Protection against Unilateral Dispositions of the Family Home – An Irish Perspective

By Kathryn O’ Sullivan*

Introduction

The need to prevent unilateral dispositions of the family home where it is in the sole legal ownership of one spouse is an issue which has generated considerable debate down through the years in many common law countries. Indeed, as the esteemed Professor John Wylie explained in an Irish context:

‘One of the most intractable problems to confront the legal system in recent decades is how far a spouse who has no legal title to the matrimonial home should have protection against dispositions by the legal owner (the other spouse) which may jeopardise the “non-owning” spouse’s right of occupation’ (Wylie, 2000).

Yet, despite the difficulties involved in balancing the competing interests, legislatures across the globe have, with varying degrees of effectiveness, sought to deal with this predicament through the implementation of a regulatory framework. After all, as Fiona de Londras notes ‘There is, the law recognizes, something special about homes: something that might even be said to “trump” the sheer market orientation of efficiency and alienability’ (de Londras, 2011).

Considering the value of such legislation which allows a non-owning spouse to veto unilateral dispositions of the family home, Heather Conway and Philip Girard explain:

* Lecturer in Law, Cayman Islands Law School; email Kathryn.o@sullivan@ul.ie. The research for this paper was undertaken in partial fulfilment of the requirements for the degree of Ph.D at the University of Limerick, Ireland. The author gratefully acknowledges the helpful comments of Ms. Una Woods, University of Limerick, Mr. John Eekelaar, University of Oxford and Prof. Bruce Ziff, University of Alberta on an earlier draft of this paper.
'The policy basis of such rights is clearly to encourage consultation between spouses before any major change is made to their living arrangements. These rights also recognise the uniquely personal nature of the matrimonial home: no other asset of the spouses is treated in this fashion’ (Conway and Girard, 2005).

In Canada, the pressing need to protect the family home from inter vivos unilateral dispositions led to the introduction of homestead-style legislation which bestows ‘substantial powers of management on a narrow range of partners’ (Fox, 2003; Ziff, 2006 notes that the various provincial legislatures ‘drew heavily’ on developments in the United States of America in formulating this approach). The Land (Spouse Protection) Act 1996 currently applies in British Columbia. Pursuant to the 1996 Act, a disposition of the family home by the owning spouse during their life or on death is void for all purposes unless made with the non-owning spouse’s written consent. However, this protection will only apply if the non-owning spouse has registered an ‘entry’ of their occupation of the family home with the Land Title and Survey Authority. In England and Wales, rather than restricting the unilateral disposition of the family home, the Family Law Act 1996 (as amended by the Civil Partnership Act 2004) confers rights of occupation or ‘home rights’ on spouses. However, again, these rights will only bind a purchaser if they are registered prior to the sale.¹

By contrast, Ireland adopts a much more robust approach to the protection of the family home pursuant to the Family Home Protection Act 1976. Subject to limited exceptions, the written consent of a non-owning spouse² is automatically required for the conveyance of any interest in the family home.³ Positive action in the form of registration is not required by the non-owning spouse. Although Wylie notes the Act was ‘one of the most controversial pieces of legislation to have been introduced into the Republic’ (Wylie, 2000; see also Shatter, 1997), over the years it has gained broad acceptance.
This article provides an Irish perspective on the need to protect non-owning spouses against the unilateral disposition of the family home. First, the historical context which led to the introduction of the Family Home Protection Act 1976 is discussed and the main provisions of the legislation are presented. The article then questions whether the 1976 Act has faded into irrelevance in the Ireland of 2013. Concluding that the legislation continues to play a vital role in the protection of spouses in Ireland, the article argues similar legislation ought to be considered in other common law jurisdictions where the unilateral disposition of the family home is not subject to comprehensive restrictions. In particular, the article focuses on the weaknesses which are evident in the level of protection afforded to non-owning spouses in the family home inter vivos in England and Wales and British Columbia, Canada. Arguing that legislative reform would considerably bolster the position of vulnerable, non-owning, spouses in both jurisdictions, the article concludes with a discussion of the key lessons to be learned from the Irish approach.

**The historical development of the Family Home Protection Act 1976**

To place the Family Home Protection Act 1976 in context, it is necessary to consider the law governing inter vivos matrimonial property transactions prior to its introduction. Historically, the common law doctrine of coverture, by virtue of which a woman renounced her legal personality upon marriage, applied in Ireland (for further discussion of the doctrine of coverture and the historical differences between single women and married women, see Johnston, 1972). This doctrine was described succinctly by Sir William Blackstone in his 1756 *Commentaries on the Law of England*:

‘By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover, she performs everything’ (Morrison, 2001).
Thus, upon marriage, a wife’s property was transferred to her husband who alone was capable of administering it. In effect, all personal property held by the wife was vested absolutely in her husband.\(^4\) While a wife did not forfeit the ownership of her real estate, she no longer possessed the authority to manage the property or receive the rents or profits derived therefrom.\(^5\)

Since the mid-Nineteenth century, major developments in matrimonial property law have greatly altered the position of the traditionally dependent wife. The introduction of formal equality by the Married Women’s Property Acts represented a particularly important milestone by affording married women the capacity to own and control their own property.\(^6\) Introducing a separate property regime, this legislation ensured each spouse’s property claims were no longer based on rights and obligations arising from the marital relationship but were instead founded in title.

Unfortunately, although in theory this development would appear to have improved the position of married women, in reality it was a double-edged sword. In order to benefit from the new, separate property regime, a woman would have to acquire title to property. However, very few married women were actually in a position to generate a property portfolio. They were, in the vast majority of cases, financially inferior to their husbands. Moreover, the prevailing social convention in most of the common law world, including Ireland, was for property to be acquired in the sole name of the husband. In more modern times, this was then often exacerbated by bank policy. If a mortgage was obtained to finance the purchase of property, banks usually insisted that the property was put in the name of the principal earner, almost invariably the husband. The position of non-owning wives vis-à-vis the family home was, therefore, precarious.

In the mid-1970s, Senator Mary Robinson noted, ‘Probably the source of greatest hardship in our family law has been the helplessness and the dependence of the wife who could not prevent the matrimonial home from being sold over her head.’\(^7\) To counteract this injustice, in 1972 the Commission on the Status of Women proposed the introduction of a system whereby a spouse’s
ability to unilaterally dispose of the matrimonial home was severely restricted (Commission on the Status of Women, 1972). This proposal, with its firm constitutional foundation, subsequently formed the basis of the Family Home Protection Act 1976. It is interesting to note that the Commission also considered the introduction of,

‘a system of co-ownership of the matrimonial home under which the home would be legally regarded as being jointly owned by the husband and wife, by virtue of the marriage bond, except where an agreement to the contrary had been entered into by the spouses’ (Commission on the Status of Women, 1972).

The Commission concluded that the former proposal to restrict the unilateral disposition of the family home would be ‘the easier to introduce and to operate and would be less likely to lead to injustices in individual cases’ (Commission on the Status of Women, 1972). Nevertheless, it recommended that the latter proposal regarding co-ownership of the family home ‘should be further investigated and if it should prove to be a workable one, consideration should be given to its introduction as an alternative to the foregoing recommendation’ (Commission on the Status of Women, 1972). Consequently, upon the introduction of the Family Home Protection Bill, Senator Robinson described it ‘as an interim measure on the road to a proper and just system of co-ownership of the matrimonial home’. The need for a default regime of co-ownership of the family home was subsequently reiterated in 1993 by the Report of the Second Commission on the Status of Women (Second Commission on the Status of Women, 1993). This prompted the publication of the Matrimonial Home Bill 1993 which vested the beneficial ownership of the matrimonial home in the joint names of the married couple. However, this Bill was never enacted as the Supreme Court deemed it to be unconstitutional.

*Main provisions of the Family Home Protection Act 1976*
Today, the principal source of inter vivos protection for non-owning spouses in the family home in Ireland continues to be the Family Home Protection Act 1976. In effect, the 1976 Act constitutes a ‘remedial social statute’ and the courts have vowed to interpret it ‘as widely and liberally as can fairly be done’ to ensure the effectiveness of its measures. The main thrust of protection afforded by the 1976 Act arises under section 3. Section 3 requires, subject to certain exceptions, the written consent of the non-owning spouse for the conveyance of any interest in the family home.

