra*.
33 Upon close analysis, this misconception appears to have played a role in the Supreme Court's refusal to accept non-financial contributions (such as work in the home) as constituting to an indirect contribution under the resulting trust. See paragraph of text to note 48 *infra*.

the repayment of a secured loan. Is it acceptable that, as was expressly held in *N.* v. *N.*,[34] a share will be gained by a woman who pays off a mortgage which was raised to finance improvements to a man's property, while a woman who pays for the same improvements in cash will be awarded nothing?[35] And what of someone who repays an *unsecured* loan (*e.g.* bridging finance or an unsecured loan from an employer) which represents a portion of the purchase price of property? Under Finlay C.J.'s "fundamental principle" there could be no trust because, in the absence of security for the loan, there is no question of buying back any estate transferred to the lender. What if the secured loan is taken for the benefit of the person who subsequently helps in its repayment? Consider the case where a family mortgages their home to finance their son's university education. If he repays the money which has been borrowed for his benefit, why should he be presumed to gain a share in the ownership of the family home?

It is submitted that the doctrine under discussion is founded on a misunderstanding. It is ironic that in *N.* v. *N.* the Supreme Court unanimously approved this extension to equitable principles which, according to Egan J. in *L.* v. *L.*[36] (decided on the same day) had already been stretched to their permissible limits.[37]

Work in the Home and the Resulting Trust

In the early case of *R.K.* v. *M.K.*,[38] Finlay P. held that a resulting trust could not be founded upon work in the home and in the rearing of children. This position was challenged in the High Court in *L.* v. *L.*,[39] where Barr J. awarded a claimant a one-half share in the family

34 [1992] I.L.R.M. 127, 132.
35 See the discussion under the heading "Contributions to Improvements" *infra*.
36 [1992] I.L.R.M. 115, 127.
37 Under the English analysis, it is possible that the mortgaging of a property subsequent to its acquisition could be the occasion for the formation of a common intention in relation to the sharing of the ownership: *Austin* v. *Keele* (1987) 61 A.J.L.R. 605, 609 *per* Lord Oliver. However on the basis of existing English law, it would not seem permissible to infer the existence of the common intention simply from the decision to mortgage the house.
38 High Court, unreported, October 24 1978, Binchy *op. cit. supra* n.13, p.267.
39 [1989] I.L.R.M. 541.

home on the basis of a rather adventurous application of the Irish Constitution.40 On appeal the Supreme Court unanimously over-ruled his decision.[41] It was felt that the adoption of the new doctrine would constitute "a usurpation by the courts of the functions of the legislature."[42]

The discussion in the Supreme Court in *L.* v. *L.*[43] was focused on the constitutional argument. As was confirmed more explicitly in *N.* v.*N.*,[44] the judges of the Supreme Court were also satisfied that work in the home could not be accommodated within the traditional Irish resulting trust framework.[45] Why can a contribution through earnings from outside employment, but not through work in the home, create a resulting trust? The argument appears to run as follows:[46] In reality, the parties to a matrimonial or quasi-matrimonial relationship regard themselves as having a joint budget and pay all expenses from a family pool represented by the earnings of the couple. It is only factors of convenience which dictate that the woman pays *e.g.* for food and clothing, and the man meets other outgoings such as mortgage repayments. Thus it is legitimate to treat the woman as making, by her contributions to the family pool, what is in effect a *direct* contribution to the repayment of the mortgage.

