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‘Proper Provision’ and ‘Property Division’: Partnership in Irish Matrimonial Property Law in the Wake of *T v. T*¹

Introduction

The issue of how best to regulate matrimonial property is a vexed and recurring one in Irish law. This is not only due to the necessarily conflicting interests that must be resolved: how best to provide for spouses and children in a fair and just manner, out of (usually) quite limited resources, while respecting the rights of third parties such as new partners and creditors, is not easy to determine. Much of our answer depends on our approach to marriage itself, as how we view the marital relationship impacts directly on the system of regulation we adopt. This point may appear trite, yet the view Irish law takes of marriage, let alone of matrimonial property, is far from clear. Current law appears to demonstrate conflicting understandings and values at different stages of the marital relationship, leading to a complex and inconsistent approach to the issue of marital property. In particular, the apparently contradictory views of partnership or sharing principles within the marital relationship is the cause of major confusion within the legislative approach to the issue of matrimonial property rights.² Although some light may have been shed on the *judicial* view of matrimony by the recent Supreme Court decision in *T v. T*,³ the *legislative* contradictions in this area remain problematic.

Partnership and sharing principles

‘Sharing principles’ and ‘partnership’ are of fundamental concern to the issue of marriage and our resulting attitude to property regulation.⁴ Primarily, these principles are concerns of the community property approach to matrimony, which considers that property sharing is based not only on the fact of marriage or on contributions by either spouse to the acquisition of property (or to the relationship generally),⁵ but on an intention to own things in common and to act as if the marriage were a partnership. Marriage is more than simply a legal bond between individuals, it is argued; hence it is appropriate to think of needs and objectives, including financial needs, in joint rather than individualistic terms.⁶ Accordingly, legal principles based on individualist

¹ This article draws upon a paper delivered at the 2004 Annual Conference of the Irish Association of Law Teachers (Derry, April 2004).

² In fact, as will be argued, the legislative *intent* appears relatively consistent, although the legislative *outcome* may not be.

³ Supreme Court, unreported, 14 October 2002.

⁴ See, e.g., Prager, ‘Sharing principles and the future of marital property law’ (1977) 25 *UCLA Law Rev* 1. However, see also Glendon’s comments in Glendon, *The New Family and the New Property* (1981), chapter 2.

⁵ These are among the older justifications for the community approach, along with the need to provide security for the wife, as a dependant, and the facilitation of contributions by both parties to the family finances. See Foyer, ‘The reform of family law in France’, p. 79, in Chloros (ed.), *The Reform of Family Law in Europe* (1978) and Paulsen, ‘Community Property and the Early American Women’s Rights Movement: the Texas Connection’ (1996) 32 *Idaho Law Rev* 641 at 654. Note, however, Chloros’ contention that joint property systems were devised not to assert the unity of the family, but to keep the wife under her husband’s tutelage; hence the preference of English law for separation of assets, as promoting the emancipation of women. See Chloros, ‘Principle, Reason and Policy in the Development of European Law’ (1968) 17 *ICLQ* 849 at 858.

⁶ Gardner argues that the better view is to look for evidence of ‘trust and collaboration’. See Gardner, ‘Rethinking Family Property’ (1993) 109 *LQR* 263.

doctrines are not appropriate for application to issues such as marital property, as this would essentially be enforcing a fiction and treating close partners as strangers. To communitarians, the marital partnership is akin to a joint enterprise where the contributions of both parties, though different, are equally essential to the success of the venture, and should be valued equally. Each spouse has an equal stake in the marital partnership, and each is equally entitled to share in the fruits of the marriage. An emphasis on financial contributions alone devalues the contributions of the non-earning spouse, discriminates against the home-maker and undermines her human dignity. Sharing and partnership principles are also of considerable significance in an equitable redistribution approach,⁷ although other factors (such as need and responsibilities) are also important here. Hence, sharing is discretionary rather than pre-defined, to allow flexibility to deal with different family situations.

In a separationist view, by contrast, partnership principles have no role to play in the financial aspects of matrimony, and the focus is individualistic rather than based on sharing. Although husband and wife share emotions and experiences, they remain independent individuals in respect of their property entitlements and should not have their property rights adulterated without their express consent.⁸ Free will is assumed, and each spouse is presumed to make independent choices with regard to their lifetime objectives. Hence, a failure to provide for one's financial security is a matter of personal decision and it is inappropriate to require the other spouse to make good any deficiency. Independence is therefore both assumed and encouraged, although often in the face of social reality: both the social context in which family decisions are made⁹ and the role of the other spouse in family decision-making¹⁰ are treated as irrelevant. It is also assumed that gender equality will result from the encouragement to women to ensure their personal financial security, though there is no evidence that this is indeed the case.¹¹

As well as differing in respect of partnership and sharing principles, all three approaches – separationist, communitarian and redistributive – are based on differing concepts of justice and fairness. In the communitarian and redistributive views, justice and fairness require (or at least mandate) sharing, although communitarians consider

⁷ In making assets available for redistribution and in affecting the distribution made.

⁸ See, *E.g.*, Powell, 'Community Property – a Critique of its Regulation of Intra-familial Relations' (1936) 11 *Washington LR* 12.

⁹ For social and financial reasons (for example, because women statistically tend to earn less than men, or because of socialised gender roles), it is usually the woman's career that will be subsumed to family needs.