The array of inter vivos transactions directly affected by the 1976 Act is quite wide-ranging. A conveyance under section 3 includes a mortgage, lease, assent transfer, disclaimer, release and any other disposition of property otherwise than by will or by donatio mortis causa. The definition of ‘conveyance’ also includes an enforceable agreement, whether conditional or unconditional, to make any such conveyance.

With regard to the consent required of the non-owning spouse, three specific criteria must be met: (a) it must be made prior to the conveyance; (b) it must be in writing; and (c) it must be valid. To be valid, the consent must be ‘free’ and ‘fully informed’. This was established in the Supreme Court decision of Bank of Ireland v Smyth. While the Supreme Court accepted that the Bank of Ireland was not bound to fully explain the charge to the respondent or advise her to obtain independent legal advice, it added:

‘the reason why [these steps ought to have been taken by the Bank Manager] was to protect the Bank’s own interest since if Mrs Smyth had consented to the charge after it had been fully explained to her and after she had received independent advice it is unlikely that her consent could have been challenged. So it is correct that the Bank ought to have done these things, but not because they owed Mrs Smyth any duty to do so. The reason was to ensure that they got a good title to the land which was the subject of the charge.’

With regard to the importance of independent advice, it was held in ICC Bank Plc v Gorman:
‘There is no requirement in law that a spouse who is giving a consent for the purposes of section 3 of the 1976 Act must have the benefit of independent legal advice in the sense of advice from a legal practitioner who is not acting for the mortgagor spouse or the mortgagee. What is required is that the consent should be a “fully informed consent”.... a solicitor witnessed the giving of the consent by Nicola Gorman and attested her signature. In the circumstances, in the absence of evidence to the contrary, in my view, the Court is entitled to assume that Nicola Gorman gave her consent voluntarily and on the basis of adequate knowledge of what she was doing’ (for more, see Sanfey, 1996).

As the burden of proof lies on the person seeking to rely on the consent pursuant to section 3(4), Professor John Mee notes the decision in Bank of Ireland v Smyth has had ‘serious implications for practitioners’ (Mee, 1996).

Generally, in the absence of prior, valid, written consent as required by the Family Home Protection Act, a conveyance involving any disposition of an interest in the family home by the owning spouse will be declared void. However, the protection conferred by section 3 is not absolute. Instead, certain specified exceptions exist to the sanction of voidness and some limited caveats on the need for consent are set out in sections 3 and 4. ‘Far and away the most important exemption’ is imposed by section 3(3)(a) (Wylie and Woods, 2005) which provides that a conveyance to a purchaser for full value is not void, notwithstanding the absence of valid consent. A ‘purchaser’ is defined as a ‘person who in good faith acquires an estate or interest in property’. It has been held that this reference to ‘good faith’ incorporates the doctrine of notice. Thus, to benefit from this exemption, a purchaser must not have actual, constructive or imputed notice that property is a family home at the time of the conveyance.

The duties of a purchaser’s solicitor were summarised succinctly by Henchy J in Somers v Weir:
‘He must ascertain if the property, because of its present and past use, is a family home within the meaning of the Act of 1976. If it is, he must find out if it is a sale by a spouse and if so whether the conveyance should be preceded by the consent in writing of the other spouse so as to prevent its being rendered void under Section 3. If that other spouse omits or refuses to consent the purchaser should require the vendor to apply to the court for an order under Section 4 of the Act dispensing with the consent.’

In practice, to ensure a purchaser is not fixed with constructive notice, the Law Society Conveyancing Committee recommends that their solicitor should raise pre-contractual inquiries or requisitions (see the Law Society’s Requisitions on Title; see also Wylie and Woods, 2005). Although in Reynolds v Waters the High Court held that purchasers are entitled to rely on statutory declarations that the property in question is or is not a family home within the meaning of the Act, where there is something to suggest fallibility or where reference is made to supporting documents further enquiries must be made.

Moreover, to ensure fairness between spouses, a spouse cannot arbitrarily refuse to give his or her consent. Section 4 of the 1976 Act states that the court may dispense with the consent of the non-owning spouse where it is unreasonable for the spouse to withhold consent having regard to all the circumstances. Finally, section 5 of the Family Home Protection Act 1976 empowers the court to transfer the family home to the non-owning spouse where the spouse who holds title to the home is engaging in conduct which may lead to the loss of the home. Before the court may make such an order, however, there must be evidence of an intention to deprive the applicant spouse of their residence in the family home.

*Is the Family Home Protection Act 1976 relevant in the Ireland of 2013?*

It has been noted ‘family property policies adopted in particular jurisdictions are usually indicative of social attitudes towards both property issues and family relationships at the time of enactment’
(Fox, 2003). While the Report of the Commission on the Status of Women 1972 which prompted the enactment of the Family Home Protection Act 1976 provided a faithful narrative of the position of women in the early 1970s, the report now merely represents a historical document offering a window into another age. Describing the prevailing social habits of the period, the report explained, ‘In relation to the family residence, it is the case in most marriages that the home, which is normally the principal item of family property, is owned by the husband and any mortgage repayments on it are generally made from his income’ (Commission on the Status of Women, 1972).

Today, due to various gradual but profound socio-legal developments, the landscape of home ownership has changed dramatically. As a result, the factors which initially provoked the introduction of the Family Home Protection Act 1976 are now of less significance and whether the legislation retains the intrinsic value it once possessed as the supreme inter vivos protector of the family home is open to debate. Therefore, the question arises: Is the legislation relevant in the Ireland of 2013? Three principal arguments against the continued importance of the Act may be advanced.

- Argument One: The traditionally dependent wife no longer exists rendering the legislation obsolete

The protection of a traditionally dependent wife was undoubtedly uppermost in the minds of the Irish legislature and was an influential factor in formulating the legislation. Upon the introduction of the Family Home Protection Bill, it was noted ‘when a man marries and has a family, in view of the responsibilities he has taken on automatically he forfeits … some of his property rights under the Constitution. No man should be able to leave his wife and children without a home.’ Thus, as de Londras notes: ‘[the] broader societal significance [of the Act] was primarily in its impact on married women, who were generally not working in paid employment, and usually had no ownership rights in the family home through which they could protect themselves’ (de Londras, 2011).
Following the High Court decision in *Bank of Ireland v Smyth*, but prior to the Supreme Court judgment, Mee raised some concerns about the fundamental ethos of the legislation in protecting dependent wives:

‘In relation to *Smyth* itself, in looking at the four points set out by Geoghegan J in relation to what is required for a wife to understand a transaction, one is struck by the passive role to be played by the woman. There is no question of her taking responsibility for her own actions. Rather, she must be sat down and “explained”, “told” and “recommended” to, as if she were a child. In the terminology of gender politics, there is no recognition of the agency of the woman’ (Mee, 1994).

He added:

‘[T]he essential problem remains that all married women are treated, without distinction, as vulnerable. This ignores the fact that, despite the continued existence of gender inequality in our society, many such women do not need any special tenderness from equity in relation to their financial arrangements’ (Mee, 1994).

A number of points may be made in response to Mee’s concerns. First, although it is accepted the stereotype of female dependency or helplessness no longer applies to the vast majority of the population, significant numbers of women continue to work exclusively in the home. Recent statistics show that over 500,000 women in Ireland are currently exclusively engaged in work in the home (Central Statistics Office, 2012) while many more work part-time or intermittently – such irregular employment or reduced hours necessarily impacts on their ability to acquire or generate an interest in the family home. Second, the language of the Act is expressed in gender-neutral terms and applies to both spouses equally thus negating the argument that it operates merely to ensure the protection of the traditionally dependent wife (Central Statistics Office, 2012 also shows that a limited proportion of men were occupied full-time in the home – just less than 10,000 such men
were recorded). Third, in unanimously upholding the decision of the High Court, Blayney J for the Supreme Court in *Bank of Ireland v Smyth* stated that the Act’s protection of the home was for the benefit of the family as a whole and not merely for the dependent spouse. Similarly, in *Dunne v Hamilton* the court observed, ‘The Act provides for the protection of the family home, presumably as an implementation of the constitutional duty that falls on the State to protect the family and to guard with special care the institution of marriage.’ Fourth, the continued importance of such legislation in protecting spouses with no interest in the family home is also evidenced by the inclusion in Part IV of the Civil Partnership Bill 2009 of measures preventing the unilateral disposition of the shared home which essentially replicate the provisions of the Family Home Protection Act 1976.