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40 Barr J. relied on the anachronistic Art. 41.2.2 of the Irish Constitution of 1937 which provides that the State shall endeavour "to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home." He reasoned that since a wife who embraced the constitutionally-preferred role of full-time wife and mother was precluded from making financial contributions to the acquisition of the home "her work as home-maker and in caring for the family should be taken into account in calculating her contribution towards that acquisition". [1989] I.L.R.M. 541, 542. The value of this contribution was to be assessed by the Court "in the light of its nature, quality and duration." *Ibid*, 543. Unfortunately Barr J. failed to integrate his new doctrine into the existing trusts law framework and it appears that, quite apart from its dubious Constitutional basis, his doctrine would have led to serious inconsistencies in practice. For further discussion of Barr J.'s short-lived innovation, see *e.g.* Jackson (1989) 11 *D.U.L.J.* (*n.s.*) 158 and Brady (1991) 42 *N.I.L.Q.* 1.
41 [1992] I.L.R.M. 115.
42 *Ibid*, 120 *per* Finlay C.J..
43 *Supra*.
44 [1992] I.L.R.M. 127, 131.
45 Work in the home has not fared any better in England. See *Burns* v. *Burns* [1984] Ch. 317. Contrast the *dicta* of Browne-Wilkinson V.-C. in *Grant* v. *Edwards* [1986] Ch. 638, 657.
46 According to Finlay C.J. in *L.* v. *L.* [1992] I.L.R.M. 115, 121 "a trust could, having regard to the particular features of dealings between the parties in a marriage which was amicable, arise from ... the provision through earnings of money into the family pool." Note also the reference to the idea of a "family fund" by Henchy J. in *McC.* v. *McC.* [1986] I.L.R.M. 1, 2. *Cf.* the dissenting speech of Lord Reid in *Gissing* v. *Gissing* [1971] A.C. 886, 896.

It appears to have been on the basis of this theory that Finlay C.J. made the requirement of a "monied" contribution to the acquisition of the property in dispute.[47] The final step in the argument would be that work in the home cannot be conceptualised as a financial payment into a family pool, and therefore cannot be treated as, in reality, a *direct* contribution as required under this analysis of the resulting trust.

It appears that the Supreme Court were hindered by their view, revealed in *N.* v. *N.*,[48] that the repayment of a mortgage constitutes the "direct" provision of the purchase price of the equity of redemption. This misconception made it appear reasonable to concentrate on the question of whether or not a claimant has "directly" repaid the *mortgage*. In truth in order to recognise even direct financial contributions to a mortgage, the resulting trust doctrine must be radically extended to take account of the economic reality of the provision of the *purchase price of the house*. If one realises that this extension has already been made, there is less objection to making a similar extension in relation to work in the home.

Unpaid Work in the Legal Owner's Business

Having rejected work in the home on the basis that it does not represent a "monied" contribution to a family fund, the Supreme Court proceeded to treat unpaid work in the legal owner's business on an entirely different footing. In *N.* v. *N.*,[49] a family home, which was in the husband's sole name, had been partly converted into apartments for rent. Finlay C.J. (speaking for the Supreme Court) awarded a one-half share in the beneficial ownership to the wife, 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."[50] He then asserted that:

47 *L.* v. *L.* [1992] I.L.R.M. 115, 121.
48 *Supra*.
49 [1992] I.L.R.M. 127.
50 *Ibid*, 132.

> Such activities are different from and not to be identified with the activities of a wife and mother in the home.[51]

In what relevant sense are the two sorts of activities "different"?[52] The woman who works without pay in a man's business no more makes a "monied" contribution to a family pool than does the woman who works without pay in the home. In both cases, the woman merely makes it easier for the man to pay off the mortgage *himself*. The genuine economic contribution which both types of activity make to the repayment of the mortgage simply cannot be accommodated within the family pool logic.

If the favourable view taken in *N.* v. *N.* in relation to unpaid work in the legal owner's business[53] is to be justified, it must be on the basis of an alternative theory, which concentrates on the existence of a causal link between the contributions of the claimant and the practical ability of the legal owner to meet the instalments due on the mortgage. Yet, once one retreats to this "causal link" theory, it is becomes impossible to see why work in the home cannot also give rise to a resulting trust. If a woman minds the children, cooks for the family, washes their clothes, maintains the house and performs dozens of other daily tasks, can it sensibly be denied that she lightens the financial burden incurred by her husband in taking on a mortgage?[54] The judicial assumption seems to be that work in the home does not amount to a contribution to an acquisition because it is the "ordinary" fulfilment of a woman's role in society whereas work in the man's business is above the call of "duty" and therefore worthy of recognition. Unless one takes a woman's work in the home for granted, it cannot be denied that it reduces the financial burden involved in a purchase.[55]

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51 *Ibid*.

52 Note the unexplained concept of a contribution in "money's worth" mentioned by Finlay C.J. in *N.* v. *N.* [1992] I.L.R.M. 127, 132. Perhaps the view of the Supreme Court reflects the traditional dichotomy in social contract theory between the public and the private. Events which take place in the home are often classified as within the private sphere and therefore placed beyond the purview of the law. See *e.g.* O'Donovan *Sexual Divisions in Law* (1985), especially chapter 1.

