Electronic Assignment Cover sheet

Please fill out and attach as the first page of Assignment.

Student(s) Number as per your student card:

_____________________________10330783_____________________________

_______________________Conor Courtney________________________

Course Title: LLB Law Part-time

Lecturer Name: Elaine Walsh

Module/Subject Title: Law of Real Property

Assignment Title: LCLRA 2009

No of Words: (Excluding Footnotes/Bibliography etc) 2,667.
The Land and Conveyancing Law Reform Act 2009 has substantially reformed the law of real property in Ireland and in particular the law of co-ownership.

Discuss the reforms that have been made to the law of co-ownership. Your discussion should also assess whether the reforms that have been made in the above areas have actually updated and simplified the law and identify if there are other areas of co-ownership law which require reform. Reference should be made to legislation, case-law and articles if applicable.

The Land and Conveyancing Law Reform Act 2009 (hereafter to be referred to as ‘the 2009 Act’) entered into Irish legislation on December 1st 2009, excluding s.132 (rent reviews) which came into effect on the 28th of February 2010. It aimed to both simplify and clarify Irish law in the area of real property, and this included substantial reformation of the co-ownership rules in Ireland. This essay will discuss these changes, and will consider the resulting effects this has had on Irish law. It is my contention that these changes signalled a progressive and ameliorated redefinition of co-ownership law, especially regarding court orders, bodies corporate, and the unilateral severance of a joint tenancy. However, in retaining objectivity, the 2009 Act was not infallible in its reforms.

To discuss the reforms which the 2009 Act has introduced in relation to co-ownership in Ireland, one must first clarify Ireland’s position in relation to co-ownership. Co-ownership in Ireland can be separated into two major categories; namely, joint tenancy and tenancy in common. These two forms of co-ownership differ in relation to the percentage of ownership of each individual co-owner, and the way in which interests are passed upon death. In joint tenants, each co-owner retains an equal proportion of the property, complete joined ownership, and the ownership is passed through the process of survivorship, which results in the interest of the deceased co-owner being passed onto the remaining co-owner, or co-owners. Survivorship, or *jus accrescendi*, was outlined in Section 4(c) of the Succession Act 1965,

*“The estate or interest of a deceased person under a joint tenancy where any tenant survives the deceased person shall be deemed to be an estate or interest ceasing on his death”*.  

In relation to tenants in common, each co-owner obtains a percentage of the property, usually based upon financial contributions, and this percentage of

---

1 Pat Igoe, ‘Reforms in Irish property law’, (Society of Chartered Surveyors Journal Ireland Summer 2014)
5 *Succession Act 1965*
6 *Lake v Gibson* [1729] 1 Eq Ca Abr 290 (p. 291).
ownership can be transferred, sold, or assigned in a will. The type of co-ownership thus affects the relationship that co-owners have to both the property itself, and to each other.

The first area of reform which I will be discussing are the changes made to the powers of the court over co-ownership. The court has the right to impose orders on co-owned land in respect to partition, sale, or taking account of encumbrances affecting the land. The court equally has the power, under s.31(2) of the 2009 Act, to issue;

(d) An order directing that accounting adjustments be made as between the co-owners,
(e) An order dispensing with consent to severance of a joint tenancy as required by section 30 where such consent is being unreasonably withheld,
(f) Such other order relating to the land as appears to the court to be just and equitable in the circumstances of the case.\(^7\)

However, it must be noted that the court’s powers have not been exclusively extended. In relation to equity, “The equitable jurisdiction of the court to make an order for partition of land which is co-owned whether at law or in equity is abolished”\(^8\), which is indicative of the dualistic nature of the 2009 Act. This proves that the 2009 Act was one which aimed to reform co-ownership both through the allocation and the diminution of rights and powers of co-owners and the courts.