¹⁰ In most family situations, it is argued that decisions as to who will earn and who will engage in (for instance) childcare activities, will be a matter of agreement between the spouses rather than the separate decision of one. Allocating the negative financial consequences to one spouse alone effectively means that the other spouse's complicity in the mutual arrangement is ignored, and indeed rewarded.

¹¹ Until recently, the requirement that women resign from their employment on marriage meant that most could not in fact have provided financially for themselves. Current statistical evidence also suggests that women generally, as earning less than men for myriad reasons, will be less able guarantee their personal financial security. Ruane and Sutherland (*Women in the Labour Force* (1999)) note that the average weekly industrial earnings of females in Ireland in 1997 were only 64.37% of men's. The average hourly earnings for women comprised 72.93% of the average for men when all industries examined were considered, and in fact the ratio was considerably lower in some sectors (p. 58). Within the corporate sector, female managing directors earned only 75% of the salary of male equivalents, and females in other management ranks earned around 86% of the salary for male equivalents (p. 69).

that the sharing should be on an equal basis, while advocates of discretionary redistribution argue that equality may in some contexts lead to injustice. Separationists, by contrast, contend that justice and fairness require that the individual's property (often hard-earned) remains with that individual.

Partnership in Irish law: statutory background

Which of these approaches prevails in Irish law? This is not an easy question to answer, as no one approach prevails in all situations. Certainly, while a marriage subsists, the approach is purely separationist,¹² as even the ameliorating effect of trusts law is based upon contributions in money or money's worth, rather than partnership ideals or other forms of contributions (such as emotional support or work in the home).¹³ The strictness of this view is not directly mitigated by the Constitution, despite the oft-quoted provision contained in Article 41 lauding the value of women's domestic contributions to the greater social good. However, the approach is by no means the same in the event of the termination of the marital relationship by death, when the Succession Act 1965 entitles the surviving spouse (of either gender) to a specific proportion of the deceased spouse's assets.¹⁴ This was clearly based on both communitarian and constitutional principles, as is evidenced by the parliamentary debates on the then Succession Bill.

Introducing the Bill, the then Minister for Justice, Mr. Lenihan, emphasised the constitutional duty of the State to protect the family, especially mothers.¹⁵ However, the real focus was on partnership principles: the Minister explained that fixed rather than discretionary entitlements were adopted because 'in the case of a spouse, the provision of a legal right to a specific share, irrespective of dependency, is the only system compatible with the true nature of the obligations and responsibilities that bind husband and wife'.¹⁶ The express rejection of need or mere 'adequate maintenance' as the criterion for entitlement or provision,¹⁷ clearly represented a move away from previous common law attitudes, and it was emphasised that the wife 'has moral rights above and superior to any mere right to be maintained in the house, given what is called "the range of her teeth", and allowed the use of the family conveyance to take her to Mass on Sundays'.¹⁸ On a practical point, it was considered that compelling a widow to take legal action to obtain a share of her spouse's property would be unjust, could give rise¹⁹ to family contention and would undermine the effectiveness of the

¹² Since the Married Women's Property Act 1882.

¹³ See Mee, 'Trusts of the Family Home: the Irish Experience' (1993) *Conv.* 359 for an account of the law in this area.

¹⁴ Where a spouse dies testate, the surviving spouse is entitled to half or one third of the value of the estate (depending on whether there are also surviving children): section 111, Succession Act 1965. Under section 56 of the Act, the surviving spouse also has a right to have the family home appropriated to him or her, in full or partial satisfaction of any share to which he or she is entitled. Where a person dies intestate, the surviving spouse is entitled to all or half of the estate, again depending on whether there are also surviving children: section 67 of the 1965 Act.

¹⁵ 59 *Seanad debates* col 414 (Second Stage (Committee)).

¹⁶ *Ibid.*, col 415. Opposition in a rather novel form came from Senator O'Quigley, who argued that the Bill should be rejected 'because it suggests that the majority of the property owning people in this country are improvident, disregarding their wives or husbands and have no consideration for them. Part IX of the Bill... is legislative slander upon the people.' (*Ibid.*, col 430).

¹⁷ *Ibid.*, col 416.

¹⁸ *Ibid.*

¹⁹ See also 213 *Dáil Debates* col 340 *et seq.* (Second Stage).

legislation.²⁰ Indeed, many of the arguments used by the Minister appear prescient: costs, fear of the court process and the probability of judicial inconsistency²¹ appear as cogent in the context of the current marital breakdown legislation as in that of the 1965 Act. The Minister concluded that the Bill effectively introduced

*a matrimonial regime under which property on a marriage will, in the ultimate result, become the property of the husband and wife, and of the children until they reach the stage of being non-dependant. I envisage that the position will be somewhat the same as in France where husband and wife, in the absence of a pre-marriage contract, own their property in common... In other legal systems that do not have community of property as between husband and wife, there is a growing tendency to accept the principle that the surviving spouse has a greater claim on the estate of a deceased person than the lineal or collateral kin. It will be agreed that this principle accurately reflects the true nature and importance of marriage and of the status which marriage confers on both partners.*²²

