REGISTRATION OF A NOTICE UNDER THE FAMILY HOME PROTECTION ACT 1976 IN THE REGISTRY OF DEEDS

Section 12 of the Family Home Protection Act, 1976 makes provision for the registration of a notice of a marriage in the Registry of Deeds. In order to register such a notice, an Affidavit or Statutory Declaration, in the form of the precedent set out on page 1.2, must be sworn/declared by the applicant spouse and lodged in the Registry.

Once the registration of the notice is complete, the name of the property owning spouse is entered on the Index of Names in the Registry of Deeds as "grantor" and the following note is entered under the description of the property:

"Notice pursuant to Section 12 o the Family Home Protection Act 1976.
AD (applicant spouse) is married to the said CD (owner spouse)"

Synopsis of a practice note originally published in Law Society Gazette, April 1978.

PRECEDENT FOR REGISTRATION OF A NOTICE IN THE REGISTRY OF DEEDS UNDER S.12 OF THE FHPA 1976

I, ... of ..... in the County of ..... give notice as follows:

1. I am the lawful spouse of ..... of ..... in the County of ..... having married him/her on ..... the ..... 19 ..... at ..... in the County of ..... .

2. The said ..... has an interest in the dwelling-house and premises known as ..... (include the name of street, town or village, townland, parish,barony and county).

3. The said dwelling house and premises described in the last foregoing paragraph are our Family Home within the meaning of Section 2 of the Family Home Protection Act, 1976.

4. I apply to have this notice of my marriage registered in the Registry of Deeds pursuant to Section 12 of the Family Home Protection Act, 1976.

Dated ..... day of ..... 19 .....
SIGNED by the said ..... in the presence of:

I ..... of ..... in the County of ..... aged 21 years and upwards do solemnly and sincerely declare as follows:

1. I refer to the above notice which I have signed my name in the presence of a witness before making this Declaration.

2. I say that the facts set out in this notice are true in every respect.

3. I make this Declaration for the purpose of verifying the particulars of the above notice under Section 12 of the Family Home Protection Act, 1976 and for the purpose of registering said notice in the Registry of Deeds pursuant to the Registration of Deeds Act, 1707 conscientiously believing the same to be true and by virtue of the Statutory Declarations Act, 1938.

DECLARED by the said ..... this ..... day of ..... 19 .....
at ..... in the County of ..... before me a Commissioner of Oaths in the said County.

.....
COMMISSIONER FOR OATHS.

Published in Law Society Gazette, April 1978

FHPA, 1976

EVIDENCING SPOUSE'S CONSENT

The decision of the High Court (McWilliam J.) in the case of Kyne v Tiernan (1978 No. 6857 P. Judgement l5th July, 1980) reported in the November issue of the Law Society's Gazette, confirming that once a spouse had consented in writing to a contract for the sale of a Family Home no further consent for the purpose of the Family Home Protection Act to the assurance was required, was of considerable assistance in clarifying this doubtful point.

It is now being argued that a corollary to the decision is that a written consent to the assurance need not be sought once the appropriate prior consent to the contract had been obtained. While this is a logical extension of the decision in Kyne v Tiernan, it is the view of the Conveyancing Committee that the practice of seeking the spouse's consent in writing to the assurance, which has operated since 1976, should not be abandoned. To do so would be to breach a much older conveyancing practice that contracts for sale are not normally regarded as "title documents" and that their production on any subsequent sale should not be required. It might also be regarded as an inroad on the legal doctrine that on the completion of a purchase the "contract merges in the conveyance".

Accordingly, while recognising that, if any difficulty arises about getting later consent to the assurance, the solicitors for a vendor and purchaser may safely rely on a spouse's prior written consent to a contract for the sale of a Family Home, the Committee strongly urges the retention of the practice of arranging for the endorsement of a prior written consent by the spouse on the assurance itself.

In making this recommendation, the Committee is taking cognisance of the very likely risk of relevant contracts not being retained with Title Deeds and thus giving rise to serious problems in proving the granting of the relevant spouse's consent, in the event of future sales of the property.

Published in Law Society Gazette, May 1981

FHPA

CONSENT OF A MINOR

The Conveyancing Committee has also been concerned with the problem of whether a minor spouse could consent to a sale or mortgage under the Act, without the approval of the Court. Mortgagees' Solicitors have been insisting upon Court approval being obtained to consents, lest their mortgages be void.

Most of the families involved in these situations have been young married couples and the extra cost of an application to the High Court for approval for the sale, is a considerable burden on a class of people who can least afford it.

Representations were made to the Department of Justice, which indicated that it had the matter under consideration and would provide for a statutory amendment, if it were found necessary.

Doubts as to the law on this matter have now been resolved by the decision of McWilliam, J. in the High Court case of Lloyd v Sullivan, the learned Judge holding that a minor spouse could not give a valid consent without the approval of the Court.

The Department of Justice has introduced a section in the Family Law Bill, 1981, which, when passed, will entitle a minor spouse to give a consent without needing the authority of the Court. The relevant section is Section 10[1] and its provisions are intended to be retrospective.

Published in Law Society Gazette, May 1981

1. The Family Law Act 1981 came into force on the 23rd June of that year and Section 10 was in the same terms as Section 10 of the Bill.

FHPA

ABSENCE OF SUPPORTING EVIDENCE TO SPOUSE'S CONSENT

The Conveyancing Committee has been asked for guidance by a number of practitioners as to the proper approach to be made by the purchaser's solicitor where, on investigation of the title of an unregistered property, an assurance of a family home made after the 12th July, 1976 appears on the title and, although the assurance bears a consent completed by the vendor's spouse, there is no supporting evidence identifying the consenting party as the spouse of the vendor.

The Committee is satisfied that the present practice of seeking a statutory declaration from the vendor and the consenting spouse exhibiting a copy of their marriage certificate to evidence the identity of the consenting party was not adopted immediately after the introduction of the Act and takes the view that, in the ordinary way, a purchaser's solicitor should not, where there is a spouse's consent endorsed on an assurance of the family home executed prior to the 1st January, 1978, and no supporting evidence of the identity of the consenting spouse is available, requisition any further evidence.[1]

Published in Law Society Gazette, June 1981

1. See also paragraph 7 on page1.15 hereof and precedent S.54 declaration on page A1.27 hereof

SECTION 14 OF THE FHPA, 1976

The Joint Committee is of the opinion that there is no necessity to have a deed made in pursuance of Section 14 of the FHPA adjudged duty stamped.

Section 14 provides that no Stamp Duty, Land Registry Fee, Registry of Deeds Fee, or Court Fee shall be payable on any transaction creating a Joint Tenancy between Spouses in respect of a "family home" where the home was immediately prior to such transaction owned by either Spouse, or by both Spouses otherwise than as Joint Tenants". [1]

The intention of Section 14 is to encourage Spouses where the Family Home is owned by one of them, to place the home in joint ownership.

By reason of such Statutory exemption it is not necessary for the Deed creating such Joint Tenancy to be adjudicated. In so far as the Registry of Deeds is concerned, provided there is a Certificate in the Deed and Memorial that such vesting is made in pursuance of the Act, the Registrar will register the Deed without Adjudication.

The Certificate could be in the following form:

"It is Hereby certified that the property hereby assigned/conveyed/transferred is the Family Home of the Parties hereto within the meaning of the Family Home Protection Act 1976 and that this assignment/conveyance/transfer is being made in pursuance of Section 14 of the said Act".

