In the matter of **Article 26 of the Constitution** and in the matter of **The Matrimonial Home Bill, 1993** [S.C. No. 367 of 1993]

Supreme Court 24th January, 1994

Buckley C.J. 24th January, 1994

This is the decision of the Supreme Court on the reference to it by the President of the Matrimonial Home Bill, 1993, pronounced pursuant to Article 26 of the Constitution of Ireland, 1937.

Assertion of repugnancy to Article 41

The first question which falls to be decided by the Court is whether the provisions contained in the Bill, vesting in each spouse equal rights of ownership in the matrimonial home unless they already have these rights, are repugnant to Article 41 of the Constitution.

Article 41, under the heading "The Family", states, *inter alia*:-

> "1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
>
> 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.
>
> 2. 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
>
> 2° The State shall, therefore, 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.
>
> 3. 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."

Assertion that the Bill is unnecessary to protect the family or the dependent spouse

Counsel for the Attorney General contended that the Bill enhances the position of the dependent spouse and children with regard to the family home. By protecting the interest of the homemaking spouse, the Bill provides security for spouses and children, thereby strengthening the position of the family. By contrast, counsel assigned to challenge the constitutional validity of the Bill submitted that existing legislation adequately protects the position of the dependent spouse and the family with regard to the family home.

A variety of legislative measures already exist to vindicate spouses' rights in respect of the family home and other property. However, all such measures are limited in their scope and effects.

The Married Women's Status Act, 1957, permits a spouse to apply to the court to determine the spouses' proprietary interests in particular property, including the family home. However, it does not confer a share of that property on either spouse; nor does it provide any mechanism for adjusting the spouses' existing legal and equitable rights in respect of the property. Thus, unless a dependent spouse is able to establish a pre-existing equitable interest

in the property (for example, but not limited to, under a resulting trust), the 1957 Act cannot assist her.

The Succession Act, 1965, entitles a surviving spouse to a defined share of the deceased spouse's estate, on either testate or intestate succession. The surviving spouse also has a right to appropriate the family home, in full or partial satisfaction of any share to which he or she is entitled. However, the 1965 Act operates only on death. It does not affect or confer any proprietary interests while both spouses live.

The Family Law (Maintenance of Spouses and Children) Act, 1976, provides for discretionary financial support orders for spouses and children in appropriate circumstances, but does not confer either spouse with any proprietary interest in the family home or other property.

The Family Law (Protection of Spouses and Children) Act, 1981, deals with barring orders and protection orders, along with a very limited provision regarding rights to chattels. It confers no proprietary entitlements in respect of the family home or other property.

The Judicial Separation and Family Law Reform Act, 1989, permits the court to confer, inter alia, a proprietary interest in the family home on a spouse on the granting of a judicial separation order. However, such an order is purely discretionary, and the court must exercise its discretion in the light of specified factors. The Act does not confer any proprietary interest in the family home on either spouse prior to judicial separation and no claims or orders can be made without acknowledging that the marital relationship has broken down.

The sole statutory measure that enhances the legal protection offered to spouses in respect of the family home while both spouses still live and cohabit is the Family Home Protection Act, 1976. This, however, does not confer any proprietary interest in the family home on the non-owning spouse, but merely prevents the transfer of an interest in the family home without the prior written consent of that spouse.

Common law and equitable doctrines also offer some protection to spouses, both during marriage and on marital breakdown. However, the protection afforded by each is restricted. The common law confers on a wife a very limited right of support, effectively restricted to the provision of necessaries, for which an estranged wife may pledge her husband's credit in some circumstances (Shatter, *Family Law in the Republic of Ireland* (Dublin, Wolfhound Press, 3rd edition, 1986), at p.432). It does not confer any power to transfer property between spouses. Equity permits a wife to establish an interest in the family home or other property through the doctrine of the presumed resulting trust. However, only direct and indirect financial contributions are recognized for trusts purposes, and a homemaker spouse, who has not been in a position to make financial contributions either to the acquisition of the family home or to the family budget generally, may be left without any equitable entitlements. This was clearly established by the recent decision of this Court in *L v. L* [1992] 2 I.R. 77. That case also established that the Constitution does not confer any proprietary interest in the family home on a homemaking wife and mother.

