Judgment Mortgages and the Family Home Protection Act 1976: A renewed call for reform

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Abstract

The introduction of the Family Home Protection Act 1976 (the “1976 Act”) was a significant development in the protection of the family home in Ireland. However, an important lacuna has emerged in its coverage in light of its inapplicability to judgment mortgages registered over the family home. On the Tenth anniversary of the Law Reform Commission’s Consultation Paper on Judgment Mortgages, this article draws on the most up-to-date data to highlight the seriousness of this shortcoming. It investigates the vulnerability of non-debtor spouses where a judgment mortgage is registered over the family home and questions what reforms may be introduced to better achieve the objectives of the 1976 Act in such circumstances.

Introduction

In the mid-1970s, Senator Mary Robinson remarked: “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.”¹ In response to this threat, 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 restricted.² This proposal, modified and extended by the legislature, was subsequently brought to fruition through the Family Home Protection Act 1976.³ Although initially conceived as a means of protecting non-owning spouses in the family home, particularly wives, the objective of the legislation has since been stated in broader terms. Blayney J. for the Supreme Court in Bank of Ireland v Smyth noted 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.⁴ 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.”⁵

The main source of protection afforded by the 1976 Act arises under s.3, which requires, subject to certain exceptions, the written consent of the non-owning spouse⁶ for the conveyance of any interest in the family home.⁷ This consent must, (a) be made prior to the conveyance; (b) be in writing; and (c) be valid. To be valid, it must be “free” and “fully informed”⁸ and the burden of proving this standard rests with the person seeking to rely on the consent. Moreover, an extensive array of inter vivos transactions is directly affected by the 1976 Act. A conveyance under s.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. In light of its comprehensive nature, Minister Cooney, the then Minister for Justice, noted in Dáil Éireann in 1976: “It is an unavoidable consequence that from now on the consent of the wife will be required in all cases of the sale of the family home.”

However, an important lacuna in the legislation has emerged vis-à-vis judgment mortgages which seriously compromises the effectiveness of the 1976 Act in achieving its objective. In light of the decision in Containercare Ireland Ltd v Wycherley, it is clear section 3 consent is not required in situations where a judgment mortgage is registered against a family home.

On the Tenth anniversary of the Law Reform Commission’s Consultation Paper on Judgment Mortgages 2004, this article once again places the focus squarely on the difficulties posed by judgment mortgages. Drawing on the most up-to-date statistical data, it highlights the increasing prevalence of judgment mortgages in Ireland and, in particular, the specific threat they pose to the family home. The article investigates the extent to which non-debtor spouses remain vulnerable where a judgment mortgage is registered over the family home and what reforms may be introduced to protect such spouses. Finally, the article examines why the proposals contained in the 2004 Consultation Paper have not been introduced to date and renews the call for reform.

A Shortcoming Emerges

Rejecting the proposition that a judgment mortgage which had been registered without the prior consent of the non-owning spouse was void under the 1976 Act, in Containercare Ireland Ltd v Wycherley, Carroll J. held: “[A] judgment mortgage is a process of execution.... A judgment mortgage, if registered against a family home, is not a disposition by a spouse purporting to convey an interest in the family home. It is a unilateral act by a judgment creditor ... it cannot be construed as a conveyance by a spouse.” This approach was confirmed by Barrington J. in Murray v Diamond:

“I do not think that the mere fact that a man has irresponsibly allowed himself to get into debt, or allowed a judgment to be obtained against him and thereby allowed a situation to develop in which his creditor registers a judgment against his interest in the family home, would justify a court in saying that he has conveyed or purported to convey his interest in the family home to the judgment mortgagee.”

A judgment mortgage, he held, comes into existence by operation of law. Although the Supreme Court in Bank of Ireland v Purcell “dropped a heavy hint that it disapproved of the idea that judgment mortgages were not covered by the Family Home Protection Act 1976”, this remains the reality. As a result, the situation may be summarised thus:

“[I]f a husband incurs business or other debts for which he is personally liable, while he cannot raise money to discharge such debts by mortgaging the home without his wife's cooperation, where the debts are not discharged and a judgment is obtained against him for the money due, a judgment creditor may register the judgment against the husband's interest in the home and then bring an application before the courts to seek an order for
sale to enforce payment of the monies due to him out of the husband’s share of the proceeds realised from any such sale of the home.”