Therefore, although clearly the traditionally dependent wife is no longer as common as in 1976, the presence of such a character is not, in fact, necessary when considering the continued vitality of the legislation.

- Argument Two: Increased co-ownership renders the legislation obsolete

The increasing incidence of legal co-ownership between spouses, particularly among new homeowners, has undoubtedly had a major impact on the relevance of the legislation today. From a sociological point of view, increased levels of education, a growing awareness of legal rights and the rise of feminism have ensured that many women who in the past would not have been co-owners are now more likely to insist that their name appears on the title to the family home. Moreover, purely economic practicalities have also played an important role in this change. Where property is purchased on foot of a mortgage loan, it must be purchased in the names of all the borrowers. As a result of the enormous expense involved in purchasing a home, mortgages raised to finance such purchases regularly require both spouses to be borrowers and, hence, co-owners in order to generate a loan sufficient to finance the purchase.
However, although the prevalence of exclusive ownership of the family home is undoubtedly reduced, there remains an important, vulnerable and often forgotten segment of society for whom the legislation remains of vital importance in protecting against the unilateral disposition of the family home. First, many homes purchased in the 1950s, 60s, 70s and 80s continue to be held in the sole name of one spouse. Second, while it is undoubtedly rare nowadays to have newly-purchased properties vested in one spouse only, anecdotal evidence suggests such a scenario may arise where, upon inheritance, a family home is placed in the sole name of the beneficiary. Third, a spouse may have purchased or built the property prior to marriage and failed to transfer the property into joint names after the wedding. Fourth, it has been suggested that sole-ownership could arise where one spouse has serious health issues and may not be in a position to get life assurance to underpin a mortgage (Martin, 2001). Fifth, despite the fact that it is the general policy of lending institutions to ensure that where a property is purchased on foot of a loan it is held in the names of all borrowers, this is subject to one caveat. It may arise that, in a joint loan application, one of the proposed joint borrowers may be taking a gift of a site from their parents. While the beneficiary of the gift from their parents is unlikely to be liable for Capital Acquisitions Tax, any other borrower whose name appears in the title deeds would be. Thus, in order to avoid such a tax liability for the other borrower, the beneficiary of the gift may seek to have the property vested in their name exclusively. Finally, the family home could be purposely placed in one spouse’s name in order to protect it from the creditors of the non-owning spouse. Therefore, despite the considerable societal changes since the mid-1970s which have undoubtedly transformed socio-legal behaviour in Ireland, situations continue to arise in which the family home remains exclusively owned by one spouse, usually the husband. In these circumstances, non-owning spouses continue to rely on the protections afforded by the legislation.

Moreover, in a somewhat unexpected development, the Family Home Protection Act 1976 may also be relevant in certain co-ownership situations, specifically where the parties are in dispute over
whether to sell the property. In *O’D v O’D* it was established that a co-owning spouse could benefit from the protection afforded by the Family Home Protection Act 1976 in an action under the Partition Acts 1868 and 1876. Murphy J in the High Court denied the applicant husband who was entitled to a half share in the matrimonial home the order for sale sought. Where the co-owner who requested the sale was entitled to a 50 percent share or more in the ownership of the property, section 4 of the 1868 Act stated the court could not, in the absence of ‘good reason to the contrary’, refuse to award a sale of the property and a division of the proceeds. Murphy J held that what constituted ‘good reason to the contrary’ within the meaning of section 4 of the Partition Act should ‘properly have regard to the rights of parties under the Family Home Protection Act 1976’. As a result, it was observed that the Family Home Protection Act 1976 had made ‘substantial inroads’ into the jurisdiction of the court afforded by the Partition Acts (Conway, 2012). Conway states, ‘while it may be true to say that the primary purpose of the 1976 Act, is to protect the non-owning spouse, the Act does accord some protection to the legal title owner by requiring his consent in these circumstances’ (Conway, 2012).

Section 31 of the Land and Conveyancing Law Reform Act 2009 has now repealed and replaced the Partition Acts and provides that any person with an estate or interest in land which is co-owned whether at law or in equity may apply to the court for an order under this section. However, section 31(5) of the 2009 Act states that nothing in this section shall affect the jurisdiction of the court under the Family Home Protection Act 1976. Thus, the approach applied in *O’D v O’D* will presumably remain good law under the Land and Conveyancing Law Reform Act 2009 ensuring the continued importance of the 1976 Act for co-owners (Conway, 2012).

- Argument Three: The development of the purchase money resulting trust renders the legislation obsolete
On initial analysis, it appears the development of the purchase money resulting trust in Ireland, which has arisen since the introduction of the Family Home Protection Act 1976, provides a much more powerful protection for a spouse whose name does not appear on the title deeds than that afforded by the legislation. First applied by the courts in *Heavey v Heavey*, the purchase money resulting trust affords such spouses the ability to generate an equitable interest in the family home through contributions to the purchase price, both direct and indirect. As Alan Shatter explains:

‘It is now well established that if the legal title to the family home is held in the sole name of one spouse and the other spouse directly or both directly and indirectly contributes to its acquisition, the latter may successfully claim a proprietary or beneficial interest in it’ (Shatter, 1997).

It has been established that contributions to the purchase price of a property, whether in an outright purchase or through mortgage repayments, generate a beneficial interest. Moreover, contributions to a family fund while a mortgage is being repaid also give rise to a beneficial interest. In addition, unpaid work in the homeowner’s business shall give rise to a successful claim for a beneficial interest in the home. The protection generated by this interest is further consolidated through its status as an overriding interest under section 72(1)(j) of the Registration of Title Act 1964 or an interest which is protected under the doctrine of constructive notice when coupled with actual occupation of the property. This means it will bind a purchaser or a mortgagee of the family home. Where overriding status is not obtained, or the doctrine of notice does not apply, the interest will attach to the proceeds of sale or loan following such a transaction. Thus, a preliminary analysis would suggest that the purchase money resulting trust represents a much deeper and more substantial protection for non-owning spouses than the mere right of veto afforded by the 1976 Act (see Fox, 2002).

However, there are number of weaknesses inherent in the purchase money resulting trust. The Family Home Protection Act 1976 remains particularly important for spouses whose contributions
are not recognised under the equitable remedy. First, the issue of whether unpaid work in the home ought to generate a beneficial interest has proved particularly contentious. As it currently stands, the law on this point represents the greatest weakness in the purchase money resulting trust. In *L v L*, Barr J in the High Court acknowledged that it was well established that a spouse was not entitled to a beneficial interest of the family home on the basis of contributions made through work in the home. However, he held that as a woman who performed the constitutionally preferred role of wife and mother was precluded from making financial contributions to the acquisition of the home, ‘her work as home-maker and in caring for the family should be taken into account in calculating her contribution towards that acquisition’. On this basis, he awarded the applicant a fifty percent beneficial interest in the family home. On appeal, the Supreme Court unanimously overruled this decision. In justifying the judgment of the court, Finlay CJ stated the adoption of this new doctrine would constitute ‘a usurpation by the courts of the function of the legislature’.

Second, it was held in *W v W* that making or paying for improvements to property will not generate an entitlement in the absence of evidence of an agreement that they would be recompensed for the expenditure or that, in light of the surrounding circumstances, they were induced to believe such compensation would result. In *NAD v TD* Barron J held:

‘The circumstances in which a wife may contribute to the improvement of the property of her husband may obviously vary considerably between minor decorative improvements at the one end of the scale and payment for the erection of an entire dwelling house at the other end. In each case, since the legal and beneficial ownership of the property was already vested in her husband he is entitled at law in the absence of a contrary agreement to take the entire benefit of the improvement.’