In so far as the Land Registry is concerned, provided there is lodged with the Transfer, which should contain the aforementioned Certificate, a Statutory Declaration or a Certificate that the property is the family home of the parties to the Transfer, the Registrar will register the dealing without Adjudication.

Published in supplement to Gazette, September 1983. JC

1. Section 114 of the Finance Act, 1990 provides that no stamp duty shall be payable on any transfer of property between spouses.
See Practice Notes at pages 1.11 and 1.12 hereof

AN UNMARRIED COMPANY?

Recent correspondence to the Conveyancing Committee has shown that there is reluctance to answer any question on the Family Home Protection Act where the Vendor is a company. This is presumably based on the view that, since a company cannot have a spouse, no requisition under the Family Home Protection Act is therefore appropriate.

However, the recent case of Walpoles (Ireland) Limited - v - Jay and obiter dicta in other cases have highlighted the fact that in certain cases it is necessary to make enquiries where it is believed a person, other than the Vendor or his predecessors in title, has been in occupation of any part of the property as a "family home". In Walpoles (Ireland) Limited -v- Jay, the Vendor was a company but the Purchaser was on notice that the residence situate on the property had been occupied by a Director of the Vendor company for a number of years. It was held that while there was nothing which could make void the conveyance of the property by the Vendor Company nevertheless the Purchaser was entitled to make enquiries as to the nature of the interest (if any) held by the Director in the property and as to the termination of that interest.

The problem arises from the wide definition of both "interest" and "conveyance" in the Act. "Interest" means "any estate, right, title or other interest legal or equitable". "Conveyance" includes "a mortgage, lease, assent, transfer, disclaimer, release and any other disposition of property ...".

It is therefore the view of the Conveyancing Committee that where a Purchaser is aware that any person, other than the Vendor or his predecessors in title has been or is in occupation of the property as a "family home", then additional requisitions should be raised. This could arise in circumstances similar to that in Walpoles (Ireland) Limited -v- Jay where a Director or other employee of a Vendor company is in occupation, where another married member of the vendor's family is in occupation or where the property has been occupied by tenants.

In the light of the foregoing the standard form of requisitions under the Family Home Protection Act have been revised and are circulated with this issue of the Gazette.

When considering the reply to be given to the standard requisition 51 (a) the attention of practitioners is drawn to the definition of "family home" in Section 2 of the Act. It "means, primarily, a dwelling in which a married couple ordinary reside". The requisition is not confined to whether the property is the Vendor's "family home".

NOTE: These Requisitions require a civil marriage certificate (i.e. a Certified copy of Entry in the Marriage Register Book) to be exhibited in the statutory declaration.

AN UNMARRIED COMPANY?

(Contd.)

Published in Law Society Gazette, October 1983

Such a certificate is clearly the best supporting evidence of the marriage which can be produced and should be furnished. This does not mean that a Purchaser or Lender should not be prepared to accept the next best supporting evidence such as a Church Marriage Certificate in circumstances where there are valid reasons why a Civil Marriage Certificate is not available on closing.

FHPA, 1976

TRANSFER OF SITES FOR DWELLING HOUSES – CERTIFICATES FOR LAND REGISTRY

The attention of Practitioners is drawn to the provisions of Section 2 (2) of the Family Home Protection Act which prescribes inter alia that a "dwelling" includes "any garden or portion of ground attached to and usually occupied with the dwelling".

It should be borne in mind that a site for a dwellinghouse which has been carved out of a holding may, although no house or building may ever have been on the site, still have formed part of a "garden or ground attached to and usually occupied with a dwelling", etc.[1]

Solicitors should take this into account when framing certificates for the Land Registry.

Published in Law Society Gazette, January/February 1984

1. See also paragraph 8 on page 1.15 hereof

PROOF OF FHPA CONSENT IN SEPARATION

In recent years the practice has emerged of the parties to the Deed of Separation simultaneously executing a Deed of Waiver incorporating the relevant waiver provisions from the Deed of Separation. Where such a Deed of Waiver exists, it is of course unnecessary to exhibit an extract from the Deed of Separation. The practice of entering into Deeds of Waiver is to be encouraged. However, if no Deed of Waiver exists, it is of course quite acceptable to exhibit the appropriate extract from the Deed of Separation.

This marginal note was added on publication of the updated handbook in 2006, 3rd Edition

The Joint Law Society/Building Societies Committee has been asked for its opinion on the practice of a Purchaser's/Mortgagee's Solicitor insisting on a Vendor/Mortgagor's Separation Agreement being exhibited in their Family Home Protection Act 1976 Declaration.

The Committee feels that it is not proper practice for an entire Separation Agreement to be exhibited as such agreements usually contain very personal and private information which would not be appropriate in a document that will remain part of the title for many years.

The Committee recommends that a Purchaser/Mortgagee's Solicitor should seek a Statutory Declaration from the disinterested spouse confirming that the property being sold/mortgaged is not a Family Home; in the event that this declaration is not available the Committee strongly recommends that as prima facie evidence that a property is not a "Family Home" by virtue of the fact that one spouse has not resided therein that a purchaser/mortgagee's Solicitor should accept either:

1. A corroborative declaration from the Vendor/Mortgagor's Solicitor that he/she has read the Separation Agreement and quoting any relevant paragraph therein or appropriate extracts therefrom; or
2. A declaration from a party to the Separation Agreement exhibiting a solicitor's certified copy of the relevant extracts or extract therefrom.

Where there is any doubt as to whether the property being sold/mortgaged is or is not a "Family Home" within the meaning of the Act the purchaser's/mortgagee's solicitor should seek the consent of the Vendor's/Mortgagor's spouse or a Court order dispensing with such consent pursuant to Section 4 of the Family Home Protection Act 1976.

NOTE: It is suggested that where a Deed of Separation is to contain a clause confirming the prior consent in writing of the spouses to the future sale of property that might be a "Family Home" within the meaning of the Family Home Protection Act 1976, that such a clause should be the last clause in the Deed, immediately prior to the signatures of the parties. This would more readily enable a Vendor/Mortgagor's solicitor to exhibit a certified photocopy of such a clause combined with the appropriate signatures.[1]

Published in Law Society Gazette, January/February 1985. JC

1. Please see precedent Family Law Declaration at page A1.17 hereof

FAMILY LAW ACT, 1981

The Committee was asked to recommend a standard form of wording to be included in Declarations to deal with the Family Law Act on the basis that typically this is dealt with by the addition of a Clause into a Declaration being furnished under the Family Home Protection Act.

The Committee suggests the following wording.

> "The above property is not affected by the provisions of Section 5 of the Family Law Act, 1981 by virtue of the fact that I have never agreed to marry any person"[1].

The Committee emphasises that while this wording will cover the majority of cases it only applies to people who have never entered into an agreement to marry any person and that obviously care should be taken by Practitioners to explain to clients that they are not being required to declare this unless it is true. If the person in question was engaged then certain other enquiries need to be made to make sure that the other party to the engagement has not made any contribution to the property which might create an interest therein which could have priority to the Purchaser or Mortgagee. The other party should furnish a Declaration stating that the agreement to marry has not terminated and, if it be the case, has not made any contribution which might create an interest. If such other party has made a contribution, an acknowledgement would be necessary postponing any such interest in favour of the Mortgagee. In such a case it would be advisable to have such other party retain independent advice. Obviously the Clause dealing with the Family Law Act would have to be retailored to suit the facts. The Committee emphasises that the key factor in relation to the Family Law Act is the question of contribution[2].