Partnership principles also play a role in the *inter vivos* rights of spouses in Irish law, though to a lesser extent. This lesser role results only to some degree from legislative policy. It is true that initial legislation in the context of the family home (the Family Home Protection Act 1976) failed to confer ownership rights on the non-owning spouse in respect of the family home. However, on examination of the parliamentary records, it is evident that the Act was intended as an interim measure, pending fuller discussion of spousal rights and the appropriate method of legislative protection. It is clear from the introductory speech of the then Minister for Justice, Mr. Cooney, that the 1976 Bill was conceived as part of an ongoing and lengthy reform process in family law,²³ although this did not prevent considerable criticism for the Bill's failure to award immediate co-ownership of the family home to all spouses. This criticism was largely based on partnership concepts; for instance, Senator Robinson, while

²⁰ The Minister commented, 'I am not going to force into court every Irish widow who is wronged by her deceased husband. I am totally opposed to any system which obliges a man's widow to go to court to obtain what should be hers as of right' (59 *Seanad debates* col 416 (Second Stage)). Similarly, in the Dáil, the Minister commented that 'no system can be satisfactory which obliges the members of a testator's family to go to court to obtain what should be theirs as of right. It is generally agreed that the extent to which any law gives rise to litigation is a measure of the failure of that law'. (213 *Dáil Debates* col 342 (Second Stage)). The costs of such a process were also significant (*ibid.*), as was the probable timidity of claimants and the desire to avoid involvement in court proceedings (*ibid.*, col 343).

²¹ The Minister noted that 'in those countries which operate a [discretionary] system of family provision... experience shows that different judge tend to take different views of what constitutes a just and reasonable provision for a member of a testator's family. This has given rise to anomalous decisions which have tended to lessen the effectiveness of the statutory provisions and to nullify the intentions of the legislature' (213 *Dáil Debates* col 343 (Second Stage)). Perhaps rather too sweepingly, the Minister continued that 'It is the unanimous opinion of leading authorities ... who have studied the matter that systems of family provision which are based on the exercise of judicial discretion are unsatisfactory and are least capable of achieving the protection of the family which should be the common aim of all civilised communities' (*ibid.*).

²² 213 *Dáil Debates* col 349 (Second Stage).

²³ 84 *Seanad Debates* col 920 (Second Stage). The Minister emphasised the need to deal with pressing human problems, while research on the larger issues was ongoing. He also suggested that the reason for the lack of immediate co-ownership provisions was the 'complete lack of a consensus' as to what system of co-ownership should be adopted (*ibid.*), although it also appears that he may personally have had doubts regarding co-ownership should be introduced at all (*ibid.*, col 921).

feeling the Bill would have ‘a deep psychological and cultural impact’ on wives,²⁴ felt that full co-ownership provisions would ‘reinforce the concept of partnership in marriage’²⁵ and would ‘be a significantly better measure in reinforcing the dignity of the marriage relationship’.²⁶ Indeed, the Senator also queried the rationale behind the different treatment of spouses in the 1976 Bill and the Succession Act, asking ‘Why not give [a wife] a protection during her life which we have been happy to give her after her death?’²⁷ It was also argued that co-ownership would ‘give the wife a genuine sense that the partnership in marriage was a partnership in relation to the property and the fruits of that marriage’, thus redressing the ‘very considerable imbalance’ felt by many wives who felt that the considerable work done by them was of lesser value than the financial contributions made by their husbands.²⁸

The move towards a full community of property, apparently considered desirable by the legislature at the passing of the 1965 and 1976 Acts, has not yet come to pass. This may be attributed to the failure, on constitutional grounds, of the strongest move in the direction of community, the Matrimonial Home Bill 1993. The 1993 Bill would have gone far further than either previous piece of legislation by conferring property rights on non-owning spouses *inter vivos* for the first time, albeit only in respect of the matrimonial home.²⁹ Again, this was specifically predicated on partnership ideals: introducing the Bill, the then Minister for Equality and Law Reform, Mr. Taylor, commented that ‘we are now focusing with ever increasing awareness on the idea of marriage as a partnership to which both spouses may make differing but equally valuable contributions. With that shift in emphasis comes a reassessment of certain ownership patterns which we have hitherto taken for granted’.³⁰ He continued,

*Sadly, our society is sometimes guilty of paying mere lip service to those who do not take up paid employment but undertake instead the role of homemaker and carer. Their work is praised but the materialism which characterises society today means that it may not always be given equal recognition. The granting of automatic and equal ownership rights in the matrimonial home is one way of redressing the balance and ensuring the work of which I have spoken is recognised in deed as well as word.*³¹

He concluded,

This Bill testifies to the value of marriage in our society and confirms it as an institution where partnership and sharing should predominate. By

²⁴ *Ibid.*, col 924.

²⁵ *Ibid.*, col 925.

²⁶ *Ibid.*, col 928.

²⁷ *Sic.* Presumably this should read, ‘after her husband’s death’. *Ibid.*

²⁸ *Ibid.*, col 931.

²⁹ The 1993 Bill did not fully implement the recommendations of the Second Commission on the Status of Women in its *Report to Government* (1993) (hereafter ‘the Second Commission’). This point which did not go unnoticed in the parliamentary debates (see the comments of Senator Neville, 137 *Seanad Debates* col 1527, and of Senator Henry, *ibid.*, col 1539-1540). The Commission on the Status of Women, in its *Report to the Minister for Finance* (1972), p. 177, had expressed a preference for a deferred community approach, albeit without any real analysis of the possibilities. The Second Commission, which went so far as to recommend that a community regime be adopted, did not specify what type of community this should be (see the Second Commission, p. 39).

³⁰ 137 *Seanad Debates* col 1517.

³¹ *Ibid.*, col 1519.

