

# The family homes protection act essay sample



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The Family homes protection Act, 1976 is the first in a succession of enactments dealing with matters of family law, which have impacted greatly on Irish conveyancing practise. Since coming in to force on 12th of July 1976, the Family Home Protection Act, 1976 and its related enactments have done more to regulate the ownership of matrimonial property than any other piece of legislation since the foundation of the state. The purpose of this assignment is to examine the effects of this Act and its sister enactments, in order to determine weather or not the legislation relating to the family home is necessary and adequate.

It is first important to discuss the meaning of the family home. Section 2(1) defines family home as meaning: " Primarily, a dwelling in which a married couple ordinarily reside. The expression comprises, in addition, a dwelling in which a house whose protection is in issue ordinarily resides, if that spouse has left the other spouse, ordinarily resided before leaving" This section was not adequate and left a lot of questions unanswered, and as a result was amended by section 54 of the Family Law Act 1995, which read as follows:

In subsection (1), Dwelling, means any building or any part of a building occupied as a separate dwelling and includes any garden or other land usually occupied with the dwelling, being land that is subsidiary and ancillary to it, is required for amenity or convenience and is not being used or developed primarily for commercial purposes, and includes a structure that is not permanently attached to the ground and a vehicle, or vessel, whether mobile or not, occupied as a separate dwelling".

The family home protection Act, 1976 was prompted as a result of a report published in 1972 by the commission on the Status of Women, the purpose of the act was to prevent one spouse, in whose sole name the family home was vested, from dealing with the property without the knowledge and/or the consent of the non owning spouse. Section 3 of the Act provides that: “ Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then subject to subsection (2) and (3) and section 4, the purported conveyance shall be void”

The operation of s 3 (1) was discussed in Barclays Bank v. Carroll<sup>1</sup>. This case involved a husband who transferred the family home to C, without having obtained his wife’s prior consent to the transfer. The transferee subsequently mortgaged the property. When C went bankrupt, his assignee in bankruptcy sought to have the mortgage set aside on the basis that the original transfer was void for the non-compliance with s 3 (1) and therefore c did not have sufficient title to create the mortgage.

In the judgement Hamilton P stated, however, that, as the purpose of the section was the protection of the right of residence of the non-owning spouse, only he or she could invoke the section to have an offending conveyance declared void. In the instant case, as the wife has no desire to have the original transfer avoided, there was no other person entitled to do so. This basically means that any conveyance not complying to section 3 (1) can only be found to be void at the instigation of the spouse.

This section of the Act emphasises the need for consent, and there has been a lot of case law relating to it. For consent to be valid it must be a voluntary, fully informed consent made prior to the purported conveyance in writing. To date there has been no case law relating to consent being obtained by duress or undue influence. But the affect of this section has resulted in third parties and financial institutions being levied with huge responsibilities to protect the interest of the spouse. The Supreme Court in *Bank of Ireland v.*

*Smyth* discussed the question of informed consent<sup>2</sup>. Here the wife had given her consent to what she believed to be a charge over the land attached to the family home and the land. Mrs Smyth had executed her consent to the charge in the presence of an employee of the plaintiff bank. It transpired that the employee had not enquired of Mrs Smyth whether she understood what was being covered by the document to which she was consenting. The bank contended that it was not required to take into account what was in Mrs Smyth's mind.

Discussing the nature of spousal consent, however, Blayney J stated that validity of Mrs Smyth's consent depended on whether she had full knowledge of what she was doing. <sup>3</sup> " The spouse giving consent must know what it is he or she is consenting to. Since giving one's consent means that one is approving of something, obviously, a precondition is that one should have knowledge of what it is that one is approving of". <sup>4</sup> In the instant case, Mrs. Smyth could not give a valid consent to the conveyance in question, as she was not aware of its full import.

Furthermore, the court found the bank to be on notice of Mrs Smyth's lack of knowledge, as it would have been apparent if the bank employee had made reasonable enquiry. The charge was therefore held to be invalid, as no valid consent had been obtained. The Judge also held that the bank should have advised the wife to obtain independent advice, but rejected the notion that this stemmed from a duty owed by the bank to the wife. It was in the bank's own interest to ensure that a real consent had been obtained, because if they had not, the consequence was that the charge was void.

This does put a lot of responsibility on the bank, but I feel that this is necessary, as the bank is a professional organisation with trained staff who are aware of the laws in relation to this area, in contrast to a spouse with no legal background and thus know knowledge of what he or she may be getting themselves into, by signing a consent form. Section 3 of the Family Home Protection Act has also greatly complicated the task of a purchasing solicitor in relation to the purchase of residential property.