The difficulty presented by the emergence of this legislative gap has long been acknowledged. Almost 30 years ago, the Report of the Joint Oireachtas Committee on Marriage Breakdown recommended “legislative action should be taken immediately in order to prevent the spirit of the [1976] Act being defeated whereby judgment mortgages can be used to secure the sale of the family home without the consent of either or both spouses”. No action followed. Exactly 10 years ago, in 2004, the Law Reform Commission’s Consultation Paper on Judgment Mortgages was published. It noted that while no specific statistical data was available, it seemed “reasonable to assume that a significant proportion of judgment mortgages” were registered against family homes. In light of the difficulties in the area, it too recommended reform of the law governing judgment mortgages and the family home. Again, no legislative action was forthcoming.

In the meantime, however, the number of judgment mortgages filed in Ireland has increased dramatically year on year. While 367 judgment mortgage affidavits were filed in the High Court in 2004, 3,075 judgment mortgage certificates, which since December 1, 2009, replace judgment mortgage affidavits, were filed in the High Court in 2012—a staggering increase of more than 800 per cent. Similarly, although the earliest statistical data on the frequency of judgment mortgage affidavits filed in the Circuit Court originates from 2007, this too shows a considerable increase. While 1,266 such affidavits were filed in the Circuit Court in 2007, this figure more than trebled by 2012 when 4,375 judgment mortgage certificates were filed.

Moreover, although not all judgment mortgages filed in the High Court or the Circuit Court are ultimately registered against property, a large proportion is. While the Law Reform Commission reported 1,779 judgment mortgages were registered in the Land Registry and the Registry of Deeds in 2003, this figure has since increased by more than 450 per cent with 8,097 judgment mortgages registered in the Land Registry and the Registry of Deeds in 2013. Although, like the Law Reform Commission, this author was unable to obtain statistical data on the issue, it remains “reasonable to assume” a considerable proportion of these judgment mortgages continue to be registered against family homes throughout the country.

Therefore the question arises: In light of the inapplicability of the 1976 Act, how vulnerable is an “innocent” spouse to the sale of a family home where a judgment mortgage is registered over the property and what can be done to make their position more secure, thereby better achieving the core objective of the 1976 Act in such circumstances?

The Vulnerability of “Innocent”, Non-debtor, Spouses and Avenues for Reform

Where a judgment mortgage is registered over a family home, the vulnerability of an innocent, non-debtor, spouse depends to some extent on how ownership of the property is held.

The vulnerability of an innocent, non-debtor, co-owning spouse

Until very recently, where a judgment mortgage was registered against a co-owner’s interest in a family home, a judgment creditor was required to seek an order for the sale of the entire property under the Partition Acts 1868 and 1876 in order to enforce their security. Pursuant to s.4 of the Partition Act 1868, where the co-owner who requested the sale was entitled to a 50 per cent share
or more in the ownership of the property, 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.27 In such circumstances, therefore, it appeared there was a strong presumption in favour of sale.28 Notwithstanding this, however, First National Building Society v Ring appeared to throw an important lifeline to vulnerable, non-debtor, co-owning spouses by indicating that an order for sale may not automatically be made against the property upon an application by a judgment creditor under the Partition Acts.29

Ring concerned a creditor who registered a judgment mortgage against a family home on foot of a judgment obtained against the husband for £160,000. While the wife did not possess a right of veto under the 1976 Act, Denham J. considered the fact that the property in question was a family home was a relevant factor which ought to be considered by the court when deciding whether or not to exercise its discretion to refuse a sale under s.4 of the Partition Act 1868. Having considered the particular facts of the case, Denham J. concluded: “The second defendant who is a co-owner and who is an innocent party and has no judgment registered against her would undoubtedly suffer a significant sacrifice if her property, part of the family home, were now sold. In these circumstances it does not appear appropriate now to order partition or sale in lieu of partition.”30