*automatically conferring joint ownership of the matrimonial home on the partners to a marriage, it recognises that the contributions of both spouses are capable of having equal validity, regardless of whether one contribution is valued in money terms and the other contribution comes through the daily task of caring and nurturing in the home itself. It seeks to get away from the reductive system whereby work is deemed to be of value only if it can be expressed in monetary terms. It pays tribute to different values and insists that these also be recognised and honoured.*³²

Unfortunately, on referral to the Supreme Court by the President,³³ the Bill was held to be unconstitutional. The failure was not, however, based on the supremacy of property rights, or on a rejection of partnership principles, but on the potential interference with previous family decisions. The court accepted that the objective of the legislation was to promote the stability of marriage and the institution of the family, by encouraging joint ownership of the family home. However, the manner in which this aim was to be achieved conflicted with the inalienable right of decision-making reserved to the family itself under Art. 41.1.1 of the Constitution. Because the Bill applied the principle of joint ownership to every matrimonial home, it could interfere with positive decisions of the family, if a couple had decided that their home should not be jointly owned. While it was possible to contract out of the legislation, it would be necessary for spouses to re-address the issue, which might arouse discontent, disturb the equilibrium of the family and lead to litigation.³⁴

Following the rejection of the 1993 Bill, no further legislative attempt was made to implement a full community property approach,³⁵ although it has been argued by this writer elsewhere that modified legislation might have been successful.³⁶ Instead, the focus shifted to equitable redistribution principles, such as had already been enacted in the context of judicial separation,³⁷ although the intention there had simply been to ameliorate the invidious position of separated spouses, particularly wives. A redistributive approach was also adopted in the Family Law Act 1995 (which repealed and replaced the Judicial Separation and Family Law Reform Act 1989) and in the Family Law (Divorce) Act 1996.³⁸ Under this legislation, property ownership is not altered by marriage *per se*. However, where spouses disagree, separate or divorce, the

³² *Ibid.*, col 1526.

³³ Under article 26 of the Irish Constitution, the President may refer a bill to the Supreme Court to rule on its constitutionality. If found to be unconstitutional, the Bill cannot be signed into law.

³⁴ *Re Matrimonial Home Bill 1993* [1994] 1 ILRM 241.

³⁵ Introducing the Family Law Bill 1994 to the Dáil, the then Minister for Equality and Law Reform, Mr. Taylor, commented that 'no alternative legislative route... can safely be taken to achieve a broadly similar result' to the failed Matrimonial Home Bill; no reference was made to a possible referendum. 439 *Dáil Debates* col 613 (Second Stage).

³⁶ See Buckley, 'Matrimonial Property and Irish Law: a Case for Community?' (2002) 53 NILQ 39-76.

³⁷ Under the Judicial Separation and Family Law Reform Act 1989.

³⁸ Interestingly, on introducing the Family Law Bill 1994 (later the 1995 Act) to the Dáil, the then Minister for Equality and Law Reform, Mr. Taylor, did not explain whether the government now considered a discretionary approach preferable to a full community regime. Although he noted that the 1993 Bill had failed on constitutional grounds, and that the government felt that similar objectives could not now be achieved by legislative means, he did not discuss whether (for instance) a referendum might be held to implement a preferred community option. Instead, he stressed that the 1993 Bill had dealt with the ownership of the matrimonial home during marriage, and that these rights would also have been subject to readjustment in the event of marital breakdown, under the pre-existing judicial separation legislation. (Dáil – 2nd stage – re 1994 bill – vol 439 – 23 Feb 1994 – col 613-614)

court (if appropriate) may make ancillary orders, including property adjustment orders. Judicial powers are very extensive, and include orders for the sale of property and division of the proceeds or for one spouse to transfer his or her interest in property to the other.³⁹ In making these orders, judges are required to consider particular criteria,⁴⁰ including the present or likely future ‘income, earning capacity, property and other financial resources’⁴¹ and the ‘financial needs’⁴² of each spouse. No order may be made unless it is in the interests of justice.⁴³ Although these discretionary powers fall far short of the vested proprietary interests conferred under many community systems,⁴⁴ partnership principles are clearly influential,⁴⁵ although other considerations are also included for judicial consideration.

Overall, the lack of a coherent legislative approach to marriage or marital property is clear, with the strong partnership principles evident in the testamentary rules much less present in the *content*, if not the *intent*, of the *inter vivos* regulations. Although some of this inconsistency is clearly against the legislature’s will, the unfortunate result is a ‘yes-no-maybe’ approach to marital property issues, where the outcome differs significantly depending on the context. That this is unsatisfactory in the extreme goes, it is submitted, without saying. However, this but tells half the story: what, it must be asked, is the judicial approach to matrimonial property issues? Does the judiciary differ from the legislative view of marriage, and the principles at play regarding property issues, insofar as judicial attitudes can be separately assessed? What role, if any, is played by partnership concepts?

Judicial approaches to partnership

Certainly, the judicially constructed doctrines of resulting trusts law have been strictly separationist, and attempts to utilise the Constitution to implement sharing principles have ultimately failed,⁴⁶ despite the sympathetic views of some judges.⁴⁷ Judicial applications of the current marital breakdown provisions have also not been noted for consistency, or the regular application of partnership principles, or an emphasis on factors such as sharing, moral support and contributions to home life.⁴⁸ Although it is possible that this is changing, the dearth of reported judgments (due to the *in camera* rule) and the prevalence of settlements and consensual orders, have made it hard to

³⁹ Section 9(1)(a) of the 1995 Act and section 14(1)(a) of the 1996 Act.