Published in Law Society Newsletter, 1986. JC

1. Please note the new wording used in the current precedent Family Law Declarations at pages A1.3 to A1.26 hereof

2. Please note the clarification of Section 5(1) of the Family Law Act 1981 provided by Section 48 of the Family Law Act, 1995

CONSENT OF SPOUSES: PERSONAL REPRESENTATIVES

The Committee has received a series of requests for advice as to whether, or in what circumstances, the consent of the personal representative's spouse may be necessary in the sale of residential property which formed part of the deceased's estate, by the personal representative in the course of administration of the estate.

In December 1981 the Conveyancing Committee recommended that it was not necessary for a solicitor purchasing a property from a personal representative who is selling qua personal representative to enquire into the position in relation to the Family Home Protection Act in respect of the occupation of the premises by non conveying beneficiaries. This recommendation did not receive widespread acceptance and the Committee has recently become concerned that it was too simplistic particularly where a personal representative is selling quite a number of years after a death.

The matter is not without difficulty and the Committee, having taken Senior Counsel's advice, is satisfied that only guidelines can be given. The facts in each case must ultimately determine the position.

Where there is no evidence that the personal representative and his or her spouse have resided in the property no consent should be sought, though a Declaration confirming the non-residency should be obtained from the personal representative.[1]

Where there is some evidence that the personal representative or/and his or her spouse may have resided in the property for a short period (e.g. while looking after the deceased during illness or caretaking the property after death) but there is evidence to show that the personal representative's family home is elsewhere, then again no consent should be sought, though a Declaration confirming the location of the personal representative's family home should be obtained from the personal representative. The fact that the personal representative or the spouse may be beneficially entitled to the property under the Will or intestacy is of no significance in this situation.

Where the personal representative and his or her spouse have lived in the property and when there is no evidence to suggest that their family home is elsewhere, then it would be reasonable to seek the consent of the spouse. This would particularly apply where the personal representive or his or her spouse are beneficially entitled under the Will or intestacy to the property.

Published in Law Society Gazette, April 1988

1. Note the text of family law declaration by personal representative at page A1.13 hereof.

GIFTS AND INHERITANCES BETWEEN SPOUSES, TRANSFERS BETWEEN SPOUSES

Inheritances between Spouses have not been liable for Inheritance Tax since the 30th January 1985 (Section 59 Finance Act 1985) and Gifts between Spouses have not been liable to Gift Tax since the 31st January 1990 (Section 127 Finance Act 1990). The relevant provisions of both Finance Acts provide that not only are the Gifts and Inheritances exempt from C.A.T., but also that they will not be taken into account in computing liability for Tax on other Dispositions.

EVIDENCE OF STATUS

The Revenue Commissioners have taken the view that as the Gifts and Inheritances are exempt from Tax there is no necessity to obtain a Certificate of Discharge from Capital Acquisitions Tax. The Conveyancing Committee have been asked for their Opinion on this practice and are in agreement with it subject to the Vendor producing evidence that the Parties to the Gift or Inheritance were in fact Spouses at the date of the disposition. It is considered that this evidence should consist of a Statutory Declaration, confirming that the parties were spouses at the date of the gift or date of the death. Such declaration should exhibit the Marriage Certificate of the Parties which Declaration in the case of a Gift should be made by both Parties to the Gift and in the case of an Inheritance by the surviving Spouse. This Declaration should be retained as part of the Title Documents.

Section 114 of the Finance Act 1990 provides that where the property is transferred between Spouses no Stamp Duty should be payable on the instrument. The Adjudication Office of the Revenue Commissioners have adopted a practice of returning un-adjudicated Deeds of Conveyance and Transfer between Spouses on the basis that adjudication is not required. Having regard to the fact that the exemption from Duty only applies where the Parties are Spouses the Committee consider that such Conveyances and Transfers should be accompanied by a Statutory Declaration of the Parties exhibiting their Marriage Certificate and confirming that they were Spouses as at the date of the Disposition.

Published in Law Society Gazette, June 1991

FHPA

POWERS OF ATTORNEY

The Conveyancing Committee receives many queries as to whether it is safe to accept the completion of a consent under the Family Home Protection Act executed by an agent on foot of a Power of Attorney. The Committee is satisfied that a person can execute any document on foot of an appropriate Power of Attorney as fully and effectively as the grantor of the Power of Attorney could execute it himself. This clearly includes the execution of a consent under the Family Home Protection Act. Ideally the form of Power of Attorney should be specifically drafted to include reference to the giving of a consent for a specific transaction although, clearly, a properly drafted general Power of Attorney would be adequate. As in relation to all Powers of Attorney the Committee repeats its warning to make the giving of the consent a principal power under the Power of Attorney and not an ancillary one.

Solicitors should also think twice before agreeing to accept an appointment under a Power of Attorney to give a consent unless they have the clearest possible instructions - preferably in writing. Again, Solicitors should take care lest they owe a duty of care to a consenting spouse to advise on the general wisdom of appointing the agent which is something that would need to be carefully considered in any case. It is really no different from appointing any agent under a Power of Attorney to execute a deed and it is obviously a particular type of agency that should not be given lightly.

People sometimes believe that an agent acting on foot of a Power of Attorney who clearly has power to execute the consent can also complete a declaration to verify the facts regarding a marriage etc. under the Family Home Protection Act. Such evidence would be worthless being hearsay. An agent cannot give evidence on behalf of another either in court or by way of declaration. The agent could only execute the declaration if he or she is doing so of his or her own knowledge and in such event is not doing so on foot of the Power of Attorney.

Published in Law Society Gazette, April 1992

STAMP DUTY ON MEMORIALS

Practitioners are reminded that there are two distinct circumstances which arise in relation to Stamp Duty on Memorials arising from the provisions of the following Acts:-

1. **Section 14 Family Home Protection Act, 1976**

   An assurance of a Family Home by one spouse into the joint names of both spouses is exempt from Stamp Duty.

   A Memorial of the Deed of Assurance is also exempt from Stamp Duty.

2. **Section 114 Finance Act, 1990**

   (a) An assurance by one spouse which has the effect of placing a family home into the sole name of the other spouse is exempt from Stamp Duty.

   (b) An assurance between spouses of a property which is not a Family Home is exempt from Stamp Duty.

   However, Memorials of these assurances are liable to Stamp Duty.

Published in Law Society Gazette, September 1992

FHPA, 1976 AS AMENDED BY THE FLA, 1995

1. Section 3 (1) of the 1976 Act provides that where a spouse, without the prior written consent in writing of the other spouse, purports to convey any interest in the Family Home to any person other than the spouse then, subject to Sub-Sections (2) (3) and (8) and Section 4 the purported conveyance shall be void.

1.1 Sub-Sections (2) and (3) of Section 3 and Section 4 have now been amended by the 1995 Act. Sub-Section (8) is a new Sub-Section.

2. Sub-Section (8) (b) provides that a Conveyance shall be deemed not to be and never to have been void by reason of sub-section (1) unless:

(a) It has been declared void by a Court by reason of Sub-Section (1) in proceedings instituted before the passing of the 1995 Act, or
on or after such passing, and within six years from the date of the Conveyance (Section 3 (8) (a) (i)), or
after such six year period by a spouse who has been in actual occupation of the land concerned from immediately before the expiration of the six years until the institution of the proceedings (Section 3 (8) (a) (ii)) (This would apply principally to mortgages), or

(b) Subject to the rights of any other person concerned, it is void by reason of sub-section (1) and the parties to the Conveyance or their successors in title so state in writing before the expiration of 6 years from the date of the Conveyance (Section 3 (8) (b) (ii)).