In addition to granting rights to the court, the 2009 Act equally conferred rights of co-ownership upon bodies corporate. A body corporate can be defined as, ‘An artificial person or legal entity created by or under the authority of the laws of a state or nation’\(^9\). The 2009 Act empowers a body corporate to engage in co-ownership with other individuals, or other bodies corporate, viewing them as possessing the same rights as an individual. The act equally clarifies that upon the dissolution of the body corporate, which is entitled to be strictly a joint tenant co-owner, ‘the property devolves on the other surviving joint tenant or joint tenants’\(^10\). This is a simple clarification on the position of bodies corporate within Irish co-ownership law. However, it should be noted that, again, this allocation of rights and powers was explicit in its expression, as bodies corporate are only eligible to enter into joint tenancies where a joint tenant would have been created between individuals;

’Where a body corporate and an individual or two or more bodies corporate become entitled to any property in circumstances or by virtue of any instrument which would, if the body or bodies corporate had been an

\(^7\) The Land and Conveyancing Law Reform Act 2009
\(^8\) The Land and Conveyancing Law Reform Act 2009
\(^9\) Black’s Legal Dictionary (2nd edn).
\(^10\) The Land and Conveyancing Law Reform Act 2009
individual or individuals, have created a joint tenancy, they are entitled to the property as joint tenants\(^{11}\).

As such, a body is entitled to co-own a property, thus relying upon the right of survivorship granted through joint tenancy, and equally bypassing succession, as survivorship transcends the reliance upon wills and probate. Therefore the forfeiture rule under s.120 of the 1965 (Succession) Act does not apply to property held in a joint tenancy as the deceased’s interest in the property ceases on his or her death\(^{12}\).

A final major reform which was incorporated by the 2009 Act was the abolition of the ability of unilateral severance of a joint tenancy. This was an antiquated concept which had been present in Irish property law, which allowed one co-owner to freely sever a joint tenancy. This severance could be accomplished without the permission of any other co-owners. This severance would, in turn, redefine the co-ownership as being a mere tenancy in common\(^{13}\). It was argued that this was a shallow aspect of the law of co-ownership, as a joint tenancy must satisfy several conditions, such as the four unities of; possession, time, title, and interest, before it can be established. The concept of a single co-owner having the power to sever a joint tenancy is incredulous, as the common law view is that co-ownership will result in a joint tenancy, unless words of severance are used within the conveyance, such as ‘share and share alike’\(^{14}\), ‘between’\(^{15}\), or ‘respectively’\(^{16}\). This presumption can equally be rebutted. As such, since there previously existed two conditions which enabled the severance of a joint tenancy, as well as several barriers to its creation, the additional allowance of unilateral severance was a tautologically flawed element to Irish property law. As such, this was an area desperately in need of reform, and this change came about through the 2009 Act. The 2009 Act clarified the Irish position on severance of a joint tenancy, and it outlined in s.30(1):

‘From the commencement of this Part, any—

(a) Conveyance, or contract for a conveyance, of land held in a joint tenancy, or
(b) Acquisition of another interest in such land,

By a joint tenant without the consent referred to in subsection (2) is void both at law and in equity unless such consent is dispensed with under section 31 (2)(e)\(^{17}\).

\(^{11}\) The Land and Conveyancing Law Reform Act 2009
\(^{13}\) Andrew Lyall, Land Law in Ireland (3rd edn, Round Hall 2010) p.416.
\(^{14}\) Hayes v Ward [1788] 2 Ridg PC 85.
\(^{15}\) Crozier v Crozier [1843] 3 Dru & War 373.
\(^{16}\) Stephens v Hyde [1734] Ca t Talb 27.
\(^{17}\) The Land and Conveyancing Law Reform Act 2009
This outlines that a unilateral severance of a joint tenancy will be void, unless there was either consent given by the other co-owner(s), or, through a court order in lieu of consent. The 2009 Act has equally abolished severance due to a judgement mortgage, which was established by s.7 of the Judgement Mortgage (Ireland) Act 1850. This removal of unilateral severance has indeed simplified and clarified the law, as it protects the intentions of the co-owners, while equally addressing the situations in which unilateral severance may occur, such as through a court order, or through the conduct of the co-owners.