⁴⁰ The 1989 Act lists ten such factors (section 20(2)(a) to section 20(2)(j) of the 1989 Act (now repealed)), the 1995 Act lists twelve (sections 16(2)(a) to 16(2)(l) of the 1995 Act) and the 1996 Act lists thirteen (Section 20(2)(a) to 20(2)(l), and section 20(3) of the 1996 Act).

⁴¹ Section 16(2)(a) of the 1995 Act, and section 20(2)(a) of the 1996 Act.

⁴² Section 16(2)(b) of the 1995 Act and section 20(2)(b) of the 1996 Act.

⁴³ Section 16(5) of the 1995 Act and section 20(5) of the 1996 Act.

⁴⁴ Although some community regimes (such as that applicable in France) confer a vested property interest during the marriage, others (such as the current German system) defer entitlements until the marriage ends. For a more detailed account of both these systems, see Buckley, *supra*, at p. XXX

⁴⁵ Both in the entitlement to be considered for property benefits at all and in the inclusion of factors such as the contributions made by either spouse to the welfare of the family, including both financial and domestic contributions, contained in section 20(2)(f) of the 1996 Act and section 16(2)(f) of the 1995 Act.

⁴⁶ *L v. L* [1992] ILRM 115.

⁴⁷ See, for instance, the comments of Barr J in the High Court in *BL v. ML* [1992] 2 IR 77 at 98-99, where he commented, in respect of Article 41.1 of the Constitution, that ‘It is also in harmony with that philosophy to regard marriage as an equal partnership...’

⁴⁸ See Buckley, *supra*, at 64 *et seq.*

establish judicial trends. The few reported decisions have been mixed: for instance, in *JD v DD*, McGuinness J focused on the applicant's work in the home and the fact that her role as homemaker was approved by the respondent, among other factors, and held that a 'reasonably equal' distribution was appropriate.⁴⁹ Similarly, in *EP v CP*,⁵⁰ McGuinness J, commenting on the family arrangements, stated that 'it was a joint enterprise and must be taken as such.'⁵¹ However, in *MK v. JP (Otherwise SK)*,⁵² McGuinness J commented that she doubted whether a policy of equal division of assets between spouses had ever been part of the common law in Ireland or England (as held by the High Court). In *O'L(A) v O'L(B)*,⁵³ McGuinness J was strongly influenced by the fact that 'virtually all of the financial contributions' to the family home came from the husband,⁵⁴ though the wife had made some indirect contributions from her savings, and had given up her career to care for the child and the home generally.⁵⁵ In *Y(M) v Y(A)*,⁵⁶ where the wife had borne the burden of the home responsibilities and childcare, Budd J was content to order the husband, who possessed 'substantial sums with which to indulge his own extravagant lifestyle', to provide 'the relatively small sums which his wife and child require to live on in a frugal and thrifty manner'.⁵⁷ In *McA v McA*,⁵⁸ an apparently generous award to the wife actually deprived the significantly wealthier husband of comparatively little of his own property, as most of the money paid to the wife was hers as of right (due to her contributions to the husband's business). Similar judicial frugality was evident in *CN v RN*,⁵⁹ where the wife essentially ended up with a right of residence in a £70,000 house, which would only become fully hers if her much wealthier husband predeceased her.⁶⁰ The lack of an overall consistent approach is clear.

The decision in *T v. T*

Much of this inconsistency may be resolved in the wake of the recent Supreme Court decision in *T v. T*.⁶¹ Not only is this one of most important family law decisions in recent years, but it is the only one to articulate a view on the nature of marriage and

⁴⁹ [1998] FLJ 17 at 29.

⁵⁰ High Court, unreported, 27 November 1998.

⁵¹ *Ibid.*, p. 5.

⁵² Supreme Court, unreported, 6 November 2001.

⁵³ [1996] 2 FLJ 63.

⁵⁴ *Ibid.*, at 66.

⁵⁵ McGuinness J commented that, from a point of view of justice, 'A proposal simply to transfer this entire asset to the wife gives no recognition to [the husband's] contributions and I do not feel that it would be equitable to take this course' (*ibid.*, at 67). It is not suggested in this paper that financial contributions should not also be given due weight.

⁵⁶ [1997] 3 FLJ 86.

⁵⁷ *Ibid.*, at 89.

⁵⁸ High Court, unreported, 23 May 2000.

⁵⁹ [1996] IFLR 1.

⁶⁰ The maintenance awarded was extremely low, even allowing for the £30,000 lump sum award, given the length of the marriage and the wife's age, poor health and almost non-existent income. The husband, on the other hand, had a high salary, and could presumably have easily afforded a higher rate of maintenance, if he had spent less extravagantly on himself and on his new partner.