Notwithstanding that the importance and strength of the precedent became a source of some confusion,31 Laffoy J. again referred to Ring in the 2010 High Court decision of Trinity College v Kenny and distinguished the facts in Ring from the facts at hand.32 Considering an application seeking an order for sale of the family home pursuant to a judgment mortgage, the court found that the couple, in their seventies, would be in a position to purchase alternative accommodation for themselves with the balance of the proceeds of sale once the debt was repaid. The court also observed that the couple’s five adult children had all left home. Notwithstanding that there would be a “degree of disruption to their lives”, an order for sale was, therefore, granted.33

The decisions in Ring and Trinity College appeared to establish that where a family home was used as security, a judgment creditor was not conferred with an automatic entitlement to an order for sale of the property upon the registration of his interest in it—whether such a request was granted, depended on the facts of the case.34 Moreover, it is suggested that, although the situations were by no means the same, such an approach was in keeping with the decision of O’D v O’D.35 Here, 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. held that what constituted “good reason to the contrary” within the meaning of s.4 of the Partition Act 1868 should “properly have regard to the rights of parties under the Family Home Protection Act 1976”.36

Today, however, the Partition Acts have been repealed and replaced by the Land and Conveyancing Law Reform Act 2009 (“the 2009 Act”). As a result, a judgment mortgagee must now apply for an order for sale pursuant to s.31 of the 2009 Act. Does the apparent authority of Ring continue to hold good? It appears it might.38 Furthermore, although there may have been doubts about the strength of its precedent, it is certainly arguable that the introduction of the 2009 Act leaves the door ajar for the approach in Ring to be developed on more solid footing.39

Admittedly, on one hand, it has been argued that the 2009 Act removes the framework for judicial discretion as previously existed under the Partition Acts 1868 and 1876 “and replaces it with an entirely open-ended regime where the co-owner has no certainty of being able to bring the co-
ownership to an end and no criteria are mentioned to guide the court” thereby affording the judiciary “untrammelled discretion”. While this is clearly a concern, on the other hand, it could present an opportunity for the positive development of the law in relation to judgment mortgages. As Conway notes:

“[T]he new statutory jurisdiction under s.31 is more flexible than that under the Partition Acts, where the court’s discretion was usually restricted to making an order for either partition or sale and the difficulties formerly associated with the former remedy usually created a strong presumption in favour of the latter. This may have some bearing on the final outcome”.41

Moreover, it is contended the development of an approach akin to that adopted in Ring would not be unduly unfair to third party creditors. Unlike other jurisdictions such as England and Wales where an “overarching pro-creditor position” has been observed,42 the protection of the family home in Ireland is clearly prioritised in line with Art.41 of Bunreacht na hÉireann which “aspires to protect the home as the seat of the family”.43 In light of both the legislative and judicial development of the law in this area, mortgagees who hold the family home as security ought to be acutely aware of the high level of protection afforded to the property. It is arguable that they ought to be alert to the special nature of the home and the fact that it may constitute a riskier form of security in comparison to other types of premises.

Furthermore, in considering other methods of circumventing the difficulties posed by the lacuna in the 1976 Act where a judgment creditor seeks an order for sale of a co-owned family home, Professor Mee also raises an interesting possibility.44 He suggests that a judgment debtor could arguably avail of his right of veto under the 1976 Act where a judgment creditor, having obtained a court order for the sale of the property, conveys the husband’s own share of the family home to a purchaser and then requires the wife to also convey her interest in the home to the purchaser. This conveyance by the wife, he argues, falls within the scope of s.3(1) of the 1976 Act and, therefore, necessitates the prior written consent of the husband which he could, theoretically, refuse. Mee explains that the “right of veto is a valuable, independent right. It arises in the husband, not because of his own property rights over the home, but because of his wife’s ownership of a share in the home.”45

Assessing the merit of this possibility, Conway suggests that “while it seems wrong in principle” that a spouse who has incurred a debt precipitating the registration of a judgment mortgage against the family home should be able to utilise a protection which was introduced with the intention of protecting an “innocent” spouse, this use of the Act would correlate with the “ethos” of the legislation which is focused on ensuring the protection of the family home.46 Despite this view, however, it is submitted that even where a husband refuses to give his consent in such a scenario, there is a high probability that the court is likely to dispense with the consent under s.4 of the 1976 Act.47