It is clear from the foregoing that homemaking spouses, most usually wives, may be left, during marriage, without any economic security or recognition for their labours, other than a right to apply for maintenance on a discretionary basis. However, the most recent evidence demonstrates that the effectiveness of this measure is greatly undermined in practice by enforcement difficulties (see Ward, *The Financial Consequences of Marital Breakdown* (1990, Dublin, Combat Poverty Agency)). The other statutory measures that protect spousal interests either do not confer proprietary rights, or operate only on marital breakdown (again on a discretionary basis) or on death. Common law and equitable doctrines are inadequate to fill this gap, and the Constitution offers no assistance.

It might be argued that a spouse does not require a legal interest in the family home outside of the context of marital breakdown. However, it seems peculiar indeed that the great value of homemaking contributions, which is constitutionally recognised, is vindicated only retrospectively (on death or judicial separation). It is stranger still that, during the spouses' lifetimes, a dependent spouse may only obtain an interest in family property on judicial separation (on a discretionary basis) or under the doctrine of the presumed resulting trust. The first option may encourage discontented spouses to separate, potentially promoting marital breakdown. The second option requires litigation to establish the plaintiff's equitable entitlements, again promoting marital disharmony. Either option may undermine marital stability, contrary to the constitutional protection of marriage contained in Article 41.3.1°. These are real concerns, as evidenced by *L v. L* [1992] 2 I.R. 77. In that case, the wife had endured very significant physical and mental cruelty, including false accusations of adultery, on the part of her husband. She decided to leave him, but the parties were subsequently reconciled. Eventually, the marriage broke down completely. Barr J, in the High Court, found as fact that the wife's concern for her economic security, and the husband's refusal to place the family home into joint names, was one of the key contributing factors in the final breakdown in the marriage (see the comments of Barr J at p.87 of the report).

Assertion that the Bill constitutes a breach of the authority of the family

Counsel assigned to challenge the constitutional validity of the Bill submitted that the Bill undermines the authority of the family in an impermissible way, in breach of Article 41.2°. The right of the spouses to make joint decisions on matters affecting the family was established by the decision of this Court in *McGee v. The Attorney General* [1974] 1 I.R. 284. Consequently, ownership of the family home is for the family to determine. By creating an automatic joint tenancy, with no reference to individual circumstances or to factors such as oppression, need or detriment, the Bill contravenes the authority of the family.

It is clear from Article 41.2° that the authority of the family is particularly to be respected. However, the right of the family to determine matters within its purview necessarily requires that the appropriate family members (in practice, most commonly the spouses) are able to contribute freely to the decision-making process. Respect for family authority and decision-making therefore raises important concerns regarding personal autonomy. These concerns are peculiarly complex, particularly within the intricate and finely-balanced context of family relationships. They must therefore be addressed broadly and within the context of the rights of the family unit as opposed to the rights of individual family members.

It does not necessarily follow, simply because a family home is held in one spouse's sole name, that this represents a mutual, fully autonomous decision by both spouses – that is, a decision to which both spouses consent, having been free, in a meaningful way, and without unfair pressures, to consider the matter and to make an informed choice. Sometimes circumstances may preclude such a choice: one spouse may have acquired the family home prior to marriage, or may have inherited it subsequently. Indeed, the issue of placing the family home into joint names may never have been addressed due to the optimism that naturally arises in the early marital period, or due to a fear by the non-owning party that raising the issue would disturb the equilibrium of the relationship or generate family disputes. At other times, particularly in the past, the force of social assumptions may have been such as to preclude an expectation by either party of joint home ownership. In other words, it may simply have been expected that the husband would be the sole owner of the family home, due to his traditional social and economic role as the family breadwinner. Such expectations were likely to inform the thinking, not only of the spouses themselves, but of legal advisors, banks

and other lenders, as well as the wider family. In these circumstances, a wife with a preference for joint ownership of the family home might well have faced strong pressure to comply with prevailing mores. Such pressures might well have affected the wife's willingness or ability to contest the matter.

Other factors may also skew the balance of power between the parties. Domestic violence (which typically affects women), or a disparity in economic power between the earning and the dependent spouse, may restrict the more vulnerable party's ability to negotiate freely within the marriage. The extensive legal, social and financial disadvantages affecting Irish women, including their historical exclusion from the labour market and their lower earning capacity, are amply outlined in the reports of the Commission for the Status of Women (see the *Commission for the Status of Women: Report to the Minister for Finance* (1972), chapters 2, 3 and 4, and, recently, the Second Commission for the Status of Women, *Report to Government* (1993), chapter 3). These significant disadvantages may have served in the past to undermine women's ability to contribute to family decision-making, and indeed may still do so.