⁶¹ Supreme Court, unreported, 14 October 2002. The Supreme Court ruling in *T v. T* represents the most coherent and thorough attempt of the Irish judiciary to consider the principles applicable to property division in the event of marital breakdown. It is the most significant Supreme Court decision in this area, involving detailed judgments by five judges. It is also one of the few cases to offer any real guidance to courts and practitioners alike regarding the interpretation of the property provisions contained in the current marriage breakdown legislation.

on how the value of the contributions of either party to the relationship should be related to property entitlements, in the light of current legislative provisions. As such, it gives valuable guidance regarding the place offered by current Irish judicial thinking to partnership and sharing concepts in the marital context. It also makes observations regarding the nature and objectives of the current legislative framework for dealing with financial issues on separation or divorce, which have the potential to impact significantly on our understanding of the statutory scheme. However, the decision is not unproblematic, particularly in relation to the repeated assertions by the court that Ireland does not have a system for ‘property division’ on marital breakdown, but merely one for making ‘proper provision’, in accordance with the Constitution.⁶² What does this mean, and what is its significance?

Provision or division?

In considering the relevant legislation,⁶³ the Supreme Court correctly noted that the legislature had not made any mandatory requirements regarding the division of assets in divorce and judicial separation cases. Discretion had been left to the court to consider what would be the best and most just resolution in any given case, and an appellate court was bound ‘to give reasonable latitude to the trial judge in the exercise of that discretion’.⁶⁴ However, it was repeatedly emphasised, the Constitution and the legislation provide for ‘provision’, rather than the ‘division’ of property; there is therefore no question of simply dividing the assets on a set basis.⁶⁵ Instead, the court must apply the factors listed in the legislation, preferably stating explicitly what weight is attached to each on the facts of the case, in order to decide what provision would be ‘proper’ in the circumstances.⁶⁶

It is submitted that there is no meaningful practical distinction between ‘provision’ and ‘division’, and that it is not true to say that Irish law does not provide for the ‘division’ of assets.⁶⁷ Undoubtedly, it is correct to say that the legislation in this area does not *require* redistribution, but this does not mean that it does not provide for ‘division’. A refusal to divide (that is, to confer some of the property of one party on another) is itself a division, in favour of the property owner. The separation of assets is a system for dividing property, even though it does not involve the redistribution of assets. ‘Provision’ also amounts to ‘division’, since the assets of the provider are necessarily being divided when he or she is required to confer property benefits (including periodic payments) on the other spouse.

This is not to say that the emphasis on ‘provision’ is insignificant: on the contrary, it may suggest two particular concerns. First, it is possible that the court’s rejection of ‘division’ denotes a particular philosophical approach to the nature of financial provision. Alternatively, it is possible that the court was merely concerned to

⁶² See Denham J, *ibid.*, at para 100; Murray J at para 172; Fennelly J at para 209; Murphy J at para 149.

⁶³ *T v. T* related to a divorce application under the Family Law (Divorce) Act 1996.

⁶⁴ Per Keane CJ, *ibid.*, at para 45.

⁶⁵ Per Denham J, *ibid.*, at para 100. This is in contrast to the language used by Keane CJ, who noted that cases might involve substantial assets where the circumstances of the acquisition of those assets required some form of division, in the interests of justice (at para 46).

⁶⁶ Per Denham J, *ibid.*, at para 91.

⁶⁷ This is despite Murphy J’s argument that property adjustment orders ‘which, to some extent, might have the appearance of division of property’, are nevertheless merely ancillary to the periodic payments that will usually constitute proper provision (per Murphy J, *ibid.*, at para 149).

emphasise the discretionary nature of financial provision under Irish legislation and to reject any mandatory or presumed form of property division. Each of these interpretations gains some support from the various judgments, although the case for the second interpretation is far stronger.

Philosophically, to say that certain assets should be ‘divided’ between spouses perhaps suggests a moral claim vested in each (for example, based on sharing principles), or the existence of a common fund, or a special character for ‘matrimonial property’ (however defined). The language of ‘provision’, on the other hand, is more reminiscent of the care of a dependant, and indeed harks back to the ‘reasonable requirements’ approach until recently favoured in England and Wales.⁶⁸ However, despite the approving references to *Wachtel v. Wachtel* (citing the ‘one third’ guideline as a marker at the lower end of the scale),⁶⁹ which would seem to reject full sharing and partnership concepts, this does not appear to be a likely interpretation. The amplifying comments of several judges, indicating a concern with justice and fairness, are redolent of the language of equitable redistribution, and of a concern with moral partnership. Thus, Fennelly J commented:

*The Court must do what is ‘proper’ in the sense of ‘appropriate’. I would have thought that this is also synonymous with what is ‘fair’ or ‘just’. In the moral sense, this is a clearly stated objective. In practice, it requires the Court to weigh in the balance the infinite variety and complexity of the elements of human affairs and relationships and to arrive at a just result.*⁷⁰

What is this but the language of equitable redistribution – dividing the assets in a manner that is just and equitable, and meets the needs of the parties and the situation?

Murray J summarised it:

*Proper provision should seek to reflect the equal partnership of the spouses. Proper provision for a spouse who falls into the category of a financially dependant spouse (where the other spouse is the source or owner of all or the bulk of the income or assets of the marriage) should seek, so far as the circumstances of the case permit, to ensure that the spouse is not only in a position to meet her financial liabilities and obligation, continue with a standard of living commensurate with her standard of living during marriage but to enjoy what may reasonably be regarded as the fruits of the marriage so that she can live an independent life and have security in the control of her own affairs, with a personal dignity that such autonomy confers, without necessarily being dependant on receiving periodic payments for the rest of her life from her former husband.*⁷¹

⁶⁸ Although Murphy J noted that the term ‘proper provision’ and the statutory criteria adopted meant that the provision to be made clearly went ‘far beyond mere “needs” and probably exceeds what is comprised in the alluring term of “reasonable requirements”’ (per Murphy J, *ibid.*, at para 152).