The vulnerability of an innocent, non-debtor, non-owning spouse

Where a family home is not co-owned, either at law or in equity, non-owning spouses appear to be especially vulnerable to the registration of a judgment mortgage and, in due course, a court order for the sale of the premises.48 On the basis of Carroll J.’s decision in Containercare, it seems that
where a judgment mortgage is registered against the family home an order for sale should be made where no beneficial interest accrues to the non-debtor spouse. What solutions can, therefore, be presented to reduce the helplessness of such spouses?

One obvious means of improving the situation for a potentially wide cohort of non-owning spouses is to better facilitate such spouses becoming co-owners in equity. The equitable remedy of choice in the Irish courts for disputes regarding the beneficial ownership of the family home is the purchase money resulting trust. Since its first application in Heavey v Heavey, the purchase money resulting trust affords non-owning spouses the ability to generate an equitable interest in the family home through direct or indirect contributions. It has been established that direct contributions to the purchase price of a property, whether in an outright purchase or financed by mortgage repayments, generate a beneficial interest. Moreover, both contributions to a family fund while a mortgage is being repaid and contributions through unpaid work in the homeowner’s business shall also give rise to a successful claim for a beneficial interest in the home.

Unfortunately, however, other very valuable indirect contributions do not presently generate a beneficial interest. In particular, it is widely considered that the failure to recognise unpaid work in the home as capable of generating a beneficial interest represents the single greatest weakness in the purchase money resulting trust. If the purchase money resulting trust was reformed to give recognition to unpaid domestic contributions, this would allow many more spouses to avail of the apparent precedent in Ring where a judgment mortgage is registered against the family home. Nevertheless, as de Londras observes:

“To say that courts ought to step in and realise socio-economic rights – such as ownership rights for financially disenfranchised stay-at-home mothers and house-wives – is not, as Gerry Whyte has noted, ‘to say that they should be first into the fray. There are good institutional reasons why we should look initially to the legislative and executive branches for protection of such rights ... the courts should only be used as a last resort, when it is clear that the political process is incapable of protecting the right in question’.”

Shatter suggested the amendment of s.36 of the Family Law Act 1995 to provide that the contribution made by both spouses to the welfare of the family would be deemed a contribution in money or money’s worth capable of generating a beneficial interest in the family home. He also recommended that the “artificial distinction” between contributions to the acquisition of property and the improvement of property should be removed. These recommendations did receive some support from the Law Reform Commission in its 2004 Consultation Paper on the Rights and Duties of Cohabitees:

“Shatter’s proposals are attractive in that they do not necessitate any radical change in the existing law. They also have the added advantage that third parties would not be unduly disadvantaged as it would be as difficult to predict whether an interest was acquired by means of unpaid work within the home as opposed to unpaid work outside the home. The interests of prospective purchasers or mortgagors could be protected by the creation of a new requisition on title dealing with the matter.”

However, although these recommendations undoubtedly have merit, their implementation may create more problems than they would solve. First, despite Shatter’s claims to the contrary, the
quantification and valuation of unpaid work in the home would be difficult. Secondly, the recommendations would not assist spouses who made pre- or post-acquisition contributions. This was highlighted as a key weakness by the Law Reform Commission. As a result, it noted: “While the rules governing the purchase money resulting trust could be amended to consider such contributions ... to do so would be to force property law to solve what is essentially a family law problem.”