2.1 A Conveyance will not by void because of non compliance with Section 3 (1) unless it has been declared void by a Court in proceedings brought before the passing of the 1995 Act (1st August 1996), or in proceedings brought after the 1st August 1996 which comply with paragraph 8.

2.2. Section 3 (8) (a) (i) provides that proceedings shall not be instituted to have a conveyance declared void by reason only of Section 3 (1) after the expiration of six years from the date of the Conveyance.
However this does not apply to any such proceedings instituted by a spouse who has been in actual occupation of the land concerned from immediately before the expiration of six years from the date of the conveyance concerned until the institution of the proceedings. This would apply, for example, to a mortgage executed by one spouse, without the prior consent of the other spouse, who remained in occupation of the property.

2.3 In addition a Conveyance which does not comply with Section 3 (1) will be void, if subject to the rights of any other person concerned, the parties to the Conveyance or their successors in title so state in writing before the expiration of six years from the date of the Conveyance.

2.4 The parties to the Conveyance would be the vendor spouse and the purchaser.

FHPA, 1976 AS AMENDED BY THE FLA, 1995

(Contd.)

3. Under Section 3 of the Conveyancing Act, 1882 a purchaser of property will have to make enquiries to see if the factors in Sub-Section (8) apply. These enquiries should be directed at the Purchase's immediate Vendor. The enquiries will be as to whether proceedings have been instituted to declare the Conveyance in question void, or, whether the parties to the Conveyance in question or their successors have before the expiration of six years from the date of the Conveyance stated so in writing.

3.1 The purchaser will also have to make searches in the Land Registry or the Registry of Deeds to see if such a statement has been registered pursuant to Sub-Section (8) (c) (i) and in the Lis Pendens Register to see if the proceedings have been instituted.

3.2 If enquiries and searches do not reveal the existence of proceedings to have the Conveyance in question declared void by reason of Section 3 (1) then the Conveyance in question is deemed not to be and never to have been void by reason of Section 3 (1).

3.3. If the enquiries or searches disclose the existence of proceedings, then these proceedings must be examined to see if they comply with Section 3 (8) (b) (i), that is to say, either those proceedings were instituted before the passing of the Family Law Act 1995, in which case the Conveyance in question can be successfully challenged, or the proceedings have been instituted on or after the passing of the Family Law Act, 1995 but comply with Section 3 (8) (a).

4. Where the Conveyance is over six years old reference need only be made to sub-paragraph (ii) of Section 3 (8) (a) which provides that the bar on the institution of proceedings after the expiration of six years from the date of the Conveyance in question (in relation to proceedings instituted on or after the passing of the 1995 Act) does not apply to any such proceedings instituted by a spouse who has been in actual occupation of the land concerned from immediately before the expiration of six years from the date of the Conveyance concerned until the institution of the proceedings. This situation is only likely to arise in relation to mortgages.

4.1 One is only concerned with Section 3 (8) (a) (ii) if proceedings have actually been instituted. Those proceedings must then be scrutinised to see if they comply with sub-paragraph (ii).

4.2 If the existence of proceedings to impugn a Deed is discovered then the only way to be sure those proceedings will not declare the Conveyance in question void is to await the outcome of the proceedings.

4.3 Section 3 (8) (c) provides that a copy of the statement made for the purpose of sub-paragraph (ii) of paragraph (b) and certified by, or by the successor or successors in title of, the party or parties concerned ("the person or persons") to be a true copy shall, before the expiration of the period referred to in that sub-paragraph, as appropriate, be lodged by the person or persons in the Land Registry for registration pursuant to Section 69 (1) of the Registration of Title Act, 1964, as if statements so

made had been prescribed under paragraph (s) of the said Section 69 (1), or be registered by them in the Registry of Deeds.

4.4. Section 69 (2) of the Registration of Title Act, 1964 provides that a burden may be registered under Section 69 (1) on the application of the registered owner of the land or of any person entitled to or interested in the burden but, if the application is made without the concurrence of the registered owner of the land or such other person as may be prescribed, the burden shall not be registered except in pursuance of an order of the Court.

5. In the definition Section to the Registration of Title Act 1964, "prescribed" means prescribed by general rules, which are the Land Registry rules made under Section 126 of the 1964 Act.

6. Section 3 (8) (d) provides that rules of Court shall provide that a person who institutes proceedings to have a Conveyance declared void by reason of sub-section (1) shall, as soon as may be, cause relevant particulars of the proceedings to be entered as a Lis Pendens under and in accordance with the Judgements (Ireland) Act, 1844.

7. What evidence should a Purchaser seek that no proceedings have been instituted before the expiration of the six year period?

7.1 The Purchaser must make a Search on the Lis Pendens register.

7.2 The Purchaser should obtain a Declaration from his or her immediate Vendor that he or she has no actual notice of the institution of such proceedings.

7.3 The Declaration should also confirm (if such be the case) that the spouse of the conveying party in the deed in question was not in occupation of the property immediately before the expiration of six years from the date of the Conveyance in question.

8. The revised definition of "dwelling".

8.1 In the 1976 Act Section 2 (2) states that:

"In sub-section (1) "dwelling" means

(a) Any building, or

(b) Any structure, vehicle or vessel (whether mobile or not), or part thereof, occupied as a separate dwelling and includes any garden or portion of ground attached to and usually occupied with the dwelling or otherwise required for the amenity or convenience of the dwelling".

Section 54 (1) (a) of the 1995 Act substitutes the following sub-section for sub-section (2):

"(2) In sub-section (1) "dwelling" means any building or part of a building occupied as a separate dwelling and includes any garden or other land usually occupied with

FHPA, 1976 AS AMENDED BY THE FLA, 1995

(Contd.)

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".

8.2 The important differences between the two definitions are the following:

8.3 The substitution of "includes any garden or portion of ground" by "includes any garden or other land".

8.4 The deletion of the words "attached to" and the addition of the words "being land that is subsidiary and ancillary to it".

8.5 The addition of the words "is not being used or developed primarily for commercial purposes".

9. A new Section 3 (9) provides that if, whether before or after the passing of the 1995 Act, a spouse gives a general consent in writing to any future conveyance of any interest in a dwelling that is or was the family home of that spouse, and the deed for any such conveyance is executed after the date of that consent, the consent shall be deemed for the purposes of Section 3 (1) to be a prior consent in writing of the spouse to that conveyance.

10. Finally, under Section 54 (3) of the 1995 Act, where a Court, when granting a Decree of Judicial Separation, orders that the ownership of the family home shall be vested in one of the spouses, it shall, unless it sees reason to the contrary, order that Section 3 (1) of the 1976 Act shall not apply to any conveyance by that spouse of an interest in the home.

Memorandum circulated to the profession on 9th September 1996

1. **Ordinary powers of attorney**

1.1 *Consents*

The Conveyancing Committee receives many queries as to whether it is safe to accept the execution of a prior consent under the Family Home Protection Act, 1976 ("the 1976 Act") by the donee of a power of attorney. The Committee is satisfied that a donee can execute any document on foot of an appropriate power of attorney as fully and effectively as the donor could personally execute it. This includes the execution of all consents including a prior consent under the 1976 Act. Ideally, the power of attorney should be specifically drafted to empower the donee to execute a consent, including prior consent, to a specific transaction, although a properly drafted general power of attorney, including one provided for in Section 16 of the Powers of Attorney Act, 1996 ("the 1996 Act"), would be adequate.