Social expectations may change over time. Writing in 1972, the Commission on the Status of Women noted that the family home was normally in the husband's sole name, but that this appeared to be gradually changing, and that there was an increased level of joint ownership among younger couples (*Commission for the Status of Women: Report to the Minister for Finance*, 1972, at paragraph 447). While it is not the role of this Court to speculate as to why this might be, it is reasonable to query the extent to which the apparent historical predominance of male home ownership – a trend strongly reflected in the case law in this area – can be attributed purely to personal preference and mutual choice.

This is not to say that decisions on home ownership were never free or mutual, but rather that we cannot assume that they always were, or indeed that the legal position regarding ownership of the family home necessarily results from an agreement at all, or that a vulnerable party should be presumed to be protected by membership of a family unit. The court must therefore proceed with some caution in this area, as there is a danger that automatically upholding family arrangements, or simply the *status quo*, in the name of assumed family authority, might simply support and maintain an imbalance of family power. Indeed it is arguable that the State has a residual protective role in respect of vulnerable spouses, and a duty to address equality concerns, in this context, for the common good.

With this in mind, it is now necessary to consider the decision of this Court in *McGee v. The Attorney General* [1974] 1 I.R. 284. The plaintiff in that case, a married woman, had four children, and was medically advised that another pregnancy would put her life at risk. The plaintiff and her husband decided not to have any more children, and attempted to import a contraceptive jelly, which was not lawfully available in Ireland. The packet containing the jelly was seized by Customs officers and the plaintiff brought an action challenging the constitutionality of s.17 of the Criminal Law Amendment Act, 1935, which prohibited the sale of contraceptives or the importing of contraceptives into Ireland for sale or any other purpose. On appeal, the majority of this Court held that the provisions of s.17(3) of the 1935 Act were no longer in force as they were not in compliance with the Constitution of 1937 and constituted an unjustified invasion of the plaintiff's right to marital privacy under Article 40.3.1°.

Although *McGee* established the right of spouses to privacy in their personal decision-making, it did not establish that family decisions must necessarily override all social policy concerns, or that the State could never interfere with family choices, even where there appeared to be potentially conflicting interests or power disparities within the family. *McGee* related specifically to issues of sexual privacy and childbearing, concerns which this Court emphasised were peculiarly a matter for the family itself. As Walsh J noted:-

> "The sexual life of a husband and wife is of necessity and by its nature an area of particular privacy. If the husband and wife decide to limit their family or to avoid having children by use of contraceptives, it is a matter peculiarly within the joint decision of the husband and wife and one into which the State cannot intrude unless its intrusion can be justified by the exigencies of the common good" (at p.312 of the report).

Likewise, Budd J emphasised that "the matter of marital relationship must rank as one of the most important of matters in the realm of privacy" (at p.322 of the report), and that the impugned legislation failed to "defend or vindicate the personal rights of the citizen or his or her privacy relative to matters of the procreation of children and the privacy of married life and marital relations" (at p.322). Griffin and Henchy JJ expressed similar views (at p.335 and p.328 respectively).

It is clear from this that the focus of this Court in *McGee* was very much on the unjustified and intrusive interference of the State with the deeply private matter of the marital sexual relationship. This is very different in kind to issues of property or home ownership, where strong principles of marital partnership, fairness and equality may justify state intervention to ensure that both spouses have some measure of economic security and share in the fruits of the marriage, and that the dignity and contributions of each are recognised. The decision in *McGee* did not establish a general right to family authority, applicable to all issues and impervious to all external regulation or scrutiny. This is also clear from previous decisions of this Court: see, e.g., *Ryan v. The Attorney General* [1965] I.R. 294.

Furthermore, it is clear that even the right of marital privacy, and the right to personal choice inherent within that right, was not unbounded. Walsh J commented:-

> "The private morality of its citizens does not justify intervention by the State into the activities of those citizens *unless and until the common good requires it*" (at p.312 of the report (emphasis added)).