One approach which would avoid these weaknesses is the reintroduction of an amended version of the Matrimonial Home Bill 1993. Section 4 of the 1993 Bill provided that where a spouse was the sole owner of the matrimonial home on the commencement date, or became a sole owner thereafter, the beneficial interest in the property would vest in both spouses as joint tenants. Despite this, the Supreme Court unanimously found the Bill to be unconstitutional as it infringed on the authority of the family. In particular, the retrospective application of the legislation proved to be its downfall. Nevertheless, a number of academics have suggested that such legislation could be reintroduced without constitutional question provided its application is limited to prospective effect. Although this reintroduction would undoubtedly be a welcome improvement in the law, it would have to be part of a wider reform of matrimonial property law. As Woods notes: “If ... the reintroduced Bill only applied to a matrimonial home purchased by a spouse after the commencement date, it could be argued that this would unfairly discriminate against the non-owning spouse whose matrimonial home had been acquired before the commencement date.” Therefore, the reintroduction of the amended Bill would have to be in conjunction with reform on the basis of Shatter’s proposals for the development of the purchase money resulting trust. Despite the respective weaknesses of both proposals, the combined effect of these reforms would certainly provide much better protection for otherwise non-owning spouses.

Unfortunately, however, although de Londras notes it is “somewhat surprising” that no government has proposed a community of property scheme since the failure of the Matrimonial Home Bill, it is unlikely whether such reform will, in fact, be forthcoming in the near future. The legislature seems to demonstrating signs of “Once bitten, twice shy”. Indeed, even if the proposals were introduced, not all non-owning spouses would be able to avail of the protection they afford. Alternative solutions must, therefore, be considered.

Advancing a partial solution in 1997, both in cases of sole-ownership and co-ownership, Shatter proposed that, whether or not legal or equitable co-ownership exists, s.5 of the 1976 Act could be modified to ensure the protection of the family home against the registration of a judgment mortgage. Currently, pursuant to s.5, the court is empowered to transfer the family home to the non-owning spouse where the owner spouse is engaging in conduct which may lead to the loss of the property. An order to protect the family home under s.5 may only be made, however, where there is evidence that the owner spouse is engaging in such conduct with an intention to deprive the applicant spouse of their residence in the family home. Crucially, therefore, the conduct concerned must represent a deliberate attempt to lose, or actually have resulted in the loss of, such an interest. In this regard, it has been noted, “[t]he intention requirement has been strictly applied, sometimes in a way that causes real difficulties” and evidence of carelessness or irresponsibility is insufficient. Moreover, as Lyall notes, cases in which an order under s.5 are made “do not, unfortunately, provide any consistent guide as to evidence of deliberate intention”. Similarly, de Londras observes:
“This ad hoc approach, has the tendency to undermine the potentially significant protective properties of s.5(1) ... for the simple reason that succeeding in such an application must inevitably be perceived as an unlikely eventuality and ... practitioners will be somewhat reluctant to advise their clients to claim under this section alone. Thus, while such applications may form part of a larger claim, it seems unlikely that the jurisprudence on s.5(1) is stable enough for a practitioner to be able to confidently advise a client as to its potential usefulness in an apposite case”. 71

To overcome these difficulties, Shatter recommended the amendment of s.5 to facilitate court orders transferring the entire ownership, or a share of it, from one spouse to the other, “without the applicant spouse having to prove that the spouse so behaving specifically intends that his or her conduct deprive the applicant spouse and/or dependent children of the family of their right to reside in the home”. 72 Although de Londras describes this requirement of intention as a “counterbalance” to the “somewhat speculative nature of protecting against harm that has not yet accrued”, 73 it is contended that in circumstances where the family home is clearly in danger of being lost due to the actions of the owning spouse, the balance of fairness should weigh in favour of intervention. 74

Again, however, although such law reform would appear to offer an effective solution on the simplest terms, difficulties would still remain. For instance, what if it is too late to get a section 5 order and a judgment mortgage has already been registered against the property? In such circumstances, it is submitted that the implementation of the proposals contained in the Law Reform Commission’s 2004 Consultation Paper on Judgment Mortgages would represent a fair solution. It recommended that to protect the interests of a non-owning spouse, “no order for sale of a family home pursuant to a judgment mortgage should be possible unless the court so orders, having heard all the interested parties”. 75 In this manner, it proposed that the situation arising on the registration of a judgment mortgage would more closely mirror s.61(4) of the Bankruptcy Act 1988, which states:

“Notwithstanding any provision to the contrary contained in ss.(3), no disposition of property of a bankrupt, arranging debtor or person dying insolvent, which comprises a family home within the meaning of the Family Home Protection Act 1976, shall be made without the prior sanction of the Court, and any disposition made without such sanction shall be void.”