Third, even if a contribution does give rise to a beneficial interest, the means of calculating the interest may also cause injustice as the claimant will receive an equitable interest proportionate to
his or her contribution. As a result, parties are required to record all contributions made to ensure the proportionate interest principle accurately reflects their contribution (Woods, 2006 notes it could be argued that this requirement ‘is unrealistic to expect in an intimate relationship; however, for a contrary view, see Delany, 2011). This may give rise to difficulties where the contributions on which the interest is based were indirect. Where accurate records do not exist, the interest awarded may not represent the contributions made. Fourth, it is clear that post-acquisition contributions shall never give rise to a beneficial interest. Moreover, although it has yet to be considered before the Irish courts, it seems reasonable to assume that pre-acquisition contributions shall not be treated as giving rise to a beneficial interest (see Mee, 2001 who notes ‘the better view seems to be that no resulting trust can arise in this situation. It would surely be strange if the non-owning partner could claim a share following the purchase when, prior to the purchase, she had no claim whatsoever to her partner’s savings’). In light of these shortcomings, it is clear that not all spouses are in a position to prove a beneficial interest in the family home under the purchase money resulting trust. In such circumstances, the Family Home Protection Act assumes critical importance.

Therefore, while the protection of the family home inter vivos is no longer the sole preserve of the 1976 Act, the continued importance of the Family Home Protection Act in this matrix should not be underestimated. The decision in O’D v O’D, in particular, demonstrates the powerful axis which has been created by the combined forces of the purchase money resulting trust, the Land and Conveyancing Law Reform Act 2009 and the Family Home Protection Act 1976. This decision ensures that where the beneficial ownership of the family home is shared, a co-owner shall not succeed in obtaining an order for sale under the 2009 Act if it would be reasonable to withhold consent under the 1976 Act.

**International context**
It is clear from the foregoing that the need to protect non-owning spouses against the unilateral disposition of the family home remains of critical importance in Ireland. Moreover, such legislation is used widely in the civil law jurisdictions of continental Europe. Countries such as Sweden, France and the Netherlands employ differing means to prevent the unilateral disposition of the family home (without necessitating registration of an entry against the title by the non-owning spouse, see Cooke, Barlow and Callus, 2006). It is submitted the vulnerability of non-owning spouses ought to be a source of real concern in many common law countries where there is insufficient protection against the threat posed. In order to illustrate the inherent strengths of the Irish legislation as well as the comparative weakness of alternative regimes, it is useful to consider other jurisdictions which adopt contrasting approaches. To this end, let us consider the protection afforded to non-owning spouses in (a) British Columbia, Canada and (b) England and Wales.

(a) British Columbia, Canada

As in Ireland, legislation directly focused on restricting the unilateral disposition of the family home applies in British Columbia. However, despite replicating certain features inherent in the Family Home Protection Act 1976, key differences may be observed between the Irish legislation restricting the unilateral disposition of the home and its British Columbian counterpart, the Land (Spouse Protection) Act 1996. Section 3 of the 1996 Act requires a non-owning spouse to register an ‘entry’ with the Land Title and Survey Authority in order to gain protection under the legislation. If an entry is made on the register, a disposition of the home by the owning spouse during their life or on death is void for all purposes unless made with the non-owning spouse’s written consent.

However, the protection this provides to non-owning spouses while a marriage subsists could, in reality, be described as illusory; in the absence of awareness of the provisions of the Act, a non-owning spouse will rarely file an entry which would trigger the protection it provides. Moreover, it is speculated that where there is awareness of the legislation, and the protection it affords, a non-
owning spouse may be reluctant to file an entry due to a fear of potentially setting a seed of doubt in an otherwise healthy relationship. Indeed, elsewhere, it has been suggested that adopting an approach which necessitates registration is an ‘unsuitable mechanism for protection of interests of a family character’ (Wylie, 2000 quoting from Megarry and Wade). Consequently, the British Columbian legislation is now considered to apply primarily where a party has elected not to commence legal proceedings on the termination of a relationship but who nonetheless feels the need to protect his or her interest in the family home, effectively acting as an alternative to a Certificate of Pending Litigation. (Unfortunately, where difficulties arise in a relationship, by the time the non-owning spouse becomes aware of the protections available under the Act, it may be too late to register an entry as the disposition may already have taken place.)

Furthermore, the equitable protection available in British Columbia to a non-owning spouse in the family home may not be as comprehensive as it initially appears either. Historically, the rules of equity which developed in the English Courts of Chancery, and succeeded in improving the position of married women throughout much of the Commonwealth, ‘had very little impact’ in Canada (Blackhouse, 1988). Instead, the Canadian courts, through the latter half of the Twentieth century, developed an approach based on the doctrine of unjust enrichment.\(^{58}\) Previously referred to in minority judgments in earlier cases,\(^ {59}\) the doctrine was fully accepted by the Supreme Court of Canada in the seminal case, *Pettkus v Becker.*\(^ {60}\) Rejecting the applicability of the doctrine of resulting or constructive trusts coupled with the attendant requirement of monetary contribution or common intention, the court instead applied the principle of unjust enrichment to the facts of the case and imposed a constructive trust.\(^ {61}\) Dickson J delivered the judgment of the court, noting ‘the principle of unjust enrichment lies at the heart of the constructive trust’.\(^ {62}\) He set out a three-fold test for the application of the doctrine: an enrichment; a corresponding deprivation; and the absence of any juristic reason for the enrichment.\(^ {63}\) Subsequently, in *Peter v Beblow*, McLachlin J accepted that the
performance of domestic services could give rise to a claim for unjust enrichment\textsuperscript{64} (see Mee, 1999; Payne and Payne, 2008).

However, although the required elements may not be particularly difficult to establish, the presumed remedy for an unjust enrichment is a ‘personal restitutionary award’.\textsuperscript{65} Therefore, while respected Canadian legal commentator Professor Bruce Ziff notes the ‘remedial’ constructive trust represents a ‘highly effective’ means of responding to unjust enrichment (Ziff, 2006), a ‘restitutionary proprietary award’ will only be made where an order for financial compensation is ‘inappropriate or insufficient’ and the labour or financial contribution of the claimant is linked to ‘the acquisition, preservation, maintenance or improvement of a specific property’.\textsuperscript{66} Indeed, it has been noted, ‘there is a good deal of discretion in deciding what remedy to award... The entire analysis involves considerable flexibility and the results are not always predictable or consistent’ (Hovius, 2007).

Unfortunately, even if a non-title holding spouse successfully obtains a proprietary remedy, further difficulties emerge. The Land Title Act 1996, which governs the registration of proprietary interests in British Columbia, is founded on a strict application of the Torrens system (the Torrens system was developed by Robert Torrens and the first Torrens title registration system was applied in South Australia in 1858; see Fox, 1950; Hogg, 1905, observed that, in addition to the original Australian Torrens system, ‘there is now an English Torrens system, a Canadian Torrens system and an American Torrens system’). The ‘cardinal principle’ of such a system, ‘is that the register is everything’\textsuperscript{67}. Consequently, section 29 of the Land Title Act 1996 abolishes the doctrine of notice:\textsuperscript{68} if a non-owning spouse does not register their equitable interest in the home pursuant to section 23(2), a purchaser or mortgagor will not, in the absence of fraud, be affected by any express, implied or constructive notice of the unregistered interest in the land.\textsuperscript{69} Instead, the beneficial interest will merely attach to the proceeds of sale or replacement property. Therefore, obtaining the consent of a spouse who is in occupation and who possesses, or may possess, a beneficial interest in the home
is not considered a necessary or prudent step by legal practitioners engaged in a conveyance of Residential property (this is unlike conveyancing practice in England and Wales discussed below; note, item 3.3 of the Law Society of British Columbia’s Practice Checklists Manual does advise a vendor’s lawyer in a residential sale to inquire as to whether the vendor’s spouse may have an unregistered interest; however, despite enumerating a considerable list of documents that a they should prepare for closing, the Manual does not expressly state that the consent of that spouse should be obtained if such an interest is found to exist). As a result, while the British Columbian approach certainly has the advantage of being ‘purchaser-friendly’ with regard to the background checks required to be carried out prior to any conveyance, this is offset by the increased vulnerability of non-owning spouses.