It is clear from this that, had a sufficiently serious injury to the common good been established, the State might well have had grounds for some level of intervention. *A fortiori*, the same principle must apply to family issues that do not fall within the ambit of the right to marital privacy established in *McGee*. The principle of family authority, though undoubtedly important, is not absolute, and is subject to the exigencies of the common good. Hence, although the present Bill may interfere with family decision-making in some (though not necessarily all) cases, it does not follow that this interference automatically constitutes a breach of the family's constitutional rights under Article 41. Rather, the question arises as to whether the State's interference with family authority may be justified by the common interest.

In *McGee* itself, no public interest argument was made that could apply to the particular context, a fact emphasised by Walsh J (at p.314 of the report). This is very different to the current situation, where the State has advanced a clear argument based on public policy concerns. Further, although Walsh J made it clear in *McGee* that the State can only interfere with marital privacy where the common good so mandates, as a last resort and where other attempts to deal with the matter are unavailing (at p.314 of the report), it does not follow that the same high standard must necessarily apply to all State interventions in matters affecting the family. Rather, the standard here must be one of proportionality. The proportionality of the Bill as a means of achieving the State's declared policy goals will be discussed further below.

Assertion that the Bill constitutes a breach of the owning spouse's constitutional right to private property

Counsel assigned to challenge the constitutional validity of the Bill contended that the Bill constitutes an impermissible breach of the constitutional right to private property by automatically depriving the owner of the family home of half of his interest, with no reference to the justice of the case and no provision for compensation. Counsel for the Attorney General contended that the Bill does not represent a disproportionate interference with the essential elements of property rights.

It is clear that the Bill represents an interference with the property rights of the owner of a family home subject to the legislation. S.4 of the Bill provides that any interest in a family home, as defined, to which either or both of the spouses is or are entitled, shall vest in both spouses as joint tenants. This applies unless the spouses are already joint tenants of the matrimonial home, or are tenants in common in equal shares, or unless (as stipulated by s.15), the spouse in whose favour s.4 applies is already bankrupt or an arranging debtor. The Bill stipulates that the interest vesting in both spouses under s.4 shall be an equitable interest only, although this may be converted to a legal interest by means of registration, under s.8. Accordingly, the Bill adjusts the position of the spouses with regard to the ownership of their matrimonial home so as to make them equal equitable co-owners, and ultimately possibly legal co-owners, of an interest previously held by one spouse alone, or by both spouses in unequal shares. The court must therefore consider whether the Bill's interference with spousal property rights amounts to a breach of constitutional rights.

Article 40.3 of the Constitution states:-

> "1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

Article 43 of the Constitution, under the heading *"Private Property",* states:-

> "1. 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
>
> 2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
>
> 2. 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
>
> 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."

The relationship between these articles is complex and difficult. It has been held that Article 43 protects the institution of property ownership from State interference, while breaches of individual citizen's particular property rights are dealt with under Article 40.3.2º: *Blake v. Attorney General* [1982] I.R. 117. However, this Court has long rejected the contention that the purpose of Article 43 is simply to protect the institution of private property from complete abolition within the State: *Buckley and Others v. Attorney General* [1950] I.R. 67. It is clear that private property rights may be restricted where this is required

for the common good, and that while the requirements of the common good are primarily for the Oireachtas to determine, the determinations of the Oireachtas may be subject to judicial scrutiny: *Buckley and Others v. Attorney General* [1950] I.R. 67; *Blake v. Attorney General* [1982] I.R. 117. It is also well established that an "unjust attack" on property rights within the meaning of Article 40.3.2º must be interpreted in the light of the values contained in Article 43: *Dreher v. Irish Land Commission* [1984] I.L.R.M. 94. In that case, Walsh J. stated (at p.96) that "any State action that is authorised by Article 43 of the Constitution and conforms to that Article cannot by definition be unjust for the purposes of Article 40.3.2". This statement was followed in several later cases, notably *O'Callaghan v. Commissioners of Public Works* [1985] I.L.R.M. 364 and *Madigan v. Attorney General* [1986] ILRM 136.