Solicitors should give careful consideration before agreeing to accept an appointment under a power of attorney to give a consent under the 1976 Act, and ensure they have the clearest possible written instructions. Solicitors should also ensure that they advise the donor to consider the general wisdom of appointing the donee in question, and the importance of obtaining, or waiving, independent legal advice. It is really no different from appointing any agent to execute a deed under a power of attorney, but it is obviously a particular type of agency that should not be given lightly.

1.2 *Declarations*

It is sometimes believed that a donee acting under a power of attorney which clearly empowers the giving of consent under the 1976 Act can also, as such attorney, complete a statutory declaration verifying the relevant facts of the marriage and compliance with current family legislation ("a family home declaration"). Such a declaration would be evidentially worthless, being hearsay. An agent cannot give evidence on behalf of another either in court or by statutory declaration. A donee can only complete a statutory declaration of his or her own knowledge, and in this event is not doing so as donee on foot of the power of attorney. This type of declaration could be acceptable where the underlying circumstances are made clear, and there is no more proximate evidence available.

2. **Enduring powers of attorney**

2.1 *Consents*

The position stated above is little different where the donee has been appointed under an enduring power of attorney ("EPA") which has been registered. An EPA does not come into force until it has been registered under section 10 of the 1996 Act, in circumstances where the donor is, or is becoming, mentally incapable. Section 6 (2) of the 1996 Act provides that "where an instrument is expressed to confer general authority on the attorney, it operates to confer, subject to the

FHPA, 1976
AS AMENDED
POWERS OF ATTORNEY ACT, 1996

CONSENTS AND DECLARATIONS
(Contd.)

restriction imposed by sub-section (5) and to any conditions or restrictions contained in the instrument, authority to do on behalf of the donor anything which the donor can lawfully do by attorney". Accordingly, the donee of a registered EPA which complies with section 6 (2) may execute a consent, including a prior consent, under the 1976 Act.

2.2 *Declarations*

Once an EPA has been registered, the donor will be, or will be becoming, mentally incapable, and any family home declaration made by the donor will be unacceptable. Therefore, in the absence of any other person who can swear a family home declaration in relation to the donor's marriage, the donee would be an appropriate person to make the family home declaration, but it would be made of his or her own personal knowledge, and not as donee. This raises the importance of the donee under an EPA taking steps to ensure that he or she is fully conversant with all the donor's affairs, both personal and financial.

Published in Law Society Gazette, July 1997

SOLICITORS' CERTIFICATES –v– FAMILY LAW DECLARATIONS

The Family Home Protection Act, 1976, Family Law Act, 1981, The Judicial Separation and Family Law Reform Act, 1989, Family Law Act, 1995 and Family Law (Divorce) Act, 1996.

The practice of providing and accepting solicitors' certificates in relation to the above mentioned Acts on dispositions by individuals (otherwise than in exceptional circumstances) is a matter of concern to the Committee.

Solicitors should always seek or provide (as the case may be) the best evidence that is reasonably available in relation to the above mentioned Acts on any disposition. The best evidence in the case of a disposition by a married individual would be a statutory declaration from the vendor and the vendor's spouse. In some cases it may be reasonable to accept a declaration from the vendor alone. The practice of giving certificates simply because it is more convenient should be discouraged.

Vendors' solicitors should only offer certificates where the best evidence is not available. In giving certificates vendors' solicitors should be able to stand over the reason for the non-availability of the best evidence and also have a personal knowledge which allows them to give a certificate. While it may appear relatively straightforward to certify that a disposition is not affected by the Family Home Protection Act 1976 it is difficult, if not impossible, to certify with absolute certainty that any disposition is not reviewable or that proceedings have not been commenced or threatened by the vendor's spouse. Accordingly, vendors' solicitors may find themselves in personal difficulties if the certificate in question turns out to be incorrect.

Purchasers' solicitors should always ask for the best evidence that is reasonably available. They should only accept a certificate where the best evidence is not reasonably available and where there is good reason for its non-availability.

Published in Law Society Gazette, March 2001

REMOVAL OF NOTICE OF MARRIAGE FROM FOLIO

A practitioner brought to the attention of the Conveyancing Committee a situation where a client was the sole owner of an apartment, title to which was registered in the Land Registry. The client was married and lived in the apartment with her spouse. The apartment therefore was the family home of the couple.

The client's spouse entered a notice of marriage under Section 12 of the Family Home Protection Act 1976 on part 2 of the folio. The client subsequently entered into a separation agreement and her spouse executed a deed of waiver consenting to the sale of the said apartment.

The question put to the committee was whether it thought a notice of marriage must be removed from the folio before closing.

The view expressed by the committee was that, from a legal point of view, there are probably no conveyancing consequences of the continuation of the notice of marriage as a notice in part 2 of the folio. However the committee suggested that it would be good practice to have the notice removed if the opportunity to do so presented itself.

The committee wrote to the Land Registry to inquire if there was any specific Land Registry procedure for having such a notice removed from the folio. The reply from the Land Registry indicated that Rule 7 of the Land Registration Rules 1972 allows for the removal of a notice that no longer affects or relates to a particular property the ownership of which is registered on a folio. The Land Registry went on to say that an application could be made when the property ceases to be a family home or at or following the registration of the spouse as sole owner.

The application can be made by adapting Land Registry Form 71A and lodging it along with all supporting documentation in the Land Registry.

Practitioners should note that a notice of marriage pursuant to Section 12 of the Family Home Protection Act, 1976 registered in respect of property title to which is registered in the Registry of Deeds, cannot be removed from the register.

Published in Law Society Gazette, December 2003

RESTRICTIONS EASED ON USE OF FAMILY LAW COURT ORDERS

Section 40 (4) of the Civil Liability and Courts Act 2004 provides that "Nothing contained in a relevant enactment shall operate to prohibit a party to proceedings to which the enactment relates from supplying copies of, or extracts from, orders made in the proceedings to such persons and in accordance with such conditions (if any) as may be prescribed by order of the Minister."

The above provision was introduced in order to alleviate the practical difficulty caused by the application of the *in camera* rule (adverted to in the decision in Tesco -v- McGrath) to the provision for conveyancing purposes of copies or extracts from court orders in family law cases.

The Minister has now made the relevant order under Statutory Instrument No. 338 of 2005 (entitled Civil Liability and Courts Act 2004 (Section 40(4)) Order 2005) and the persons specified in the schedule to the order have been prescribed for the purposes of section 40(4) of the Act of 2004.

A copy of such part only of an order or extract from an order as is necessary to enable the prescribed person concerned to perform his or her functions may be supplied to any person listed in the schedule, including a solicitor and the Land Registry. The prescribed person to whom such a copy is supplied shall not show or supply the copy to any person other than a person to whom it is necessary for it to be supplied or shown for the purpose of enabling the prescribed person to perform his or her functions.

Extracts from court orders in family law cases may now be exhibited in family law declarations without fear of breaching the *in camera* rule.

Published in Law Society Gazette, November 2005

PROPERTY NOT A FAMILY HOME - SPOUSE SHOULD PROVIDE FAMILY LAW DECLARATION

A family law declaration, whether or not it relates to a family home, should, if owned by an individual, be sworn both by the owner and his or her spouse. This, in the view of the Conveyancing Committee, is a consequence of "Tesco v. McGrath" insofar as it relates to reviewable dispositions.