53 *Cf. Hammond* v. *Mitchell* [1991] 1 W.L.R. 1127; [1992] Conv. 28 (Lawson), where Waite J. may have treated the plaintiff's work in the legal owner's business as constituting detrimental reliance upon a common intention.

54 Note the argument raised by counsel in *N.* v. *N.*, and rejected without explanation by Finlay C.J.([1992] I.L.R.M. 127, 131), that the woman who works in the home saves the man from having to pay a salary to a housekeeper or nanny and therefore makes it easier for him to pay off the mortgage.

55 In the context of the establishment of a resulting trust, the issue is whether or not the claimant can be said to have made a contribution to the purchase price. As is demonstrated by the Irish approach to indirect financial

Contributions to Improvements

In principle, the purchase-money resulting trust doctrine is not applicable to improvements.[56] Citing his own decision in *W.* v. *W.*,[57] Finlay C.J. (speaking for the Supreme Court) confirmed in *N.* v. *N.* that a direct contribution towards improvements would not "in the absence of express or readily implied agreement"[58] generate an equitable share.

The best hope for a claimant would appear to be proprietary estoppel. In *W.* v. *W.*,[59] Finlay P. had stated that a claimant could not rely on a contribution towards improvements unless "she established by evidence that from the circumstances surrounding the making of it she was lead to believe (or of course that it was specifically agreed) that she would be recompensed for it." He insisted that this "would be a right to recompense in monies only."[60] The assumption that the doctrine is not capable of giving rise to a share in the beneficial interest in the property appears to have been based on an analogy with promissory estoppel.[61] There are some indications in recent cases such as *Re J.R.62* that Irish law may be moving towards a less restrictive view of estoppel.63

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contributions, it is irrelevant whether or not she would have acted in the same way even if no mortgage loan were being repaid.

56 See *e.g. Pettitt* v. *Pettitt* [1970] A.C. 777, 818 *per* Lord Upjohn. There is no Irish equivalent of s. 37 of the Matrimonial Property and Proceedings Act 1970, which deals with improvements by one spouse to the other's property.
57 [1981] I.L.R.M. 202. He did not discuss the different approach which had been taken (without explanation) in a number of other High Court cases *e.g. M.* v. *M.* (1980) 114 I.L.T.R. 46 (a decision of Finlay P. himself) and *Friends Provident Life Office* v. *Doherty* [1992] I.L.R.M. 372.
58 [1992] I.L.R.M. 127, 132. It is unclear whether Finlay C.J. was referring here to an enforceable contract or to an understanding which might form the basis of an estoppel.
59 [1981] I.L.R.M. 202, 205.
60 *Ibid.* It seems clear that the doctrine envisaged here is a version of proprietary estoppel. *Cf.* the comments of Barron J. in *N.A.D.* v. *T.D.* [1985] I.L.R.M. 153, 160-161 and in *E.N.* v. *R.N.* [1990] 1 I.R. 383, 386.
61 See *Cullen* v. *Cullen* [1962] I.R. 268; *McMahon* v. *Kerry County Council* [1981] I.L.R.M. 419; *Haughan* v. *Rutledge* [1988] I.R. 295 and Pearce, "The Mistaken Improver of Land" (1985) 79 *Gaz. I.L.S.I.* 179.
62 High Court, unreported, October 2 1992.
63 It may often happen in practice that no form of estoppel can be established. See *e.g. N.A.D.* v. *T.D.* [1985] I.L.R.M. 153, where a home was built through the joint efforts of a couple on a site which was held in the name of the husband. The wife was denied any remedy despite her substantial financial contribution.

A Comparison Between Irish and English Law

The Irish version of the resulting trust represents an alternative evolution of English law as it stood before the House of Lords decided *Pettitt* v. *Pettitt64* and *Gissing* v. *Gissing*.[65] The acceptance by the Irish courts of the liberal approach to indirect contributions proposed by Lord Reid in *Gissing*[66] made it unnecessary for them to explore the "common intention" avenue opened up by Lord Diplock in the same case.