Accordingly, where legislation infringes upon the constitutional property rights of individuals, this infringement must be justified by "the principles of social justice" and "the exigencies of the common good" or it will constitute an "unjust attack" upon the individual's property rights. In pursuing its objectives, the State must continue to protect the constitutional rights of the citizen, as far as possible: *Cox v. Ireland* [1992] 2 I.R. 503. It is for the court to determine whether, objectively speaking, legislation can be regarded as being in the interests of social justice or the common good, and additionally whether the restrictions or delimitations of the property rights of individual citizens are reasonably proportionate to the legislative objective. The State's duty to vindicate and protect the constitutional rights of citizens (including the right to private property) must therefore be balanced against the State's duty to promote social justice and the common good, and the means chosen to achieve the relevant objective must be rationally connected to that objective and must not be excessive or arbitrary. Where the means used are disproportionate to the objective, the intervention will constitute an "unjust attack" on the personal property rights of the citizen, within the meaning of Article 40.3.2°.

The Objective of the Bill

Counsel for the Attorney General submitted that the Bill strengthens the family by equalising the spouses' entitlements in respect of the matrimonial home. The Bill recognizes the connection between family life and the home in which that family life is conducted. Imposing joint ownership of the family home recognizes and vindicates the equal partnership of the spouses and upholds the value of domestic and caring contributions. It protects the non-owning spouse and children by securing the family home for the family. Accordingly, the Bill supports the institution of marriage, and is justified by the exigencies of the common good. Supporting this, counsel particularly relied on the decision of this Court in *L. v. L.* [1992] 2 I.R. 77. Referring to the concept of joint spousal entitlements in respect of ownership of the family home, this Court stated (at p.107):-

> ". . .anything that would help to encourage that basis of full sharing in property values as well as in every other way between the partners of a marriage must directly contribute to the stability of the marriage, the institution of the family and the common good."

Counsel assigned to challenge the constitutional validity of the Bill did not dispute the legitimacy of the legislative objectives, but submitted that the Bill is an unjust attack on individual property rights. While there is a legitimate social concern to protect vulnerable spouses, recognize marital partnership and vindicate caring contributions, the Bill goes beyond a reasonably proportionate response to these concerns by imposing an automatic joint tenancy in respect of every family home, without reference to the particular family

circumstances.

It is clear from Article 41.2 that the Constitutional concept of marriage respects and values the contributions of both spouses. The Article contains an important recognition of the value of homemaking contributions, and an acknowledgement that domestic and caring work is predominantly undertaken by mothers – an acknowledgement that continues to hold considerable truth today, notwithstanding significant changes in gender roles since the foundation of the State. This is clearly demonstrated by the most recent census data. An analysis of the 1986 census, published in August 1993 by the Central Statistics Office, states:-

> "The age group with the highest female labour force participation rate was the 15-24 age group. Therefore, the rate declined with older age groups reflecting the effects of marriage and childbearing on women's participation in the labour force. Approximately seven in every ten women in the 35-44 and higher age groups were engaged in home duties in 1986" (CSO Ireland, Census 86 Vol. 6, *Principal Economic Status and Industries* (Stationery Office, Dublin, Pl. 9819), at p.12).

The importance of caring work to the common good is clearly acknowledged by Article 41.2, which provides that the State shall "endeavour to ensure that mothers are not obliged by economic necessity to engage in labour to the neglect of their duties in the home". This is not to denigrate the equally valuable contributions of the breadwinner. Rather, the provision is best read as an important reminder of the value of caring work, and the contributions of mothers, framed at a time when such contributions might tend to be overlooked or taken for granted, or otherwise devalued, in comparison with the more tangible financial contributions of the (usually male) breadwinner. The Constitution thus incorporates values of spousal equality and marital partnership, which have been consistently highlighted in the decisions of this Court, for instance, in relation to parental authority (see *Re Tilson, infants* [1951] I.R. 1, rejecting the common law doctrine of paternal supremacy, and recognising the equal and joint parental authority of both spouses in matters relating to the religious education of the children).

However, a lifetime of caring work comes with a price. A wife and mother who spends her best years caring for others within the home clearly suffers in terms of the economic opportunities available to her, including the opportunity to engage in the paid labour market or to acquire property in her own name. Nor do these disadvantages end when child-rearing and domestic responsibilities may ease, since the loss of earning capacity and career potential is likely to have continuing and profound long-term effects on the economic well-being of the homemaker spouse. By comparison, the breadwinner, commonly the husband, is free to progress in his career and to acquire property, and this freedom is facilitated by, and in a large part derived from, the homemaker's responsibility for family care and domestic duties. As Lord Simon of Glaisdale so memorably expressed it thirty years ago, "The cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it" (Sir J. Simon, *With All My Worldly Goods* (1964, Holdsworth Lecture, Birmingham, at p.14-15).