The statutory concept of the "reviewable disposition" was introduced by Section 29 of the Judicial Separation and Family Law Reform Act 1989 ("the 1989 Act") which was repealed and replaced by Section 35 of the Family Law Act 1995 ("the 1995 Act"). It was continued and applied in Section 37 of the Family Law (Divorce) Act, 1996 ("the 1996 Act).

"Reviewable disposition" is defined in both Sections 35 and 37 as meaning, "in relation to proceedings for the grant of relief brought by a spouse, … disposition made by the other spouse, or by any other person, but does not include such a disposition made for valuable consideration (other than marriage) to a person who, at the time of the disposition acted in good faith and without notice of an intention on the part of the respondent to defeat the claim for relief."

A reviewable disposition can be restrained prior to taking effect. Thereafter, it can, without limit as to time, be set aside, with proof of intention to defeat the claim for relief. That intention will be presumed if the application to set aside is brought within three years of the making of the reviewable disposition.

In Tesco Ireland Limited –v- Patrick J. (otherwise P.J.) McGrath and Thomas McGrath (1998 No. 526 Sp) ("Tesco v. McGrath"), the President of the High Court was asked to determine a number of issues, one of which is relevant for this practice note.

This issue was whether a statutory declaration (of the defendant/vendor in question alone) containing the paragraph

> *"No proceedings of any kind have been instituted or threatened and no application or order of any kind has been made in relation to the property under any of the provisions of ... the 1989 Act or ... the 1995 Act or ... The 1996 Act… and the assurance of the property to the …. parties mentioned in paragraph 7 hereof is not a disposal for the purpose of defeating a claim for relief…."*

was adequate to protect the plaintiff /purchaser.

The judgement stated that if a purchaser is to be protected from the possibility of a transaction being set aside as being a "reviewable disposition", the purchaser must establish

PROPERTY NOT A FAMILY HOME - SPOUSE SHOULD PROVIDE FAMILY LAW DECLARATION

(Contd.)

that the disposition was made for valuable consideration and that at the time he or she acted in good faith and without notice of any intention on the part of the vendor to defeat the claim for relief.

In the Tesco case, it became apparent, after the plaintiff/purchaser had made enquiries, that proceedings under the 1989 Act were in existence between the first-named vendor and his wife. The court could therefore presume, unless the contrary was shown, that the disposition was for the purpose of defeating a claim for financial relief.

The court decided that the plaintiff/purchaser would not be protected if he relied on the statutory declaration offered.

It is therefore best practice to make proper enquiries in relation to possible family law claims, and where the existence of proceedings is disclosed, a family law declaration of the vendor's spouse must be furnished confirming that the disposition is not reviewable. In the alternative, the vendor must furnish the appropriate court order.

The Conveyancing Committee has also given consideration as to whether family law declarations from non-owing spouses should as a matter of prudence be required by a purchaser's solicitor even where no proceedings are in being. Reluctantly the Committee has concluded that they should be. This conclusion is based on best practice. The Conveyancing Committee is conscious of the fact that best practice is not possible or practical in all cases. There will be occasions where a vendor may be able to explain why best practice cannot be implemented and in those circumstances a solicitor must use his or her professional skill and judgement in order to protect the interests of the client; but, where best practice has not been implemented, a solicitor must bear in mind the power of the court under the 1995 and 1996 Acts.

Published in Law Society Gazette, May 2006

FAMILY LAW DECLARATIONS - REVIEWABLE DISPOSTIONS

A. Reviewable Dispositions

The Judgement of the then President of the High Court, Mr Justice Morris, in Tesco Ireland Limited - v - Patrick J (otherwise P.J.) McGrath and Thomas McGrath (unreported High Court 1998/526 Sp) ("Tesco"), delivered on the 14th June 1999 is a useful vehicle for a consideration of the implications of the statutory provisions relating to reviewable dispositions. We are all doubtlessly familiar with the problems caused to conveyancers by the stringent interpretation of the *in camera* rule in this Judgment. This paper considers the aspects of this Judgment relating to reviewable dispositions. The Judgement of the President ("the Judgement") arose from proceedings in relation to a contract whereby the Plaintiff as Purchaser agreed to purchase certain land from the Defendants. The Purchaser raised the following requisition on title (from the then current Requisitions on Title):-

> "26.2 Confirm that this is not a "disposition (as defined by the 1989 Act or the 1995 Act) for the purpose of defeating a claim for "financial relief" (as defined in Section 29 of the 1989 Act) or "relief" (as defined by Section 35 of the 1995 Act)."

(The current edition of the Law Society's Requisitions on Title contains the following corresponding requisition:-

> "26.2 Confirm that this is not a "disposition" (as defined by the 1989 Act, the 1995 Act or the 1996 Act) for the purposes of defeating a claim for "financial relief" (as defined in Section 29 of the 1989 Act) or "relief" (as defined in Section 35 of the 1995 Act and Section 37 of the 1996 Act)".)

The Defendants replied in the following terms:-

" Purchaser will accept the Vendor's Solicitor's certificate that the provisions of this legislation do not affect the property for sale".

The Judgement stated that it was of paramount importance to the Plaintiff to acquire the status of a *bona fide* purchaser for value without notice of an intention to defeat a claim for financial relief, or ensure that the sale was not a "reviewable disposition". The importance of this status arises from the definition of "reviewable disposition".

The statutory concept of the "**reviewable disposition**" was introduced by Section 29 of the Judicial Separation and Family Law Reform Act 1989 ("the 1989 Act"), but, as that Section was repealed by the Family Law Act 1995 ("the 1995 Act"), and was substantially similar to Section 35 of the 1995 Act, it is not necessary to consider that Section in any detail here, although it would have effect in relation to any dispositions taking effect prior to the

commencement date of the 1995 Act, which was the 1st August, 1996. The statutory concept of the "reviewable disposition" was continued and applied in Section 37 of the Family Law (Divorce) Act, 1996 ("the 1996 Act").

In both the 1995 and 1996 Acts, a "**disposition**" means "any disposition of property howsoever made other than a disposition made by will or codicil".

"Relief" is defined in Section 35 (1) of the 1995 Act (and Section 37 (1) of the 1996 Act), and could be summarised as the financial or other material benefits conferred by a long list of orders under various pieces of family law legislation, including periodical payments and lump sum orders; property adjustment orders; financial compensation orders; pension adjustment orders; orders for the provision of a spouse out of the estate of the other spouse; variation orders; relief orders; and certain orders under the Guardianship of Infants Act 1964 and the Family Law (Maintenance of Spouses and Children) Act 1976.

"**Reviewable disposition**" is defined in both Sections as meaning, "in relation to proceedings for the grant of relief brought by a spouse, … a disposition made by the other spouse concerned or any other person but does not include such a disposition made for valuable consideration (other than marriage) to a person who, at the time of the disposition acted in good faith and without notice of an intention on the part of the respondent to defeat the claim for relief."

The Judgement continued that correspondence ensued between the solicitors for the parties, in the course of which the Purchaser's Solicitors were informed that "unhappy differences had arisen between the first named Defendant and his wife". The Vendors offered a statutory declaration (presumably of the Vendors alone, although this is not specifically stated in the Judgement), in the following form:-

> "No proceedings of any kind have been instituted or threatened and no Application or Order of any kind has been made in relation to the property under any of the provisions of… (the 1989 Act) or… (the 1995 Act) or… (the 1996 Act)… and the assurance of the property to the… parties mentioned in paragraph 7 hereof is not a disposal for the purpose of defeating a claim for relief…".