(b) England and Wales

Recent research gauging public opinion in England and Wales shows strong public support for protection against the unilateral disposition of the home. Empirical research conducted by Anne Barlow, Elizabeth Cooke and Thérèse Callus in 2006 demonstrates a ‘strong groundswell of opinion’ that spouses should not be vulnerable to having the family home sold or mortgaged over their heads (Cooke, Barlow and Callus, 2006). In the research undertaken, when faced with a case study concerning the unilateral disposition of the home, 61 of the 74 respondents felt that that the family home should not be sold without the consent of a non-owning wife, 7 believed the owning husband should merely inform the non-owning wife, while the final 6 respondents supported an unqualified right to sell (Cooke, Barlow and Callus, 2006). Moreover, respondents were asked whether in a scenario in which a wife acquired a house before marriage she should be able to use the property as security for a business venture without her husband’s consent. The results showed that 51 of the 74 respondents did not support such a right while 8 of the respondents did (Cooke, Barlow and Callus, 2006).
The question must then be raised: To what extent does the law of England and Wales reflect this public sentiment? At first blush, it appears not much! Unlike the approach adopted in Ireland pursuant to the Family Home Protection Act 1976, or the Land (Spouse Protection) Act 1996 applied in British Columbia, no direct protection against the unilateral disposition of the family home is afforded to non-owning spouses in the jurisdiction. Nevertheless, three principal sources of protection do mitigate the vulnerability of non-owning spouses.

First, limited protection is afforded to non-owning spouses by the availability of ‘home rights’ under the Family Law Act 1996. Section 30(2)(a) ensures a non-owning spouse, in occupation, has a right not to be evicted or excluded from the family home by the owning spouse without the leave of the court. Moreover, subsection (b) ensures that where the non-owning spouse is not in occupation, they may, with the leave of the court, enter into and occupy the home held by the owning spouse. Crucially, by virtue of section 31, purchasers will be bound by these home rights if they are registered by a non-owning spouse prior to the conveyance of the property. Therefore, although the unilateral sale of the home is not subject to legislative restrictions, a non-owning spouse may possess occupation rights in the home which will bind a third party purchaser. Unfortunately, however, the lack of public awareness of the availability of such protection has resulted in a statutory regime which operates ‘in the main ... on the basis of the mass invalidation of the statutory charges for want of registration, with registration being effected only in cases of actual or impending disputes’.72 (In relation to the lack of widespread registration, Wylie, 2000, notes, ‘from a practical point of view it is doubtful if it could be otherwise because, given the huge number of matrimonial homes in existence, mass registration of such charges might well overwhelm the registries’.) The level of protection this affords to non-owning spouses is, therefore, shallow (see Fox, 2002).

Second, even if home rights are not registered pursuant to the 1996 Act, protection may nonetheless be available to a spouse whose name is not on the legal title of the family home. In this regard, the common intention constructive trust plays a vital role.73 In order to successfully establish
a beneficial interest under a common intention constructive trust, a non-title holding spouse must prove there was an express or inferred common intention between the parties to share the beneficial ownership of the home and that they relied on this intention to their detriment. Once it is established that a spouse possesses an equitable interest, this interest may be overriding pursuant to schedule 3, paragraph 2 of the Land Registration Act 2002, or the doctrine of notice in the case of unregistered land, provided that they are in actual occupation of the home. Indeed, the provision of overriding status to such interests could become of vital importance to even greater numbers of non-title holding spouses in light of the apparent expansion of the circumstances giving rise to a common intention constructive trust. Recent judicial developments, particularly *Stack v Dowden*, seem to permit the inference of a common intention to share the beneficial ownership of the home even in the absence of direct financial contributions which were, heretofore, required for such an inference. Nevertheless, the common intention constructive trust is currently in a state of flux and the law in this area is far from clear (see Hanbury and Martin, 2012; Mee, 2012; Sparkes, 2012). Moreover, notwithstanding the potential for a common intention constructive trust to be more readily found in light of *Stack*, the presence of such a constructive trust is not guaranteed and vulnerable, non-owning, spouses may also be left devoid of equitable protection in the family home.

Third, a spouse whose is neither a co-owner at law or in equity, and has not registered their statutory home rights, may benefit from recommended conveyancing practice which promotes the adoption of a cautious approach by legal practitioners engaged in a conveyance of residential property. This caution manifests itself in two important ways. In light of the difficulty in predicting whether an equitable interest exists or not, coupled with the level of enquiry necessary to be made by solicitors in order to avoid being fixed with constructive notice, solicitors are encouraged to obtain the consent of the non-title holding spouses where they believe there is a possibility that, in the circumstances, they may have an equitable interest. Consequently, Frances Silverman notes:
‘If it is thought that the spouse or civil partner may have a beneficial interest in the property, it should be assumed that the property is held by the seller on constructive trust so the spouse’s or civil partners independent confirmation of agreement to the sale must be obtained’ (Silverman, 2011).

Moreover, it is clear the most vulnerable cohort of non-owning spouses, specifically those who do not possess a beneficial interest in the family home and whose circumstances do not raise the suspicions of the vendor’s solicitor, may also benefit from recommended conveyancing practice. Robert Abbey and Mark Richards explain the situation thus:

‘Even if the non-owning spouse or civil partner takes no steps to protect Home Rights, there is no guarantee that he or she will not do so before completion. The prudent course therefore is always to obtain a written release from the non-owning spouse or civil partner of all rights in the property together with an agreement to vacate. Otherwise the seller risks being in breach of contract’ (Abbey and Richards, 2007; a similar point is made by Silverman, 2011).

On this basis, it appears good conveyancing practice requires solicitors to obtain the consent of a non-owning spouse in all cases to ensure they obtain vacant possession and avoid a late registration of home rights which may jeopardise the acquisition of vacant possession (Abbey and Richards, 2007 also refer to the quality of consent required noting ‘the spouse or civil partner must be informed that his or her rights may be affected by giving such consent, and that he or she should obtain independent advice from another practitioner before signing the release’).

It is arguable, therefore, that notwithstanding the lack of automatic legislative protection against the unilateral disposition of the home, a ‘de facto consent requirement’ currently operates in England and Wales. At the very least, obtaining the consent of a non-owning spouse is considered prudent in any conveyance of the family home. As Abbey and Richards state: ‘The wisest course for the seller’s
conveyance is therefore *always* to check the status of each occupier and to obtain a written release from adult occupiers together with an agreement to vacate on or before completion’ (Abbey and Richards, 2007, emphasis added).

Despite this, it is submitted the protection afforded to non-owning spouses in the jurisdiction may not be as ‘all-inclusive’ as it appears. If a non-owning spouse (at law and in equity) does not register their home rights, they are exclusively reliant on the adoption of recommended conveyancing practice. This requires solicitors to ensure the non-owning spouse has waived any occupation rights which could otherwise put the seller in breach of contract to provide vacant possession. However, the feared breach of contract which precipitates the solicitor’s concern will only arise if the non-owning spouse registers their home rights prior to the completion of the sale. In situations where a non-owning spouse is either unaware of the impending sale, or of their legal rights under the Family Law Act 1996, or both, the danger posed by late registration of such rights may be negligible. In such circumstances, a solicitor may elect to take a gamble and not obtain their consent. This is most likely to happen where it is believed the non-owning spouse may wish to oppose the sale. Keeping the non-owning spouse in the dark in relation to the sale of the home or their rights may be an important strategic decision in ensuring the successful completion of the sale. It is exactly in situations such as this that non-owning spouses need automatic protection.