For these reasons, and with the support of the Constitution, it is appropriate that the legislature should seek to recognise the partnership of the spouses, and vindicate their equal but different contributions to the family, by ensuring that both spouses share, to some extent, in what may be termed the fruits of the marriage. Having carefully considered the submissions of counsel and the provisions of the Bill and of the Constitution, the Court accepts that the provisions of the Bill are directed to encourage the joint ownership of matrimonial homes (commonly the most significant marital asset) and are rationally

connected to this objective. The Court further accepts that this objective is an important element of the common good conducive to the stability of marriage and the general protection of the family, enshrined in Article 41. In this context the Court relies upon the views expressed in its decision in *L. v. L.* [1992] 2 I.R. 77 (given above).

The Proportionality of the Bill

The next question is whether the means used to attain the legitimate objective of the Bill constitute a necessary and proportionate delimitation of the personal property rights of the spouse whose rights are delimited by the Bill. The essential question here is not whether the Bill represents the ideal means of achieving the State's objective, but whether the chosen statutory scheme is within the competence of the Oireachtas.

The Bill provides that spouses shall automatically be constituted joint tenants in equity of any dwelling occupied by them as a married couple on or after the 25th of June 1993, other than dwellings already owned equally by them, irrespective of when that dwelling was acquired. Counsel assigned to challenge the constitutional validity of the Bill contended that the arbitrary use of a particular date for the application of the Bill discriminated against couples who separated prior to the chosen date. However, since the only way to avoid such discrimination would be for the legislation to apply retrospectively, which could cause serious, possibly irremediable, practical difficulties, the Court does not consider the selection of an application date to be invidious. It appears that the purpose behind specifying an application date, which was the date the Bill was introduced before the Oireachtas, was to ensure that spouses standing to lose part of their equitable interest under the legislation would have no incentive to separate before the Bill came into force. The use of the specified date prevents marriage being undermined in this way, and protects spouses who might otherwise be deprived of a benefit under the Bill. While spouses who separated prior to the specified date will not benefit under the Bill, they may well have a remedy under the Judicial Separation and Family Law Reform Act, 1989, or may already have been provided for under a deed of separation. It would be unfeasible for financial arrangements made previously under a separation deed or on judicial separation to be unravelled retrospectively, perhaps years after the event.

The Bill's application is not restricted to matrimonial homes acquired after the legislation comes into force. Again, there are solid reasons for this. Excluding existing matrimonial homes would mean that older wives, who are most likely to need the Bill's protection, would be unlikely to benefit, unless a new family home were to be purchased. As previously noted, patterns of home ownership may be changing, with joint ownership of the family home becoming increasingly common (Commission for the Status of Women, *Report to the Minister for Finance,* 1972, at paragraph 447). If this is correct, restricting the Bill's application to future home acquisitions would protect those least in need of protection, while leaving unprotected those who need it most, and who have spent longest contributing to the family. This would be invidious indeed, and would clearly not be conducive to achieving the legislative objective of promoting and recognizing marital partnership.

The Bill's application does not depend on whether the pre-existing position as to ownership of the home is injurious to the interests of a spouse or other family members, or demonstrates a failure by either spouse to discharge what might fairly be considered as his or her family obligations. The Bill does however contain a right of defeasance. Under s.7, a spouse who would otherwise benefit by virtue of the provisions of s.4, sub-s. 2, by becoming an equal owner of the family home, may, after receiving legal advice, declare in writing that he or she does not wish the section to apply to the home. Furthermore, s.6 permits the owning spouse to seek an order of the court declaring that s.4 shall cease to apply to the interest in the

family home, though the court shall not grant such a declaration unless it is satisfied that it would be unjust not to do so, having regard to all the circumstances. The section then lists, non-exhaustively, factors to which the court must have regard in determining whether it would be unjust not to grant the declaration. Accordingly, the constitutional property rights of the owning spouse suffer an initial delimitation, but this may be reversed where the court deems it just, or the spouses so agree.