The Purchaser was not prepared to close on the basis of this statutory declaration and asked for "sight of the proceedings, pleadings and any Order made in the proceedings". The Defendants (Vendors) declined to comply with this request as they took the view that since family law proceedings were heard *in camera* it was not within their capacity to disclose this information to the Purchaser.

FAMILY LAW DECLARATIONS - REVIEWABLE DISPOSTIONS

(Contd.)

The Vendors then invoked general condition 18 of the Law Society General Conditions of Sale 1995 Edition which provides

> "If the Purchaser shall make and insist on any Objection or Requisition as to the title… or any other matter relating or incidental to the sale which the Vendor shall, on grounds of unreasonable delay or expense or other reasonable ground be unable or unwilling to remove or comply with, the Vendor shall be at liberty… by giving to the Purchaser… not less than five working days notice to rescind the sale. In that case unless the Objection or Requisition in question shall in the meantime have been withdrawn, the sale shall be rescinded at the expiration of such notice".

The Plaintiff (Purchaser) then issued a Vendor and Purchaser Summons, out of the hearing of which the Judgement arose.

The President was asked to determine five issues.

THE FIRST was whether the statutory declaration containing the paragraph mentioned above was

"adequate to ensure that in relying on same the Plaintiff will be the person acting in good faith without notice of any intention on the part of the first named Defendant to dispute any claim for relief under the Family Law Act 1995 and to satisfy the Plaintiff that the assurance of the property… is not a reviewable disposition…"

It was submitted by Counsel on behalf of the Defendants/Vendors that on the authority of Reynolds - v - Waters (1982) ILRM 335, once a purchaser has made all "proper enquiries" in relation to possible family law claims affecting the property, and when the purchaser has been informed of facts, which if verified by statutory declaration would establish those facts, no such difficulty arises, and if neither the purchaser nor his solicitor has any reason to doubt the accuracy or the veracity of the statements in the proposed statutory declaration, it is not reasonable for the purchaser's solicitors to insist on corroboration of the vendor's declaration and that good title has been shown.

Counsel on behalf of the Plaintiff/Purchaser submitted that these circumstances did not exist in the present case and that the position in which the Purchaser finds itself in the present case is that of the original purchaser in Somers - v - W. (1979) IR 94.

The Judgement continued that if a purchaser is to be protected from the possibility of a transaction being set aside as being a "reviewable disposition", then the purchaser must establish that the disposition was made for valuable consideration and that at the time he acted in good faith and without notice of any intention on the part of the Respondent (Vendor) to defeat the claim for relief.

FAMILY LAW DECLARATIONS - REVIEWABLE DISPOSTIONS

(Contd.)

In Somers - v - W. Mr Justice Henchy stated that

"The question of whether a purchaser has acted in good faith necessarily depends on the extent of his knowledge of the relevant circumstances. In earlier times the tendency was to judge a purchaser solely by the facts that had earlier come to his knowledge. In the course of time it came to be held… that it would be unconscionable for a purchaser to take his stand on the facts that had come to his notice to the exclusion of those which ordinary prudence… could have called to his attention".

"He would not be allowed to say:- "I acted in good faith, in ignorance of those facts, of which I learned only after I took the conveyance if those facts were such as a reasonable man in the circumstances would have brought within his knowledge"". In assessing whether the first purchaser in Somers - v - W. acted in good faith Mr Justice Henchy adopted the procedure of examining "what was the extent of the Plaintiff's actual knowledge".

In the present case the Purchaser became aware of unhappy matrimonial differences when his Solicitors were informed of this fact by the first named Defendant's Solicitors, after the contracts were signed, but before closing. From an amended form of the Statutory Declaration mentioned above, it was apparent that proceedings under the 1989 Act were in existence between the first named Vendor and his wife. Next, the Purchaser's Solicitors were informed that an interim maintenance order had been made. It was therefore clear that claims under the family law legislation were being actively pursued by the first named Vendor's wife and the Purchaser would have been aware that under the provisions of Section 35 of the 1995 Act there was a realistic danger that the Court would presume, unless the contrary was shown, that the disposition was for the purpose of defeating this matrimonial claim. Mr Justice Morris then posed the same question as did Mr Justice Henchy in Somers - v - W.:-

"in the circumstances should the Plaintiff, as Purchaser, be fixed with constructive notice of… the existence of the Defendant's claim?".

He had "no doubt whatever that the answer must be in the affirmative". He was satisfied that the circumstances envisaged by Mr Justice Costello in Reynolds - v - Waters did not exist in the present case and "that if the Purchaser was to rely upon the statutory declaration offered it could not establish that it acted in good faith and without notice on the part of the Vendor to defeat the potential claim". The President therefore answered the first question in the negative.

Thus far, we can learn from the Judge the importance of making "proper enquiries" in

FAMILY LAW DECLARATIONS - REVIEWABLE DISPOSTIONS

(Contd.)

relation to possible family law claims, and having made the "proper enquiries" the importance of taking great care correctly to interpret the replies, particularly having regard to the contents of Section 35 (5) of the 1995 Act, and Section 37 (2) of the 1996 Act.

These Subsections provide that the court, on the application of a person who has instituted proceedings that have not been determined for the grant of relief, may:-

1. If it is satisfied that the other spouse concerned or any other person, with the intention of defeating the claim for relief, proposes to make any disposition of… any property, make such order as it thinks fit for the purpose of restraining that other spouse or other person from so doing or otherwise for protecting the claim; or
2. If it is satisfied that that other spouse or other person has, with that intention, made a reviewable disposition and that, if the disposition were set aside, relief, or different relief, would be granted to the applicant, make an order setting aside the disposition.

Where relief has been granted by the court and the court is satisfied that the other spouse concerned or another person has, with the intention aforesaid, made a reviewable disposition, it may make an order setting aside the disposition.

Accordingly, a reviewable disposition can be restrained prior to taking effect, or can be set aside both prior to and after the granting of relief.

Furthermore, the Sections go on to provide that where an application has been made to restrain or set aside a reviewable disposition prior to the determination of the proceedings (not in respect of a reviewable disposition made after the granting of relief!), with respect to a disposition that took place less than three years before the date of the application, or with respect to a disposition or other dealing with property that the other spouse concerned or any other person proposes to make, and the court is satisfied that the disposition would or has had the consequence of defeating the applicant's claim for relief, it shall be presumed, unless the contrary is shown, that the other spouse, or other person, disposed of the property, or proposed to do so, with the intention of defeating the applicant's claim for relief.

It can be seen therefore, that a reviewable disposition can, without limit as to time, but, of course, since the coming into effect of the said Acts, be set aside, with proof of intention to defeat the claim for relief, and that intention is presumed if the application is made within three years of the making of the reviewable disposition.

THE SECOND question posed by Counsel in Tesco was whether the Defendants should furnish to the Plaintiff copies of any "claims, pleadings and orders" made in the family law

proceedings. The Vendors took the stance that they were not free to furnish the Purchaser copies of "claims, pleadings and orders" made in the family law proceedings as these documents are covered by the *in camera* rule. In this, Mr Justice Morris held that he had "no doubt that they are correct". He referred to 3 of the 12 conclusions set out in the judgement of Mr Justice Barr in Eastern Health Board –V- Fitness to Practice Committee of the Medical Council and Others [1998] 3 IR 399.