In examining the reforms introduced by this act, one must equally investigate the reforms that this act failed to incorporate. Although Irish property law is a complex and ever evolving area, ‘fraught with difficulties’, it remains clear that there is a substantial need for a renewal of some of its fundamental principles. In scrutinising the 2009 Act, an oversight in the law becomes apparent, one which would have benefitted from simple reform. This issue arises when an individual has committed murder, manslaughter, or attempted murder, and is also a co-owner in a joint tenancy with their victim. The traditional view in succession law in Ireland is that a murderer is precluded from obtaining any inheritance from the will of the individual that they killed, or attempted to kill. The logic behind this treatment of the law is easy to follow; one should not be seen to be rewarded for the unlawful killing of another human being. It is a relatively straightforward rule, which both comforts the victims of such offences, and adds yet more dissuasion to such heinous crimes. However, the Irish stance on joint tenancies reflects a divergence from this line of thinking. In the relatively recent Irish case, *Cawley v. Lillis*, one which had the benefit of the reforms from the 2009 Act, the effects that result from the murder of one co-owner, by the other co-owner, were seen on joint tenancies. During this case, it was found that a murderer retained rights to a property belonging to his wife, despite the fact that he had been convicted of his wife’s manslaughter. In this case, Mr Lillis brutally murdered his wife, with whom he had been a co-owner joint tenant in their family home. This appears to be a glaring inconsistency in the law, as a murderer was entitled to the house of his victim. This goes against section 120(1) of the Succession Act 1965, which explicitly denies this right,

‘A sane person who has been guilty of the murder, attempted murder or manslaughter of another shall be precluded from taking any share in the estate of that other, except a share arising under a will made after the act constituting the offence’.

---

18 Judgement Mortgage (Ireland) Act 1850
19 The Land and Conveyancing Law Reform Act 2009 s.30(4).
24 Succession Act 1965
Joint tenancies are defined by the fact that each co-owner holds 100% of the property, whereas in a tenancy in common each co-owner owns a percentage of the property, and, as such, there are limited responses that can be made by the courts. This is a crucial difference, as it proves that the property is held by both co-owners in a joint tenancy, and is instantly transferred through the death of one owner, through the process of survivorship. Thus, a property in a joint tenancy is transferred immediately upon death, and this conferral lies outside wills and probate procedures. As such, as Martha Ridgway explains, ‘Many people use joint tenancy as a means of avoiding probate’.

This can be seen as a downfall of the Irish migration towards adopting joint tenancy, as it becomes a loophole to the distribution of estates. It has been argued that there are only two agreeable outcomes in such cases, ‘severance of the joint tenancy at law or in equity or the imposition of a constructive trust’. In this case, the Irish High Court Justice Mary Laffoy adjudicated that a fair alternative in this scenario was that Mr Eamonn Lillis would be entitled to 50% of the property, while the remainder would be held in trust for their daughter, as ‘in certain circumstances joint property will not pass by survivorship, but will revert to the deceased’s estate under a resulting trust’. This was an intriguing decision, as it implies that the court chose not to sever the joint tenancy, and turned their co-ownership into a trust for their daughter, in accordance with the succession Act 1965.

This decision is similar to the view taken by s.8(3) of the New Zealand Succession (Homicide) Act, which states that;

‘Property that is owned in joint tenancy by the victim, the victim’s killer and any other person (if any) devolves at the death of the victim as if the property were owned by each of them as tenants in common in equal shares.’

However, this decision did follow the conclusion of similar cases taken in several other jurisdictions, including Australia and Canada. In the Australian case of Rasmanis v Jurewitsch (1979), it was held that a husband who killed his joint tenant wife was entitled to some of the property, while the remainder was held

---

30 Succession Act 1965
31 New Zealand Succession (Homicide) Act 2007
in trust for her estate. In the Canadian case of *Schobelt v Barber* (1966), it was found that Mr Barber, who had killed his joint tenant wife, was entitled to half of the property. The presiding judge claimed that it would be an affront to law to punish Mr Barber’s actions twice. Mrs Barber’s half of the property was held in constructive trust for her next-of-kin, a constructive trust being, ‘a trust which arises by operation of law and which ordinarily comes into being as a result of conduct and irrespective of the intention of the parties’.