The Law Reform Commission also suggested a principled approach to the exercise of the court’s discretion by laying down specific factors to which the court should have regard in determining whether to order a sale of the family home pursuant to a judgment mortgage.

These principles included:

- the financial means of the judgment creditor, the non-debtor owner and the family of the non-debtor owner residing in the property;
- whether the sale of the property would generate sufficient funds to allow the non-debtor owner to purchase reasonably similar accommodation in the area;
- the amount of the judgment mortgage as a proportion of the value of the property;
- the ability of the judgment debtor to provide reasonable alternative accommodation from the proceeds of sale;
Yet, notwithstanding their apparent simplicity and attractiveness, these proposals were not implemented by the provisions governing judgment mortgages included in the Land and Conveyancing Law Reform Act 2009. Two factors appear to have influenced this omission. First, it was considered that it would be more appropriate to deal with this issue by amending the 1976 Act. Secondly, it was considered that the 2004 Law Reform Commission proposals were merely contributions to a consultation paper and the provisional recommendations had not followed normal procedure and been firmed up into a report before the project leading to the 2009 Act began. While the latter is, perhaps, a legitimate explanation, it could be easily overcome. However, the former excuse seems questionable. Extending the 1976 Act to include judgment mortgages is impractical. It is highly unlikely that a spouse would agree to the registration of a judgment mortgage. Moreover, although s.4 of the 1976 Act empowers the court to dispense with the consent of the non-owning spouse where it is “unreasonable” for the spouse to withhold such consent having regard to all the circumstances, where a judgment mortgage is registered against a family home such a refusal to consent could hardly be regarded as “unreasonable” in light of the negative consequences which would flow from such an action. Indeed, the Law Reform Commission noted, “it appears to us that imposing such a requirement would render the judgment mortgage procedure unworkable”.

Finally, it is worthwhile to note that an alternative approach adopted by some homestead provisions in the United States provides for the exemption, to a greater or lessor extent, of the family home from actions to recoup unsecured debts. Although a similar approach in Ireland would overcome the difficulties caused by the lacuna in relation to judgment mortgages and better achieve the objectives of the 1976 Act, it would be likely to give rise to considerable opposition from the commercial and lending sector, particularly in the current economic environment. As a result, a discretionary approach which seeks to better balance the interests of both third party creditors and non-debtor spouses appears preferable. As de Londras states, “What seems to be needed ... is a protection measure for the spouse ... at the point of the proposed enforcement of the judgment mortgage, as opposed to at the point of its creation.”

Conclusion

The 1976 Act is considered 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. However, a serious gap has arisen in the statutory coverage which undermines the ability of the legislation to achieve its core objective, namely, “to protect the interests of the non-owning spouse and the family”. Indeed, the inapplicability of the legislation to judgment mortgages registered against the family home now represents the “main deficiency” of the Act.

In light of this “deficiency” and the resulting vulnerability of non-debtor spouses in the family home, this article has considered a number of avenues for reform. In particular, it is submitted the amendment of s.5 of the 1976 Act and the incorporation into law of the Law Reform Commission’s 2004 proposals are viable solutions which would go a long way towards remedying the vulnerability of such spouses in the family home. Unfortunately, however, to date, no action has been taken and the failure of the legislature to include the 2004 proposals in the 2009 Act, is especially striking. The proposals seem to have been put on the back-burner indefinitely indicating a general disengagement
with the issue by the legislature which appears to view this lacuna in the 1976 Act somewhat benignly. Yet the shortcomings of the law in this respect are very real and ought to be recognised as such. In light of the recent economic turmoil there has been a dramatic increase in the registration of judgment mortgages in Ireland as evidenced in the statistical data reproduced above. As a result, the weakness in the protection afforded by the 1976 Act due to the legislative lacuna is now amplified. The legislature must act, sooner rather than later, to close this legislative gap and to achieve, more effectively, the objectives of the 1976 Act.