The Judgement of Morris P. went on to state

"It is therefore clear that circumstances may arise in which the interests of justice or a crucial public interest may justify the publication of matters arising at an *in camera* hearing. Mr Justice Barr instances the prosecution of a witness in such proceedings for perjury. However I am unable to identify anything in the present case which would indicate to me that it is in the interests of justice or that it is crucial in the public interest that the matrimonial proceedings in this case be made public". He therefore decided that he was "in no doubt that the answer to question number 2 should be in the negative".

The answer to this question should now been seen in the light of Section 40 of the Civil Liability and Courts Act, 2004. Section 40 applies to what are called "**relevant enactments**" which include the Family Home Protection Act, 1976, the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996. Sub-Section (4) reads as follows:-

> " (4) Nothing contained in a relevant enactment shall operate to prohibit a party to proceedings to which the enactment relates from supplying copies of, or extracts from, orders made in the proceedings to such persons and in accordance with such conditions (if any) as may be prescribed by Order of the Minister".

This provision, therefore, allows "a party to proceedings" to supply " copies of, or extracts from, orders made in the proceedings" to prescribed persons. This sub-section does not apply to pleadings, but only to "orders". Furthermore it only facilitates "a party to proceedings" from supplying the copies or extracts. The question might reasonably be asked as to what happens when the parties are dead, but the order needs to be accessed.

THE THIRD question asked whether, alternatively, should the first named Defendant or his Solicitor state in a statutory declaration that no claims in any proceedings brought by the first named Defendant's wife against him could affect the title to the property sold by the contract, if the first named Defendant can truthfully make such a declaration. The Judgement answered this question by saying that it did not arise because

"even if the first named Defendant were in a position to state in a statutory declaration that

FAMILY LAW DECLARATIONS - REVIEWABLE DISPOSTIONS
(Contd.)

no claim in any proceedings brought by the first named Defendant's wife could affect the property, I do not believe that the Purchaser could rely upon it. To that extent the answer should be in the negative".

This very question has been posed several times by practitioners to the Conveyancing Committee, in circumstances where the vendor, for example, was separated (without any deed or Order) and had issued divorce proceedings against his wife. He had contracted to sell a residence which he had purchased after the *de facto* separation. He offered precisely the declaration contemplated in the third question. The practitioner felt that it was sufficient for her client to furnish a declaration that the property had never been the family home of the vendor and his estranged spouse. Conveyancers must convince themselves that it is not only the Act of 1976 which is important, but also the Acts of 1995 and 1996.

QUESTIONS 4 AND 5 dealt with whether the Defendants were entitled to rescind the contract pursuant to General Condition 18, and whether the contract had been validly rescinded by them. The President answered these questions in the affirmative.

B. Family Law Declarations from Non-Owning Spouses.

The answer in the Judgement to the THIRD QUESTION, as to whether the Purchaser could accept a declaration from the Vendor or his Solicitor that no claims in any proceedings brought by the first named Defendant's wife against him could affect the title to the property, the answer being that the Purchaser could not rely on any such declaration, is also important for practitioners. It makes it abundantly clear that if the existence of proceedings is disclosed, the purchaser is not protected by a statutory declaration of the vendor or his solicitor confirming that these proceedings do not affect the property.

The Conveyancing Committee has also given consideration as to whether family law declarations from non-owing spouses should as a matter of prudence be required by a purchaser's solicitor even where no proceedings are in being. Reluctantly the Committee has concluded that they should be. This conclusion is based on best practice. The Conveyancing Committee is conscious of the fact that best practice is not possible or practical in all cases. There will be occasions where a vendor may be able to explain why best practice cannot be implemented and in those circumstances a solicitor must use his or her professional skill and judgement in order to protect the interests of the client; but, where best practice has not been implemented, a solicitor must bear in mind the power of the court under the 1995 and 1996 Acts. In coming to this conclusion, the Committee bore in mind the following:-

1. The purchaser is concerned to know not only whether the property is a `"family

home" within the meaning of that term in the 1976 Act, but also:-

1.1 Whether proceedings have been instituted under the family law legislation and

1.2 Whether the disposition to the purchaser is reviewable under Section 35 or 37 (of the 1995 and 1996 Acts respectively).

It is considered therefore not sufficient for a purchaser simply to be satisfied that the property is not a family home, by reasons, for example, of it being a plot of land, or a commercial property, with no dwelling thereon.

2. It was held is S. - v - S. (1994) 1 IR 407 that a claim in family law proceedings constitutes a registerable *lis pendens*, but that even in the absence of registration a purchaser who had notice of the claim would be bound by the *lis pendens*. Hence the making of a *lis pendens* search will not adequately protect a purchaser.

3. A "disposition" can be "reviewable" even if proceedings have not been issued. Hence even if the vendor can truthfully answer that proceedings have not been issued or threatened, the purchaser is still on risk that the disposition could be reviewable.

4. The Committee also considered the decision by the President in answer to question 3 in the Judgement in Tesco.

C. Dealing with Assets Pending the Outcome of Proceedings.

Practitioners may from time to time be asked by clients to act, for example, in sales or mortgages in the course of family law proceedings. The question will arise as to what form of family law declaration is appropriate. The sole owning spouse may consider that he/she can give a declaration, particularly if there is a deed of waiver in existence. However that spouse cannot declare that there are no proceedings in existence affecting the property, because proceedings under the 1995/1996 Acts can affect any property, unless no financial relief is claimed. Even in such event the person seeking to make the declaration cannot exhibit the proceedings. The Conveyancing Committee is, therefore, of the view that a declaration must, in these cases, by made by both spouses, confirming that the proceedings do not affect the property in question and that the disposition is not reviewable.

If the other spouse will not make a declaration releasing the property from any claim in the proceedings, an application will have to be made to the Court. The following reliefs could

FAMILY LAW DECLARATIONS - REVIEWABLE DISPOSTIONS

(Contd.)

be claimed:-

1. An order granting the Applicant/Respondent leave to sell/mortgage his/her beneficial interest in the dwellinghouse and premises known as ……, in the County of …..… ("the Premises") to……..freed and released from any claim of the Respondent/Applicant in the above entitled proceedings.

2. A declaration that the Applicant/Respondent is entitled to sell/mortgage the Premises to …….freed and released from any claim of the Respondent/Applicant in the above entitled proceedings to the beneficial interest of the Applicant/Respondent in the Premises.

3. An order pursuant to Section 36 of the Family Law Act 1995 to facilitate the sale of the Premises.

4. If necessary, an order pursuant to Section 4 of the Family Home Protection Act, 1976 dispensing with the consent of the Respondent/Applicant to the sale/mortgage of the Premises.

Judges have, in certain cases, made orders striking the property in question out of the proceedings, in which case, of course, the spouse wishing to alienate the property may truthfully declare that there are no proceedings pending relating to the property in question.

Practical Example

Husband separated for 8 years by Deed of Separation. He is a property investor and buys and sells and mortgages property on a regular basis. His wife files for divorce. All the husband's property transactions come to a standstill because he cannot swear a family law declaration that there are no divorce proceedings in being. The wife won't co-operate. In this case the husband will have to make such an application to the court. It has been decided in LO'M – v – NO'M [2002] 3 IR 237 that the Court will not make a general order, but that each transaction must be the subject of a separate application. However, as the courts have made orders for costs against unreasonable parties, it is expected that one successful application will be enough. In preparing to make any such application to the Court, proper groundwork should be put in place – full details of the proposed transaction should be given to the other side, showing that the claims for relief will not be adversely affected by the proposed disposition.

Published in 2006 on production of the 3rd Edition of the Law Society's Conveyancing Handbook