The fact that it is good conveyancing practice or the ‘wisest course’ to obtain the consent of the non-owning spouse is insufficient. If no consent is obtained, the non-owning spouse, who does not possess a legal or equitable interest, and has not registered their occupation rights, cannot seek to have the sale declared void. (Moreover, while it is clear that some non-owning spouses who do not have an equitable interest benefit from the extra caution exercised by solicitors in ascertaining the rights of those in actual occupation, it is insufficient that such non-owning spouses are protected merely by virtue of their possibly being something else, namely a beneficial co-owner.) Therefore,
notwithstanding the increased protection afforded by the recommended conveyancing practice, it is submitted important weaknesses nonetheless remain.

(c) Analysis – The case for reform

On initial inspection, it appears the regime adopted in British Columbia provides considerable protection against the unilateral disposition of the family home; legislative provisions directly tackle the threat and equitable protection is afforded by the flexible doctrine of unjust enrichment. However, on closer analysis, it is clear that non-owning spouses in the province are in an extremely precarious position. Although the Land (Spouse Protection) Act 1996, similar to its Irish equivalent, recognises the special status of the family home and reflects a desire to protect a non-owning spouse’s right to occupy the property, the protection it affords is shallow (Fox, 2002). The primary strength of the Family Home Protection Act 1976 in Ireland is the universal protection provided by the automatic conferral on a non-owning spouse of a right of veto with regard to conveyances of the family home. To this end, the written consent of the non-owning spouse is, in effect, a precondition to a valid conveyance of any interest in the home. By contrast, it is submitted the single greatest weakness of the Land (Spouse Protection) Act 1996 (similar to the Family Law Act 1996 in England and Wales), is that positive action is required by a non-owning spouse in order to qualify for the protection available thereunder. While valuable protection is undoubtedly provided to non-owning spouses who have filed an entry against the title of the family home, the depth of protection afforded by the British Columbian legislation is seriously undermined by the lack of automatic, universal, application which represents the cornerstone of the equivalent Irish legislation.

Interestingly, the adoption of a regime based on registration similar to that applied under the Land (Spouse Protection) Act was considered in Ireland prior to the introduction of the 1976 Act.79 While recognising that such an approach would have the advantage of comparative simplicity, it was nonetheless considered to be an ‘insufficient solution’ to the difficulties arising where a vindictive
spouse sought the unilateral sale of the family home.\textsuperscript{80} Instead, the approach was described as ‘unfriendly and in most cases positively hostile’.\textsuperscript{81} Minister Cooney, the then Minister for Justice, noted,

‘under this system, so long as the wife does not take the step of registering, she is given no protection, and there is a danger that she will wait too long in a number of cases. Secondly, a registration system will not provide any protection in cases where the husband literally walks out of the home, having secretly arranged for its sale behind his wife’s back.’\textsuperscript{82}

These concerns remain pertinent and the weaknesses of system dependant on registration, to which the Minister referred, are particularly evident in the British Columbian legislation.

Furthermore, although it may be relatively easy to establish an unjust enrichment, the default remedy for such enrichment is personal, not proprietary. Indeed, even if a constructive trust over the family home is imposed, the beneficial interest of the non-title holding spouse will not override a disposition to a third party if they are in actual occupation; pursuant to the Land Title Act 1996, positive action in the form of registration is, again, required. Consequently, solicitors in the province are legitimately unconcerned by the presence of any unregistered beneficial interests held by non-title holding spouses and do not consider it necessary to obtain their consent in the absence of an entry under the Land (Spouse Protection) Act 1996. The vulnerability of non-title holding spouses is, therefore, exceedingly weak and the need for legislative reform is compelling.

The argument for legislative reform in England and Wales is more contentious. Although the protection afforded to non-owning spouses in the jurisdiction is weakened by the lack of direct legislation restricting the unilateral disposition of the home, and the need to register home rights under the Family Law Act 1996, the vulnerability of such spouses may not be as severe as it initially appears. In the first place, if a spouse possesses a beneficial interest and is actual occupation, this interest is overriding and may successfully bind a purchaser. In light of the decision in \textit{Stack v}
Dowden,\textsuperscript{83} it may now be easier to establish a beneficial interest under the common intention constructive trust, thereby extending this important protection to more non-title holding spouses than heretofore. Furthermore, even if a spouse does not possess a legal or an equitable interest, unlike British Columbia, they may benefit from recommended conveyancing practice which promotes a cautious approach in which the consent of a non-owning spouse is always obtained.

Are these protections, therefore, sufficient? It remains this writer’s opinion that they are not. The Department for Constitutional Affairs suggested in 2005 that approximately 35 percent of married households were owned by one spouse. Even if these figures are considered generous (the calculations on which these statistics were based were challenged by Kerridge, 2007), it is clear that within England and Wales, an important segment of society remains vulnerable to the unilateral disposition of the family home. While it is reassuring that recommended conveyancing practice (indirectly) provides non-owning spouses with important protection, mere reliance on the adoption of good practice procedures is a poor substitute for concrete legislative protection. It is submitted all non-owning spouses are entitled to the same level of protection, irrespective of the conveyancing standard adopted. Legislative reform to directly tackle the threat posed to non-owning spouses in the home ought, therefore, to be introduced as a matter of priority.

Indeed, a number of highly respected academics have voiced their concerns in relation to the current situation. Kevin and Susan Gray note the ‘fundamental weakness’ of the protection afforded by sections 30 and 31 of Family Law Act 1996 ‘has always been the difficulty implicit in attempting to engraft family based rights on to an existing system of registration of incumbrances governed by the general law of property’ (Gray and Gray, 2009). In considering the ‘residential security’ of spouses, they argue ‘this can ultimately be assured only by the introduction [of] a rule of automatic co-ownership of the legal estate’ (Gray and Gray, 2009). A less radical proposal for reform was advanced by Cooke, Barlow and Callus in 2006. They suggest that the disponor ought to have to provide an affidavit, rather than simply replying to preliminary enquiries and would be asked
specifically about the presence of a spouse in the home. They note: ‘The benefit of this would be
that the disponor would be alerted to, and asked to think about, the spouse’s rights; and we think
that this could be a useful reform in both sending a message and, in some cases, providing an extra
layer of protection without undue inconvenience to anyone’ (Cooke, Barlow and Callus, 2006). It is
submitted a proposal for reform which is less radical than the former yet more robust than the latter
may provide the perfect balance. (The implementation of provisions specifically directed at
preventing the unilateral disposition of the home could also have an important social impact and
would reflect the importance of the home which is once again under consideration in the 2012 Law
Commission Consultation Paper, ‘Matrimonial Property, Needs and Agreements’).

Lessons from Ireland

In this context, it is submitted an analysis of the legislative protection afforded to non-owning
spouses in Ireland becomes particularly apt. If it is accepted that legislative intervention is required,
in either/both jurisdiction(s), what lessons may be learned from the Irish approach pursuant to the
Family Home Protection Act 1976?

First, the automatic and universal application of the requirement for section 3 consent in
dispositions of the family home is a key strength of the legislation. It is submitted that the
importance of conferring automatic protection which is not dependent on registration, should not
be underestimated. It represents the core difference between the strength of the Irish regime and
the weakness of comparable legislation applied in other jurisdictions.