The Court has already noted that it cannot be assumed that the vesting of the family home in the sole name of one spouse was the result of a decision jointly and freely taken by both spouses, but in some cases such a joint decision may genuinely have been taken. Accordingly, the Bill may disturb not only a genuine decision of both spouses, but also subsequent arrangements regarding the ownership of family assets, which may have been founded on the original decision. Hence, couples may need to review their entire financial situation to determine whether they wish their existing arrangements to continue. If they conclude that they so wish, the spouse in whose favour s.4 operates must register a declaration under s.7 of the Bill. It is entirely possible that a spouse might decline to register such a declaration, on reasonable or unreasonable grounds. The only recourse then available to the other spouse is an action under s.6, effectively compelling the spouses to litigate. However, as this Court has previously noted, current law also requires a spouse who is not the legal owner of the family home to engage in litigation, and potentially to separate legally from the other spouse, in order to obtain an interest in the property. The potential for spousal dispute therefore exists whether or not the Bill is upheld, and it is by no means clear where the greater risk of discord may lie.

It is useful to contrast the approach adopted in the Bill with that originally proposed by the Law Reform Commission in its *First Report on Family Law* (LRC 1 – 1980). The Commission proposed to grant the Court a broad equitable discretion to determine the spouses' respective beneficial interests in the family home, in line with their contributions to the acquisition, maintenance or improvement of the home. "Contributions" were defined to include both financial contributions and caring work. The proposal therefore resembled, in kind, the model later adopted in the context of judicial separation under the 1989 Act, that is, a discretionary mechanism based on particular factors and the broad justice of the situation.

The Commission's proposal offered greater initial recognition of the particular family circumstances, since a share in the family home would only be conferred on an applicant spouse where this was just and equitable. However, the Commission's approach, in requiring litigation to establish an entitlement, would create the potential for significant marital conflict. Furthermore, greater barriers (financial and psychological) might face the dependent spouse with regard to taking the necessary legal action, bearing in mind the factors previously outlined that might limit the exercise of autonomy. The owning spouse might exert pressure on the dependent spouse to refrain from bringing a claim, and such pressure might be exacerbated in relationships where there was a history of abuse or economic dependency. Such pressure might of course also be applied in the model adopted by the Bill, to dissuade the spouse disadvantaged by s.4 from applying to avoid the legislation, or indeed, to persuade the spouse in whose favour s.4 applies to waive her statutory entitlements, though some procedural safeguards are contained in the Bill to minimize such abuse. However, placing the onus on the non-owning spouse to apply for a share of the family home presents particular difficulties, which arguably exceed the difficulties faced by a spouse who wishes to avoid the application of the Bill. It might well be psychologically more difficult for a dependent spouse to claim a share in an asset to which she had no previous legal entitlement, than for a former sole owner to seek to reclaim the full interest in his property. Consequently, although the model proposed by the Law Commission accords greater weight to the property rights of the owning spouse (as they are not subjected to unnecessary, though reversible, delimitation), it

is possible, even probable, that the legislative objective might be less effectively achieved. Accordingly, the approach adopted in the Bill to the ownership of the matrimonial home is not disproportionate to the legislative objective.

Compensation

However, this is not the end of the matter. The Bill does not entitle a spouse who is deprived of part of his interest in the family home, pursuant to the legislation, to compensation. The question therefore arises as to whether this failure invalidates the Bill.

Unlike the "Takings Clause" under the Fifth Amendment to the American Constitution, the Irish Constitution does not explicitly require that State (or other) expropriations of private property must be compensated. Nevertheless, it has generally been recognised that an individual whose property is compulsorily acquired by the State or one of its agencies, for purposes deemed by the Oireachtas to be necessary to the common good, should, broadly speaking, be entitled to compensation. Thus, in *Electricity Supply Board v. Gormley* [1985] I.R. 129, a statutory power of the plaintiff to erect masts to carry power lines across the defendant's lands, without the payment of compensation (though compensation was payable for damage to trees and bushes), was held to be unconstitutional. Several cases have also addressed the issue of the appropriate level of compensation: see *Blake v. Attorney General* [1982] I.R. 117; *In Re Article 26 of the Constitution and the Housing (Private Rented Dwellings) Bill, 1981* [1983] I.R. 181; *Dreher v. The Irish Land Commission* [1984] ILRM 94. Normally, compensation may be calculated by reference to the market value of the property that has been compulsorily acquired. However, it is clear from the decided cases that the right to compensation is not absolute, and that there may be circumstances where no compensation is required, or where compensation may not equate to market value.