1 84 Seanad Debates Col.923.
2 Report of the Commission on the Status of Women (Dublin: Stationery Office, 1972), p.175. The second acceptable alternative the Commission considered to protect non-owning spouses vis-à-vis the family home was based on the incorporation of a system of co-ownership.
3 The Commission proposed that if a wife did not agree with a proposed disposition of the home, she would have the right to apply to the court within a specified time to veto the transaction where it would cause “undue hardship”, see Report of the Commission on the Status of Women (Dublin: Stationery Office, 1972). However, Minister Cooney on introducing the 1976 Bill doubted, “that a system that required the wife to go to court in order to protect her interests in this area would provide a sufficient protection” and, consequently, introduced a much more robust approach to the protection of non-owning spouses. See 291 Dáil Debates Col.74. Note, although introduced to combat the vulnerability of women in the home, the legislation is gender neutral.
6 While s.3 applies exclusively to spouses, essentially 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. See J. Mee, “Succession and the Civil Partnership Bill 2009” (2009) 14(4) C.PL.J. 86. See also S. Curtis, “The Family Home, Property Adjustment Orders and the Civil Partnership Bill 2009” (2010) 15(2) C.P.L.J. 33.
7 “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 leaving.” Regarding the term “ordinarily resides” see National Irish Bank v Graham [1995] 2 I.R. 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.
9 291 Dáil Debates Col.438 (emphasis added).
19 However, from a procedural point of view, changes were introduced under s.116 of the 2009 Act. Moreover, under the law formerly applied, considerable differences arose in relation to the powers of enforcement open a judgment creditor depending on the status of the land (i.e. whether it was registered or not). The Land and Conveyancing Law Reform Act 2009 now ensures the uniformity of treatment of judgment mortgages across both registered and unregistered land.
It appears in some cases that once a judgment is filed, the threat of registering it against the creditor’s property is sufficient to obtain repayment of the debt. Consequently, the annual number of judgment mortgage affidavits or certificates filed is likely to be higher than the number actually registered in the Land Registry or Registry of Deeds.

See the Law Reform Commission, Consultation Paper on Judgment Mortgages, (LRC CP30–2004), pp.3-4 which notes that in 2003, 239 judgment mortgages were registered in the Registry of Deeds and 1,540 judgment mortgages were registered in the Land Registry.

6,771 were registered in the Land Registry, 1,326 were registered in the Registry of Deeds. I am most grateful to Mr Greg McDermott, Property Registration Authority for his assistance in obtaining these figures. Any errors are my own.

Where the co-owner was entitled to less than a 50 per cent share in the property, the court could make an order for sale under s.3 of the Partition Act 1868 where it believed a sale would be “more beneficial” to the parties concerned, having regard to the nature of the property, the number of the parties interested or other circumstances.


One of the key shortcomings of the decision is the fact that the property in question was registered land. Therefore, the creditor in this case did not have locus standi to pursue an action for partition or sale. However, it seems this fact was over looked by Denham J. The fact that the judgment mortgagee over registered land in this case did not, under the former legislation, have the locus standi to seek to invoke the Partition Acts was recently noted in Irwin v Deasy [2004] IEHC 104; [2006] IEHC 25. Professor Mee argues that due to this “misapprehension” of the nature of the partition and sale jurisdiction, the decision “does not establish a reliable precedent”. See J. Mee, “Judgment Mortgages, Co-ownership and Registered Land” (1999) 4 C.P.L.J. 28. See also J. Mee, “Partition and Sale of the Family Home” (1993) 15 D.U.L.J. 78, 88-89. Moreover, as a result of this error, Professor Wylie also describes the reasoning in the case as “dubious” and argues “too much reliance should not be put on it”, see J. Wylie, “An Irish Perspective on Protecting a Non-owning Spouse in the Home” in Franklin Meisel et al (eds) Property and Protection: Legal Rights and Restrictions–Essays in Honour of Brian W. Harvey (Dublin: Hart Publishing, 2000) p.148.

Trinity College v Kenny [2010] IEHC 20. Denham J. in Ring noted a lack of information as to the parties interested in the property, particularly the circumstances of the wife, the valuation of the property, the feasibility of sale or the ability of the wife to purchase the husband’s share of the home. Due to this lack of information, the impact of an order for sale could not be assessed and the court adjourned the proceedings with liberty to re-enter. In Trinity, Laffoy J. noted there was “no such dearth of evidence”.