Second, the availability of protection under section 5 of the Family Home Protection Act 1976 for a
non-owning spouse where the owning spouse is engaging in conduct which may lead to the loss of
an interest in the home is a particularly positive protection afforded by the Irish legislation. \(^4\) This
provision confers, in effect, a power on the judiciary to make a property adjustment between the
spouses during the relationship. While the courts have established a high-threshold of proof which
must be surmounted to satisfy the court as to the applicability of the section, where this is met, the protection afforded thereunder is considerable. \(^8^5\)

Third, it is contended that the fine balance struck by both the legislature and the judiciary in relation to the rights of mortgagees and purchasers on the one hand, and the desire to protect a non-owning spouse vis-à-vis the family home on the other, is central to the success of the legislation. It is submitted that both institutions have clearly signalled their intentions to prioritise the latter in line with the protection afforded to the family under the Irish Constitution. Conveyances lacking a valid consent are void, subject only to limited exceptions. The most important exception in this regard concerns \textit{bona fide} purchasers for full value without notice. Defending the inclusion of this exception in the 1976 Bill, Minister Cooney explained section 3(3)(a) ‘gives protection to a \textit{bona fide} purchaser for value who proves that he has taken all reasonable steps and made all reasonable inquiries in regard to the purchase from a husband who turns out to have sold the home without the wife's consent’. \(^8^6\) However, implicitly, the protection of the family home is prioritised as to benefit from the exception, conveyancers are required to ensure complete and proper inquiries are undertaken to establish the position regarding the family home. \(^8^7\)

Fourth, in determining the quality of the consent required under section 3 of the 1976 Act, the judiciary has struck a balance which again favours non-owning spouses. From a mortgagee or a purchaser’s perspective, the necessity for ‘free’ and ‘fully informed’ consent presents a considerable burden as the onus of proving that the consent meets the requisite standard is placed squarely on their shoulders. \(^8^8\) In determining whether a disposition is void under the Act, the court undertakes a subjective analysis of the consent provided from the non-owning spouse’s perspective. It is irrelevant that the party receiving the consent is unaware that it is neither ‘free’ nor ‘fully informed’. Indeed, Mark Sanfey notes ‘spouses giving consent may paradoxically find themselves in a better position if they have failed to take any adequate or proper steps to inform themselves of the consequences of what they are doing’ (Sanfey, 1996). \(^8^9\)
As a result, the burden on the banks is considerable and serious repercussions may arise where a mortgagee fails to discharge the onus of proving that the consent provided under the 1976 Act was valid. Even where the nature and effect of a transaction are explained to the party giving the consent and independent legal advice is recommended, it is conceivable that a bank might still fail to show the consent was valid due to an evidentiary weakness. The net effect, in such circumstances, is that they would lose the security which they believed they had validly taken and on the basis of which they had advanced considerable funds. (This sanction has been described as ‘disproportionate to any lapse in procedures which may have occurred on the part of the bank’, see Sanfey, 1996. The bank would be entitled, however, to apply to obtain a judgment and have it registered against the family home as a judgment mortgage. Whether an order for sale would then be made, would be an issue for the court.)

Finally, the importance and widespread relevance of the legislation has been consolidated by the decision in *O’D v O’D* where the provisions of the Family Home Protection Act 1976 proved crucial in an application for the sale of co-owned property pursuant to the Partition Acts 1968 and 1876. It is assumed that this decision will continue to represent good law under the Land and Conveyancing Law Reform Act 2009, thus ensuring the continued relevance of the legislation in cases of co-ownership.

**Conclusion**

In considering enactments which endeavour to restrict the unilateral disposition of the family home, it is clear that, internationally, although the danger against which they guard ‘is not as serious as it used to be, [it is] by no means eliminated’ (Cooke, Barlow and Callus, 2006). However, this article demonstrates a clear spectrum in the level of protection afforded to non-owning spouses in the three jurisdictions under consideration. The weakest protection is afforded to non-owning spouses in British Columbia, Canada who are left in a particularly vulnerable position; neither comprehensive
legislative nor equitable protections provide a shield for such spouses. Somewhat surprisingly, the protection provided to non-owning spouses against the unilateral disposition of the home in England and Wales may be stronger than it initially appears, particularly in light of the recommended practice adopted for the conveyance of residential properties. Nevertheless, reliance on such practice cannot be considered sufficient protection. The introduction of a simpler, more transparent, approach which provides automatic rights to all non-owning spouses in the family home during marriage must be considered a priority.

By contrast, it is clear that, notwithstanding the need for some reform, the Family Home Protection Act 1976 provides substantial protection to the family home in Ireland and is vastly superior to the approach adopted in either British Columbia or England and Wales. While the 1976 Act does not confer a proprietary interest in the property on the non-owning spouse, merely providing a statutory right to veto any conveyance thereof, as Geoghegan J noted in the High Court, the rights conferred on a spouse under the Act ‘are very important quasi proprietary rights, even if they are not ownership rights’. Indeed, in considering the nature and degree of the proprietary protection conferred on the non-owning spouse in relation to the family home by virtue of the Family Home Protection Act 1976, Fox notes, ‘Family property policy in relation to the protection of the family home ... in Ireland has engendered a system which is narrow in its scope, but which provides a substantial or “deep” protection for spouses’ (Fox, 2002). Therefore, it is contended that the Irish legislation presents a strong template for legislators across the common law world who are interested in ensuring the continued protection of non-owning spouses in the family home while a marriage subsists.

---

1 This protection was originally introduced pursuant to the Matrimonial Homes Act 1967 in light of the decision in *National Provincial Bank v Ainsworth* [1965] UKHL I, [1965] AC 1175.
2 Almost identical restrictions on unilateral dispositions of the family home were extended to Civil Partners by s 28 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Note the Law Reform
Commission, *Consultation Paper on the Rights and Duties of Cohabitees* (LRC CP32–2004) expressed the view at p 54 that the Family Home Protection Act 1976 should not be extended to unmarried cohabitants in light of the conveyancing difficulties it would create. It noted that the extension of the provisions to qualified cohabitants would ‘create a nightmare for conveyancers’ especially since the presumptive scheme suggested in the paper meant that only the court could determine whether the parties were qualified cohabitants or not. As the paper stated, ‘how is the purchaser supposed to know if the seller is a qualified cohabitee, if the latter does not know himself?’

3 The Irish legislation does not specifically create any ‘occupation rights’ in the family home. Wives will, however, be protected by their common law right to reside in the family home which belongs to her husband. See *Heavey v Heavey* (1974) 111 ILTR 1. It is assumed, on the basis of the constitutional guarantee of equality that such protection would also be afforded to a husband where the family home is owned by the wife.

4 As Senator Gallagher colourfully put it, ‘if Cupid's arrow did not hit the man's heart her bank balance certainly did’. See Seanad Deb 27 October 1993, vol 137, col 1539.

Moreover, married women were legally incapable of contracting, of suing or of being sued in their own name. Married women were allowed to conduct business separately from their husbands but only with his consent. However, equity adopted a more lenient approach developing the concept of a wife’s ‘separate property’.

5 Married Women’s Property Acts 1865, 1870, 1874, 1882, 1884, 1893 and 1907.

6 Seanad Deb 1 July 1976, vol 84, col 923.

7 Article 41.1.1° of the Irish Constitution states the State ‘recognises the Family as the natural primary and fundamental unit group of Society’ and Article 41.1.2° provides that the State ‘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 State’.

8 Seanad Deb 1 July 1976, vol 84, col 923.


11 See above, n 2, regarding the extension of the protection to civil partners.

12 ‘Family home’ is defined in s 2(1) as ‘primarily a dwelling in which a married couple ordinarily resided. The expression comprises, in addition, a dwelling in which a spouse whose protection is in issue ordinarily resides or, if that spouse has left the other spouse, ordinarily resided before so leaving.’ Regarding the term ‘ordinarily resides’ see *National Irish Bank v Graham* [1995] 2 IR 244 where it was held the Act does not apply to a house which is merely intended to be occupied as a family home. See also *Linnie v Murphy* [2008] IEHC 362.

13 As a result, in *Kyne v Tiernan* (HC, 15 July 1980) the court held that if consent is given to the contract for sale, further consent to the execution of the deed of conveyance giving effect to that contract is not required. See also *Nestor v Murphy* [1979] IR 326. In practice, however, consent is generally obtained at both stages of the process.

14 See *Bank of Ireland v Hanrahan* (HC, 10 February 1987). Consent provided after the conveyance, will not have retrospective effect and will not validate the conveyance.


19 (HC, 10 March 1997) at 8-9.

20 As a result, the purchaser or mortgagee receives no title at all. Note the protection afforded under the Act is personal and a conveyance contrary to s 3 is only void at the instigation of a non-owning spouse. See *Barclays Bank (Ireland) Ltd v Carroll* (HC, 10 September 1986).

21 S 3 provides the Act does not apply to a conveyance pursuant to a contract executed prior to the coming into effect of the Act, a conveyance pursuant to a contract made prior to marriage or where the purported conveyance is to the other spouse. Moreover, it does not apply to a conveyance by a third party.