⁶⁹ Keane CJ stated that a ‘one third’ rule, such as that applicable in earlier Irish law and in English decisions such as *Wachtel v. Wachtel* ([1973] 1 ALL ER 829) would be a useful benchmark at the lower end of the scale (Supreme Court, unreported, 14 October 2002, at para 58). However, Denham J emphasised that this could not override the legislative criteria (*ibid.*, at para 105), and indeed, a ‘one third’ guideline would have no relevance in many cases, due to the limited resources available.

⁷⁰ *Ibid.*, at para 189.

⁷¹ *Ibid.*, at para 175.

This passage, with its references to the ‘equal partnership of the spouses’ and their mutual rights to ‘the fruits of the marriage’, clearly reflects the language of sharing and communality. The references to ‘personal dignity’ and ‘autonomy’ also echo the language of communitarians.⁷² The phrasing used by Murray J, indeed, is almost appropriate for describing a community of property approach, rather than equitable redistribution, but for the emphasis that the provision made must depend on the needs and obligations of both parties. Thus, equality is not guaranteed, since this might be inequitable in the circumstances of the case.

This is connected with the second, likelier interpretation of the court’s rejection of ‘division’. Although the court was anxious to vindicate the contributions of the home-making as well as the bread-winning spouse, it was repeatedly emphasised that the provision to be made must be a matter for the discretion of the judge in every given case, taking account of the peculiar facts and the relevance of the statutory criteria. A set approach to division, such as one based on equality or on particular percentages, is therefore inappropriate. Thus, Denham J stressed that ‘[i]t is not a question of dividing the assets... on a percentage or equal basis’,⁷³ while Fennelly J emphasised that the statutory language ‘does not erect any automatic or mechanical rule of equality’.⁷⁴ Murray J felt that ‘[i]t is not so much that there should be a division of... resources between the spouses’,⁷⁵ but that the home-maker ‘is just as entitled ...to have, what I have figuratively referred to as the fruits of the marriage, taken into account by the court in determining what provision should be made for each of them’.⁷⁶ However, he emphasised:

This is not to say that in making financial provision for spouses that their assets should be divided between them. Neither the Constitution nor the 1996 Act requires that, explicitly or implicitly. It is rather that [a] spouse should... not be disadvantaged by reason of the fact that all or nearly all of the assets and income in the marriage are those of the other spouse. It also means that in cases where there are very substantial assets belonging to one spouse which greatly exceed any conceivable day-to-day needs of either spouse... those assets should not as a matter of course remain with the spouse who owns them...⁷⁷

He contrasted this modern approach with that prevailing when the Constitution was adopted, where the home-making spouse ‘was treated more as simply a dependant rather than a partner when financial provision was made on separation’ when her ‘basic or essential needs tended to be the primary yardstick’.⁷⁸

⁷² Unlike those who argue that separate property ownership fosters equality and responsibility, and hence (presumably) dignity, communitarians argue that it is the failure to reward both contributors to the marriage that undermines dignity. Women’s dignity, in particular, is undermined by the legal view that non-earning parties, usually wives, contribute less to the marriage. See Vaughn, ‘The policy of community property and inter-spousal transactions’ 19 Baylor LR 20, cited in Reppy and Samuel (eds.), *Community Property in the United States* (2nd ed., 1982), p. 4.

⁷³ Supreme Court, unreported, 14 October 2002, at para 100.

⁷⁴ *Ibid.*, at para 209.

⁷⁵ *Ibid.*, at para 176.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, at para 172.

⁷⁸ *Ibid.*, at para 167. Language such as this would also tend to refute the first interpretation of the focus

Domestic contributions

All five judges emphasised that the domestic contributions of the homemaker should not be undervalued, and were just as valuable to the marriage as the financial contributions of the earning spouse. Murray J commented that ‘the courts should, in principle, attribute the same value to the contribution of a spouse who works primarily in the home as it does to that of a spouse who works primarily outside the home as the principal earner’,⁷⁹ and Denham J stated that ‘[a] long lasting marriage, especially in the primary childbearing and rearing years of a woman’s life, carries significant weight, especially if the wife has been the major home and family carer’.⁸⁰ The loss of earning and career potential to a spouse who had foregone career advancement in the interests of caring for the family was also stressed.⁸¹ This is not the language of separation, as might be expected where the philosophical ethos is of ‘provision’ rather than ‘sharing’. It is argued, therefore, that despite the court’s concern to deny that Irish legislation requires the ‘distribution’ or ‘division’ of assets, particularly one of prescribed proportions, the clear subtext is one of partnership, respect for equals, justice, fairness and the vindication of moral claims.

The role of fairness

Concepts of partnership and fairness are also emphasised by some members of the Court regarding the appropriate attitude to English authority, such as *White v. White*⁸² and *Cowan v. Cowan*.⁸³ Much has been made of the supposed rejection by the Supreme Court of the *White v. White* approach, and certainly all five judges were clear that the fundamental differences between Irish and English law meant that certain aspects of the *White v. White* decision (such as the focus on a fair division of assets, rather than proper provision)⁸⁴ could not apply in Ireland.⁸⁵ In fact the judicial approach here seems contradictory: on the one hand, we are told that ‘proper’ provision is the criterion, rather than equality or fairness, while on the other hand, we are told that proper provision will usually be related to concepts of fairness and equal

on ‘provision’ outlined above.