This is acknowledged by Heather Conway, Co-ownership of Land: Partition Actions and Remedies, 2nd edn (Bloomsbury, 2012) p.343.

O’D v O’D, unreported, High Court, November 18, 1983. First National Building Society v Ring [1992] I.R. 375 involved the interference of a creditor while the litigation in O’D v O’D was between the spouses.

See above.

O’D v O’D, unreported, High Court, November 18, 1983.
the proceeds of sale commensurate to the value of their beneficial interest. Any prior unregistered rights which bound the judgment mortgagor. Therefore, they will benefit from 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” and, therefore, awarded the applicant a 50 per cent beneficial interest in the family home. However, on appeal, the Supreme Court unanimously overruled this decision describing it as “a usurpation by the courts of the function of the legislature”.

First National Building Society v Ring [1992] I.R. 375. It is also important to note that, even if a sale is ordered, an equitable co-owner does still enjoy some protection by virtue of s.52(2) of the Registration of Title Act 1964. This provides a transferee not for valuable consideration, such as a judgment mortgagee, is bound by any prior unregistered rights which bound the judgment mortgagee. Therefore, they will benefit from the proceeds of sale commensurate to the value of their beneficial interest.

of the legislation, the amended
rather than
Any errors are my own.

Bunreacht na hÉireann

subjective, assessment of the former’s conduct, has diluted the protection that could be afforded to
the spouse to deprive the other spouse of a right of residence in the family home by an objective, r

court’s refusal in a number of cases to infer or impute the existence of the necessary intention on the part of
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experienced no practical difficulties in applying such provision to the determination of applications for ancillary
relief in judicial separation and divorce proceedings”. Two arguments can counter this. First, this assertion was
made in 1997, a time when marital breakdown legislation was in its infancy. In the intervening years it has
become quite clear there is difficulty in ascribing value to work done in the home. Second, notwithstanding
these difficulties, the problems of quantification would be even more acute under the purchase money
resulting trust than under the Family Law Act 1995 and 1996 as the proportionate interest principle would
apply to the equitable remedy.


Alan Shatter, Family Law 4th edn (Dublin: Butterworths, 1997), para.15.209 argued, “The courts have
experienced no practical difficulties in applying such provision to the determination of applications for ancillary
relief in judicial separation and divorce proceedings”.

Woods notes, “One could assume that if the Bill was reintroduced without retrospective application, it


For instance, where the couple were married before the introduction of the legislation, the amended
legislation would not apply. If the unpaid contributions in the home were made before or after the acquisition
of the property, such spouses would still be left without protection.

Section 5(1) of the Family Home Protection Act 1976. It also applies where the conduct may render the
home unsuitable for habitation.

As noted in S. v S. [1983] 3 I.L.R.M. 387 per McWilliam J.

Andrew Lyall, Land Law in Ireland 3rd edn (Dublin: Round Hall, 2010), p.484.
she opines that “the likelihood of success with an application for relief under s.5(1) … is slim”. Nevertheless,
where the husband either misled the court or violated an order, Andrew Lyall, Land Law in Ireland 3rd edn
(Dublin: Round Hall, 2010), p.485 notes a “realistic approach to the case law suggests that this factor is likely to
overcome the general reluctance of the judges to find the necessary intention in s.5”.

court’s refusal in a number of cases to infer or impute the existence of the necessary intention on the part of
the spouse to deprive the other spouse of a right of residence in the family home by an objective, rather than
subjective, assessment of the former’s conduct, has diluted the protection that could be afforded to
dependent spouses and could inhibit the courts from intervening to ensure the continued availability of a
family home for a dependent spouse and children in circumstances in which such intervention may be
desirable.”


This again would be in line with the constitutional protection afforded to the family pursuant to Art.41 of
Bunreacht na hÉireann.

I am most grateful to Mr Seamus Carroll, Principal Officer, Department of Justice for his welcome insight.
Any errors are my own.