It seems that the practical results in Ireland in relation to direct contributions to mortgage repayments may often be similar to those reached on the more convoluted English analysis. The English courts have sometimes succumbed to the temptation to calculate the respective shares on the basis of a rough arithmetical assessment of the financial contributions of the parties.[67] To justify this, they have relied on Lord Diplock's inherently improbable contention that "there is nothing inherently improbable in [the parties] acting on the understanding that the wife should be entitled to a share which was not to be quantified immediately ... but should be left to be determined when the mortgage was repaid or the property disposed of, on the basis of what would be fair having regard to the total contributions, direct or indirect, which each spouse had made by that date."[68] The straightforward Irish approach generates the same outcome, perhaps in a less artificial manner.

However, it is important to note that the share awarded by the Irish Courts will usually be strictly proportional to the amount contributed. The English analysis, on the other hand, allows the possibility of measuring the share of a claimant on the basis of the terms of

64 [1970] A.C. 777.
65 [1971] A.C. 886.
66 *Ibid*, 896-897.
67 See generally Sparkes "The Quantification of Beneficial Interests: Problems arising from Contributions to Deposits, Mortgage Advances and Mortgage Instalments" (1991) 11 *O.J.L.S.* 39. *Cf. Passee* v. *Passee* [1988] 1 F.L.R. 263.
68 [1971] A.C. 886, 909. It is arguable that if the parties had formed an intention about the sharing of property, which was less trusting than the cosy assumption of joint ownership, they would probably have taken steps to implement it in a binding contract. On a separate point, the application of this *dictum* of Lord Diplock would seem to require the recognition of a "wavering equity". Contrast the rejection by Walton J. in *Richards* v. *Dove* [1974] I All E.R. 888, 895 of such a possibility, on the basis that it would be "clearly contrary to the Law of Property Act, 1925 s.53(1)(c) without an agreement in writing."

the common intention, rather than necessarily by reference to the detriment she incurs on the strength of that common intention.[69] For the purposes of a comparative assessment, it would seem that a great deal hinges on the frequency with which the "common intention" analysis allows the award of a share in excess of that indicated by the financial contributions. Thus in relation to indirect contributions, the Irish claimant is at some advantage since the presumption of resulting trust will almost invariably guarantee her a share. This must be balanced against the drawback that her share will be limited by the extent of her financial contributions.

Interesting general questions are raised by the comparison outside the context of contributions to an acquisition, *e.g.* in relation to improvements and work in the home. It has been suggested that the distinction between the English "common intention" trust and proprietary estoppel is an illusory one.[70] It is arguable that the "common intention" trust is the product of an unhappy marriage between resulting trust and estoppel principles, arranged to compensate for the narrow view taken by the English courts of the traditional resulting trust. Since the Irish model is relatively satisfactory in the context of direct and indirect contributions to a mortgage, it would seem that (granting them a satisfactory conception of estoppel) the Irish courts have little to gain by turning to the English "common intention" trust at this stage.

Conclusion

The Irish Courts have taken an idiosyncratic approach to this area of law. Although the Irish theoretical model is less sophisticated, it may not be demonstrably inferior in practice to its English counterpart. Unfortunately, the two recent Supreme Court decisions in *L.* v. *L.*[71] and *N.* v. *N.*[72] emphasised the static nature of the traditional resulting trust. The latter decision moreover introduced a degree of unnecessary confusion concerning the

69 See *Grant* v. *Edwards* [1986] Ch. 638 where a one-half share was awarded on the basis of limited indirect contributions.
70 Hayton "The Equitable Rights of Cohabitees" [1990] Conv. 370, 377 *et seq*.
71 [1992] I.L.R.M. 115.
72 [1992] I.L.R.M. 127.

repayment of mortgages. Public dissatisfaction with the Supreme Court's decision in *L.* v. *L.*[73] has led to the promise of legislation to introduce a regime of "automatic" joint ownership of the matrimonial home.[74] Such legislation would deal with many of the remaining problems faced by married claimants, but would leave unmarried women and other claimants to rely on the rules of equity. To meet this continuing challenge, it is hoped that the Irish Courts will follow the example of other jurisdictions and develop the equitable principles of estoppel, unjust enrichment and unconscionability. In England as well as Ireland, it is surely time to set these vigorous young doctrines to work and put the ancient resulting trust out to pasture.

73 *Supra*.
74 See *Irish Times* Dec. 6 1991.