⁷⁹ *Ibid.*, at para 170.

⁸⁰ *Ibid.*, at para 95.

⁸¹ See, e.g., the judgment of Keane CJ, *ibid.*, at paras 47 and 69. Denham J noted that ‘By this total approach to the family role of a spouse and its effect, formal recognition is given to the role of caring for the family’ (*ibid.*, at para 92).

⁸² [2001] 1 AC 596.

⁸³ [2001] 2 FLR 1.

⁸⁴ The requirement of fairness was recently re-emphasised by the Court of Appeal in *Lambert v. Lambert* [2002] EWCA Civ 1685. Thorpe LJ also stated that the decision in *Cowan* should not generally be held to justify an inquiry into the relative worth of the spouse’s contributions to the marriage, which could generally be taken to be equal in value, if not in kind. He concluded that ‘A distinction must be drawn between an assessment of equality of contribution and an order for equality in division. A finding of equality of contribution may be followed by an order for unequal division because of the influence of one or more of the other statutory criteria as well as the over-arching search for fairness’ (*ibid.*, at para 38). Hence, although equality remained a check against invidious discrimination, it did not follow that a fair division must always be equal.

⁸⁵ This does not necessarily contradict the view of McGuinness J in *MK v. JP (Otherwise SK)* (Supreme Court, unreported, 6 November 2001) where she cited with apparent approval the dictum of Thorpe LJ in *Cowan v. Cowan* that fairness rather than equality was the rule (*Cowan v. Cowan* [2001] 3 WLR 684 at 703). Presumably, McGuinness J meant that ‘proper provision’ was fair provision, rather than equal provision, and this would indeed appear to echo the opinion of Fennelly J, outlined above.

partnership. *White v. White* itself was not wholly rejected in *T v. T*, as Keane CJ commented that ‘it by no means follows that what is referred to as “the yardstick of equality of division” is, in every case and for all purposes, irrelevant’.⁸⁶ He continued, ‘The age old maxim, “equality is equity”, may have only the most limited of applications in the complex exercise which the court of first instance is obliged to undertake in a case such as the present: that is not to say it has disappeared completely from the picture’.⁸⁷ It was agreed by the full court that the emphasis of Nicholls LJ in *White v. White* on the need to avoid invidious discrimination against the homemaker, and the refusal to limit the wife’s share of family assets to her ‘reasonable requirements’ was also applicable in Ireland.⁸⁸ Clearly the court, while not advocating equality (which would be outside the legislative mandate) was nevertheless concerned to ensure that non-earning spouses are not discriminated against – a concern of equitable redistribution and of community property regimes.

Overall, therefore, it is argued that the emphasis of the Supreme Court on ‘proper provision’ rather than the ‘division’ of assets was designed to rule out any strict rules or principles on division, and to ensure that the prescribed statutory factors were fully considered in each case.⁸⁹ While it is suggested that the term ‘provision’ is more restrictive than ‘division’, so that the emphasis on it might have unfortunate implications (and consequences), these should be negated by the court’s focus on fairness and justice and the probable appropriateness of a fuller provision in ‘ample resources’ cases.⁹⁰

Conclusion

In conclusion, it is argued that the Irish legislation (and attempts at legislation) in respect of matrimonial property demonstrates a clear desire to implement sharing and partnership principles. Ultimately, it seems clear, legislative intent has been to move towards some form of marital co-ownership, although this now seems unlikely to eventuate following the fate of the Matrimonial Home Bill 1993, and the subsequent move towards equitable redistribution in the Family Law Act 1995 and the Family Law (Divorce) Act 1996. Although it is quite probable that some *inter vivos* community-type measures might still be enacted,⁹¹ despite the failure of the 1993 Bill, it seems that the political will to do so is lacking. The result is a deeply inconsistent and confused approach to this fundamental property and marital issue, where (whatever the original intent) partnership principles have apparently considerably less force while the marriage continues, than after it ends. It seems, therefore, that partnership, as a guiding force for legislative thought, may be weakening in real terms in Irish politics. By contrast, it would appear that the recent marital breakdown enactments, although giving partnership principles a lesser role than early forays into

⁸⁶ Supreme Court, unreported, 14 October 2002, at para 54.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, at para 55. Similarly, Fennelly J stated that ‘I would adopt the language of Lord Nicholls to the extent that he argues for equal recognition of the value of the contributions that may have been made during the marriage, in their respective roles, by the money-earning spouse and the home-making spouse’ (*ibid.*, at para 211).

⁸⁹ Hence, also, the repeated preference that trial judges should go through the statutory criteria *ad seriatim*, discussing the relative weight placed on each. See the judgment of Denham J, *ibid.*, at para 117.

⁹⁰ See, e.g., the judgment of Keane CJ, *ibid.*, at para 46.

⁹¹ With or without a referendum; see Buckley, *supra*, at p. 76.

marital property (such as the Succession Act 1965), have greatly enhanced the judicial emphasis on sharing considerations. This is so even despite the lack of any yardstick of equality in the current law, and it would appear, from the decision in *T v. T* at least, that this trend is likely to continue, should lower courts take heed of the Supreme Court's emphasis on the value of the contributions of the homemaker and 'the equal partnership of the spouses'⁹² in marriage.

⁹² Per Murray J, at para 175.

[DISCLAIMER]

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