22 S 3(6) of the Family Home Protection Act 1976.

23 See *Somers v Weir* [1976] IR 94.

24 See s 86(1) of the Land and Conveyancing Law Reform Act 2009.
It is clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith’. See Somers v Weir [1976] IR 94 at 107.

It is also clear that conspiring with a vendor in the production of a statutory declaration or making ‘a wild and inaccurate leap in the dark’ will not be considered to demonstrate ‘good faith'. See Somers v Weir [1976] IR 94 at 107.
continues, ‘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.’


51 L v L [1989] ILRM 528, [1992] 2 IR 77 at 107. Indeed, it was held in N v N [1992] 2 IR 116 at 122 per Finlay P that a contribution in ‘money or money’s worth’ is required in order to generate a beneficial interest. However, see BM v AM [2003] IEHC 170 where the High Court appeared to grant a housewife and mother a beneficial interest in the family home on the basis of her work within the home.

52 W v W [1981] ILRM 202. An applicant who wishes to rely on such a contribution must instead avail of the doctrine of equitable estoppel.

53 [1985] ILRM 153. This view was confirmed by the Supreme Court in N v N [1992] 2 IR 116 where Finlay CJ contradicted his earlier approach in W v W [1981] ILRM 202 and held that where such an agreement exists it could give rise to a beneficial interest in the property. In CF v JDF [2005] 4 IR 154, McGuinness J held, obiter, ‘Even in the somewhat liberal context of family law the making of improvements to property cannot establish any form of beneficial title.’ It is also worthwhile to note that if the improvements were financed by a mortgage, and the non-owning spouse contributed to the mortgage repayments, this would give rise to a beneficial interest.

54 Note some flexibility was evidenced in GNR v KAR (High Court, 25 March 1981).

55 See McGill v S [1979] IR 238.

56 (High Court, 18 November 1983).

57 To ensure the efficacy of the protection provided by the legislation, the Land (Spouse Protection) Act 1996 applies exclusively to property occupied by the married couple within one year immediately preceding the application. See Spoklie (Trustee of) [1996] CanLII 1048 (BC SC).

‘Disposition’ is defined in s 1 as including: a transfer, agreement of sale, assignment of an agreement for sale, lease or other instrument intended to convey or transfer any interest in land; a mortgage or encumbrance intended to charge land with the payment of money, and required to be so executed; a devise or other disposition made by will, and; a mortgage by deposit of duplicate indefeasible title or indefeasible title, or other mortgage not requiring the execution of any document. For examples of the protection afforded by making an ‘entry’, see Rishi v Nijjar [2000] CanLII 1607 (BC SC); see also Straarup v Barton [2007] CanLII 37 (BC SC) where the husband was unable to refinance a farm mortgage in order to pay off his debts as his wife had filed an entry under the Land (Spouse Protection) Act 1996 of which he was unaware. Although the mortgage was approved it could not be registered without her consent on discovery of the lien.

58 The Canadian courts have, in certain circumstances, imposed a resulting trust where indirect contributions are made. For example, paying for household expenses have generated an interest, see Brintnell v Grasley [2000] CanLII 1322 (BC SC). However, the more flexible alternative afforded by the doctrine of unjust enrichment which also takes non-financial contributions into consideration is generally favoured in the absence of direct contributions to the purchase price.

59 See Murdoch v Murdoch [1975] CanLII 193 (SC C), the dissenting judgment of Laskin J who considered the applicant wife had ‘established a right to an interest which it would be inequitable to deny and which, if denied, would result in the unjust enrichment of her husband.’ This was developed further in Rathwell v Rathwell [1978] CanLII 3 (SC C).


61 Six of the nine Supreme Court judges were in favour of imposing a constructive trust in order to remedy the unjust enrichment.


63 Dickson J added, ‘This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.’ Pettkus v Becker [1980] CanLII 22 (SC C) at 848.

64 [1993] CanLII 126 (SC C).

65 See Kerr v Baranow; Vanasse v Seguin [2011] CanLII 10 (SC C); 1 SCR 269 at [47].

66 Kerr v Baranow; Vanasse v Seguin [2011] CanLII 10 (SC C); 1 SCR 269 at [50]-[52]. In Peter v Beblow [1993] CanLII 126 (SC C), McLachlin J stated: ‘Occasionally the remedial notion of constructive trust is even conflated with unjust enrichment itself, as though where one is found the other must follow.’

S 29 states that, except in the case of fraud, a person contracting or dealing with or taking or proposing to take from a registered owner a transfer of land, or a charge on land, or a transfer or assignment or subcharge of the charge, is generally not, despite a rule of law or equity to the contrary, affected by an express, implied, or constructive notice of an unregistered interest affecting the land or charge. They are affected, however, where (a) there is an interest, the registration of which is pending, (b) there is a lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement.

Unfortunately, it has been unclear as to exactly what conduct on the part of a purchaser constitutes fraud within the meaning of s 29. Indeed, this ambiguity is heightened in British Columbia as, unlike other jurisdictions based on the Torrens system, the Land Title Act does not contain a provision which states unequivocally that actual notice does not constitute fraud. McKinnon J in Szabo v Janeil [2006] CanLII 502 (BC SC) at [30] stated the law thus: ‘Actual notice of a prior unregistered interest may constitute fraud, but that it must be accompanied by an element of dishonesty in the conduct of the purchaser. No universal rule will be dispositive in all instances. The inquiry is thus a contextual one, to be decided on the facts of a particular case.’ See also Jager the Cleaner Ltd v Li’s Invn Co [1979] CanLII 329 (BC SC); (1979) 11 BCLR 311.

These figures were considerably lower when faced with an identical scenario involving cohabitants.

Oddly, however, when the situation was altered to consider a scenario where the house was bought in the wife’s name after marriage, the respective figures were 49 to 13. On independent enquiry, these figures were confirmed by Professor Barlow who suggested that perhaps if the property was purchased in the wife’s sole name after the marriage, the couple must have considered it to be her property rather than jointly owned property. As a result, it could be suggested that there is an implicit understanding that the husband has conceded control of the property to her. Despite describing such reasoning as ‘counter-intuitive’, Professor Barlow believed this was the most likely explanation for the finding.

Wroth v Tyler [1974] Ch 30 at 46A-B per Megarry J. This has also proved to be true in British Columbia under the Land (Spouse Protection) Act 1996, above.

In light of Stack v Dowden [2007] UKHL 17; [2007] 2 AC 432 it appears the purchase money resulting trust will no longer be applied to determine the beneficial ownership of the family home.


Lloyd’s Bank v Rosset [1990] 1 All ER 111.


Alerting a non-owning spouse to the impending sale of the home or to their rights under the Family Law Act 1996 would certainly increase the likelihood that they would register their home rights if they opposed the sale.

At the time, the Irish legislature was considering a modified version of the approach adopted in England under the then Matrimonial Homes Act 1967 (now included in the Family Law Act 1996 discussed below).


Such protection is not afforded by the Land (Spouse Protection) Act 1996.

In order to render the section of even more benefit to non-owning spouses, it is contended a legislative amendment removing the requirement for intention could be introduced.

Dáil Deb 25 May 1976, vol 291, col 58 per Mr. Cooney. In this manner, the legislation protects a purchaser where the vendor conceals the fact that the property for sale is a family home and, having completed the relevant enquiries, the purchaser does not discover this fact.


However, unlike a situation arising upon the creation of a mortgage or a charge which will be considerably more ambiguous, it will be much harder to prove that a spouse consenting to a sale of the family home did not understand the consequences.

(High Court, 18 November 1983).

In particular, the Family Home Protection Act 1976 proves limited where a judgment mortgage is registered against the family home, see Containercare Ireland Ltd v Wycherley [1982] IR 143. Unfortunately, a discussion of this weakness is outside the scope of this article.


References


Mee J. (2012). ‘Case Comment: Jones v Kernott: Inferring and Imputing in Essex’ *Conv* 76(2) 167-180.