In *Dreher v. Irish Land Commission* [1984] I.L.R.M. 94, the Land Commission compulsorily acquired lands belonging to the plaintiff. The plaintiff alleged that the relevant compensatory provisions constituted a violation of his constitutional property rights under Articles 40 and 43, as the compensation was paid in land bonds, which fell significantly in value. The plaintiff's claim was unanimously rejected by this Court. In the course of his judgment, Walsh J noted (at p. 96) that the market value of the land could not always be equated to just compensation, since, depending on the circumstances, the market value might be either excessive or inadequate compensation.

In *Central Dublin Development Association v. The Attorney General* (1975) 108 I.L.T.R. 69, Kenny J considered the constitutionality of the delimitation of private property rights in the context of the Local Government (Planning and Development) Act, 1963. Kenny J held that statutory restrictions on the right to compensation did not constitute a breach of Article 43 and did not fail to defend and vindicate the personal rights of property. The restrictions in question did not constitute a confiscation of rights but merely provided that interference with one of the rights of property should not be compensable. Kenny J further held that the restrictions were not an unjust attack upon property rights as they were reasonable and limited in their scope, and included a mechanism to mitigate any resultant hardship. They therefore represented a reconciliation of the rights of property with the exigencies of the common good.

In *O'Callaghan v. The Commissioners of Public Works in Ireland and Another* [1985] ILRM 364, the Commissioners for Public Works made a preservation order which prevented the plaintiff from carrying out ploughing operations on land which was partially occupied by a prehistoric promontory fort. The relevant legislation did not provide for the payment of compensation in respect of such an order. The plaintiff alleged that he had suffered an unjust attack on his property rights within the meaning of Article 40.3.2°. Upholding the High

Court's decision refusing the plaintiff's claim, O'Higgins CJ held that the lack of compensation did not render the delimitation of the plaintiff's property rights unconstitutional, as the delimitation was imposed to meet the exigencies of the common good (in that case, the national aspirations set out in the Preamble and Article 1 of the Constitution).

The decisions in *O'Callaghan* and *Central Dublin Development Association* are not on all fours with the current situation. The plaintiff in *O'Callaghan* was substantially on notice of the preservation requirement when he purchased the land, and of the consequent limitation of the ordinary rights of user on the part of the landowner. This awareness appears to have played at least some part in the ultimate decision of this Court. Nor was the plaintiff in either case deprived of ownership of the land or any part of it, since the preservation order in *O'Callaghan* merely restricted the way in which the land could be used, while the measures in *Central Dublin Development Association* limited the right to compensation for a refusal of planning permission in certain circumstances. By contrast, the present Bill deprives the owning spouse of an actual interest in the family home (presuming that the spouses do not agree otherwise under s.4), and the spouse whose interest is diminished will frequently have had no notice of such a potential deprivation either on marriage or at the time of the home's acquisition, since the Bill applies to all family homes occupied as such by spouses on the relevant date.

There are, however, special considerations applicable to the reallocation of interests as between spouses, imposed by the Bill. It is not the case here that the property of private individuals is being expropriated by the State for its own purposes, or for the benefit of society in general. Were this the case, very exceptional grounds would clearly be required to justify such an uncompensated deprivation. However, the concern of the Oireachtas in the Bill is to reconcile the interests of different family members, specifically spouses, in the family home. This clearly accords with the constitutional reference to "the principles of social justice" contained in Article 43.2.1°, discussed above. It also gives effect to the values enshrined in Article 41, which recognizes that work in the home is indispensable for the welfare of the family, as well as the common good. Under the Bill, the owning spouse is not deprived of an interest in the family home to benefit a stranger, or wider society. Rather, the owning spouse is deprived of the full interest in the family home to benefit the person to whom he or she is married, with whom he or she has an intimate connection, and with whom he or she is forging a lifelong partnership, in circumstances where the contributions of each partner are of equal value and are equally essential to the wellbeing of the family as a whole.

Conclusion

Marriage is both a civil contract and a social status which contains a life-long commitment. It therefore creates reciprocal obligations as between the spouses, which are designed for their mutual protection and welfare, as well as the welfare of any children of the marriage. It is reasonable, therefore, that the Oireachtas should seek through legislation to balance the interests of the spouses, including their property interests, and to vindicate their differing contributions, both during marriage and in the unhappy event of marital breakdown. Accordingly, following careful consideration, the Court concludes that the rights arising from the Bill are not a disproportionate interference with spousal property rights and are within the ambit of the Constitution.