The inconsistencies in this area, however, seem universal. In the Illinois case of *Welsh v James*, it was held that a husband responsible for killing his wife was entitled to their entire joint property, yet, this same view was overturned in the Illinois Supreme Court case of *Bradley v Fox*. In the Fox case, Davis J held that, ‘the unities of interest, title, time and possession were destroyed by the act of one joint tenant killing another joint tenant and extinguished the right of survivorship’.

This precedence set by the Irish courts does away with the fact that, legally, Mr Lillis was the immediate owner of the property, upon the death of his wife. Equally, it brought a criminal perspective into a civil case, which is a grey area. Yet murder convictions were recently considered in the civil (inheritance) case of *Nevin v Nevin*, so the criminal perspective of this civil case is not novel ground. Mr Lillis’ right to the property was not forfeited under the Succession Act 1965, as it was not bequeathed to him through the will of another, it was transferred immediately through survivorship. This marks a major lacuna in joint tenancy legislation, and stands as a flaw of the 2009 Act, as it circumvents succession law in such circumstances.

This case equally enters one into a didactic dialogue revolving around the role and the protection afforded to the family home in Irish legislation. The Family Home Protection Act 1976 described the rights afforded to the family home, s.5(1);

> ‘Where it appears to the court, on the application of a spouse, that the other spouse is engaging in such conduct as may lead to the loss of any interest in the family home or may render it unsuitable for habitation as a family home with the intention of depriving the applicant spouse or a dependent child of the family of his residence in the family home, the court may make such order as it considers proper, directed to the other spouse or to any other person, for the protection of the family home in the interest of the applicant spouse or such child’.

And yet, in allowing the murderer of a spouse to retain control over the family home, the courts are allowing the home to be ‘uninhabitable’ for Lillis’ Daughter.

---

33 *Schobelt v Barber* [1966] 60 DLR (2d) 519.
35 *Welsh v James* [1951] 408 Ill 18.
36 *Bradley v Fox* [1955] 7 Ill 2d 106.
37 *Bradley v Fox* [1955] 7 Ill 2d 106.
38 *Nevin v Nevin* [2013] IEHC 80.
39 Family Home Protection Act 1976
As such, the uncertainty of the 2009 Act has failed in this area in its attempt to make co-ownership law clearer, simpler, and more effective for the public.

In conclusion, the Land and Conveyancing Law Reform Act 2009 made many changes to the law of co-ownership in the Irish legal sphere. Although these changes varied in the degree of their severity and application, they were fundamentally an improvement on the level of simplicity and modernisation of the law. However, it remains clear that elements of these reforms may have detrimental effects, and although they aimed to improve the law, they have enabled sinister applications through their interpretations.
**Bibliography**

Black’s Legal Dictionary (2nd edn).


Minn L. Rev, ‘Disposition of Property Held in a Joint Tenancy When One Co-Tenant Causes the Death of the Other’ (1957).


**Cases**

*Bradley v Fox* [1955] 7 Ill 2d 106.


*Crozier v Crozier* [1843] 3 Dru & War 373.

*Hayes v Ward* [1788] 2 Ridg PC 85.

*Lake v Gibson* [1729] 1 Eq Ca Abr 290.

*Nevin v Nevin* [2013] IEHC 80.


*Schobelt v Barber* [1966] 60 DLR (2d) 519.

*Stephens v Hyde* [1734] Ca t Talb 27.

*Welsh v James* [1951] 408 Ill 18.

**Acts**

Judgement Mortgage (Ireland) Act 1850

Succession Act 1965

Family Home Protection Act 1976

New Zealand Succession (Homicide) Act 2007

The Land and Conveyancing Law Reform Act 2009