Not alone is it necessary to ensure that consent is forthcoming from the spouse of the present vendor, it is also necessary to investigate the possibility that the present transaction might be invalidated by the absence of consent to a previous transfer of the house. This is clearly very inconvenient for the conveyancer, as it is the responsibility of him or her to inquire into the validity of prior transactions, to which their client was not a party.

Although new legislation held under the Family Home Act 1995, improved the situation by introducing a six year cut off point to take an action, and also

as a result of the findings in the case of *Guckian v. Brennan*<sup>7</sup>, it was established that in relation to registered land, there was no need for a purchaser to inquire into the validity of past transactions. This was justified on the basis of the principle that “ in the absence of fraud, the register affords conclusive evidence of the validity of the title.

This puts the responsibility on the land registry to police the enforcement of the Act. This is good news for solicitors as the workload and responsibility is greatly reduced. Gannon J’s decision in the case has been widely debated by academics, who believe that when the legislation is interpreted in detail it is demonstrably incorrect in view of the plain wording of the relevant provisions of the registration of title Act 1964 and the Family Homes Protection Act 1976.

At the moment the decision stands, but as it is only a high court judgement it is venerable in the sense that the Supreme Court or another High Court judge who was willing to look more closely at the relevant statutes might take a different view thus overcomplicating the situation for conveyancers. So there may be a need to copper fasten the present legal position through legislation. Subsection (2) provides that subsection (1) shall not apply to a conveyance if it is made by a spouse in pursuance of an enforceable agreement made before the marriage of the spouses.

Subsection (3) basically provides that a conveyance shall not be rendered void under subsection (1) if it is made to a purchaser for full value meaning such value as amounts or approximates to the value of that for which it is given. For example if a vendor conceals the fact of his marriage and conveys

to a purchaser is a family home, the appearance of the vendor's wife subsequent to the conveyance will not affect the validity of the conveyance, if the purchaser had no notice of the marriage or of the wife's existence and is bona fide and has given full value.

This does relieve a lot of pressure on the purchaser, and he will not be left with the burden of say a financial institution. But the responsibility is still on the solicitor to make the relevant inquiries and inspections. In the case of *Somers v. Weir*<sup>8</sup> just such a situation arose where by a purchaser's solicitor failed to make the enquiries he reasonably ought to have made properly to ascertain whether a wife's consent was required and as a result the transaction was found to be void.

In my opinion I believe that it is necessary to put the burden on the solicitor to investigate the validity of the property, as this is what the legislation was put in place. Section 4 provides that a court may dispense with the consent of a spouse if it is unreasonably held, " taking into account all the circumstances including. " (a) The respective needs and resources of the spouses and of the dependent children (if any) of the family, and b) in a case where the spouse whose consent is required is offered alternative accommodation, the suitability of that accommodation having regard to the respective degrees of security to tenure in the family home and in the alternative accommodation.

There is extensive case law relating to this, but for the purposes of this assignment it is unnecessary to delve in to it in great detail. But it is worth mentioning as indicated by the word " including", (a) and (b) are not all

embracing, the court being able to take into account other relevant circumstances. The Doctrine of notice operates in a completely novel manner.

Under Section 3(3)(a) of the 1976 Act a purchaser for full value takes a good title despite lack of consent by the non-conveying spouse. Purchaser is defined by section 3(6) as a purchaser in good faith. This was examined in the case of *Somers v. Weir*<sup>10</sup>; it was held that the expression in good faith imports a doctrine of notice into section 3. This was again expanded on in the case of *Allied Irish Bank v. Finnegan*<sup>11</sup>, here the Supreme Court held that the purchaser in the case had to establish that he did not receive any notice of the possible invalidity of the consent.

This is very similar to the equitable doctrine of notice in some respect but the outcome is quite different. In equity a bona fide purchaser without notice of a legal estate will take the legal title free of the equity. A purchaser with notice of the equity will nevertheless still obtain the legal title by the conveyance, but will take it subject to the equity. In contrast to the situation in hand the question of notice determines whether the purchaser acquires any title at all. <sup>12</sup>

The question now arises, that if the conveying spouse denies that the house is a family home, can the purchaser rely on that. Or should the purchaser obtain a statutory declaration setting out the facts, which are true. The question is broached in the case of *Reynolds v. Waters*<sup>13</sup>. This case involved a purchaser who enquired of the vendor whether the property in question is a family home. The vendor denied it was. After further inquiry from the



purchaser of the facts, the vender explained that he was married but was abandoned by his wife before they moved into the property and are now divorced.

He included a statutory declaration. The purchaser asked for consent to be given by the wife, and a joint declaration to be written up. The vendor refused and sought a declaration under section 4, which was granted by the high court. The question that now remained was whether the purchaser was liable to pay interest on the money from the date that the vender replied. This pitched the question to the courts whether or not it is necessary for the purchaser to demand the consent of the wife, or would the original declaration suffice.