

## Chapter 6: supplement on the financial and property relations of spouses, including occupation of the home

### INTRODUCTION

In chapter 6, we explored the extensive contemporary law relating to the distribution of spouses' and civil partners' property in the event of divorce/dissolution. In introducing that material, we outlined some of the key socio-economic data about couples' household finances which provide essential context to understanding the practical importance of the law discussed in that chapter. A fuller appreciation of the law applicable on divorce can also be gained by having some sense of the legal historical context relating to the position of spouses *during* marriage, and the assumptions that it entailed about the roles of each spouse which still arguably find some resonance today in the way that many couples arrange their households, despite the current law. And so in this supplement we explore the distinctive historical impact of marriage on the positions of husband and wife, the disabilities imposed on wives, the resulting common law duties placed on husbands, and the contemporary – gender-neutral – statutory duties that now effectively take their place. We consider three related issues:

- The doctrine of unity and its consequences for both spouses
- Duties of maintenance during marriage
- Duties to provide a home for one's spouse and its management during marriage.

While civil partnership has none of the gendered historical baggage of marriage, the contemporary gender-neutral laws apply equally to civil partners. In the discussion below, save where the context clearly otherwise indicates, references to marriage in relation to contemporary law should be taken to include civil partnership.

### MARRIAGE AND THE 'DOCTRINE OF UNITY'

As we noted in chapter 2 of the main text, at common law, the doctrine of unity prescribed that husband and wife were one person in law, represented by the husband.<sup>1</sup> This had profound implications for wives' property:<sup>2</sup> in principle, wives were disabled from owning property so all personal property of the wife owned prior to marriage or acquired during it, including any earnings, were the husband's. The position regarding the wife's real property (land) was more complicated: the husband took control of that property during the marriage; if a child was born, the husband would have a life interest in the property; but if he predeceased the wife, she would be able to recover any land that he had disposed of without her consent.<sup>3</sup> As a result of these laws, and wives' disabilities in contract and tort law, Cretney concludes that 'it is not a great exaggeration to say that the common law robbed the married woman of full human personality'.<sup>4</sup> Equity, however, took a different view, and so wealthy parents would ensure that their daughters' property was protected by trust before they married. But that avenue was not practically available to the poorer classes and—

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<sup>1</sup> See 2.4.2.

<sup>2</sup> This summary is taken from Cretney (2003a), 90–3.

<sup>3</sup> See Doggett (1992), 36–59; Kahn-Freund (1955); O'Donovan (1985), ch 2.

<sup>4</sup> Cretney (2003a), 91.

crucially for working class wives—could not protect a wife’s earnings. As John Stuart Mill put it in his powerful essay of 1869, *The Subjection of Women*: ‘The two are called “one person in law”, for the purpose of inferring that whatever is hers is his, but the parallel inference is never drawn that whatever is his is hers; the maxim is not applied against the man, except to make him responsible to third parties for her acts, as a master is for the acts of his slaves or of his cattle.’<sup>5</sup>

There were limited compensations for the wife’s disabilities: for example, she had a right at common law to be maintained by her husband and would be presumed to be acting as his agent in the purchase of ‘necessaries’, so could pledge his credit with tradesmen;<sup>6</sup> he would be liable for any tort she committed.<sup>7</sup> But her essential disability remained, while her unmarried sister enjoyed the same rights to own property as men.

Katherine O’Donovan has argued that the common law was largely based on ideological and economic rationales.<sup>8</sup> The ideological basis was the doctrine of unity and the wife’s consequent subjection to the husband’s control. But the common law also served an economic function: by denying them economic power and rendering them dependent on their husbands, wives were pushed into motherhood and unpaid domestic service in the home, while husbands went out into the market to earn a ‘family wage’. The law therefore sustained the traditional division of labour between spouses and the separation of the public world inhabited by men from the private world of women.<sup>9</sup>

The Married Women’s Property Acts of 1870 and 1882 brought key reform. This legislation followed sustained campaigns by the early women’s movement, with the support of sympathetic (male) parliamentarians, moved by the injustice experienced in particular by working class wives.<sup>10</sup> The current law is found in early twentieth-century legislation, notably:

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**Law of Property Act 1925, s 37**

A husband and wife shall, for all purposes of acquisition of any interest in property...be treated as two persons.

Later legislation confirmed wives’ capacity – like any other person – to own and deal with property and to be liable in their own right in tort, contract, bankruptcy etc.<sup>11</sup>

But, as we discuss in chapter 7 of the main text, the general law of property can still be regarded as an inadequate tool for the protection of economically weaker family members. The nineteenth-century reformers, motivated by a political philosophy of individualism, had sought formal equality: married women should have the same rights as any other person to own property. The basic appeal of that claim seems irresistible. However, while wives now had the legal *power* to own property, many were in *practice* unable to acquire any property

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<sup>5</sup> Mill (1869), 463.

<sup>6</sup> Since she could own no property, a wife could not make a contract herself, having no means of fulfilling it.

<sup>7</sup> These were necessary results of wives’ incapacity regarding property: Kahn-Freund (1955), 271–2.

<sup>8</sup> O’Donovan (1985), 30–5.

<sup>9</sup> Until the early twentieth century, women (married or not) had no vote and were excluded from professional occupations, public office, and reading for university degrees: Representation of the People Acts 1918 and 1928 and Sex Disqualification (Removal) Act 1919.

<sup>10</sup> Hayward (2018).

<sup>11</sup> Law Reform (Married Women and Tortfeasors) Act 1935.

owing to their confinement to the domestic sphere and the basis on which the general law allows interests in property to be acquired.<sup>12</sup> As Katherine O'Donovan put it, 'So long as equality remains a formal notion, like the Ritz hotel which is open to all, structural obstacles will prevent those for whom opportunities are opened from taking advantage of them.'<sup>13</sup> Despite the increasing numbers of wives and mothers who engage in paid employment, as we discuss at 6.2 of the main text, full gender equality is some way off and so these problems remain. It is in this legal and social context that the development of financial remedies on divorce discussed in chapter 6 is so important. But of course that law does nothing directly for the position of spouses *during* marriage, when each spouse owns their 'separate' property.<sup>14</sup>

## MARRIAGE, INCOME AND MAINTENANCE

The law in this area is important owing to the continued imbalance in earning power between many parents, married or not. Where one parent (usually the mother, in opposite-sex couples) gives up or reduces paid employment to take on the role of primary carer, that person is rendered to some extent dependent on the wage-earner. However, private law relating to income and savings from earnings is similar to that governing ownership and use of property. Ownership of such funds is largely determined by the general law: the earner is exclusively entitled to his or her income, and is under no general obligation to share it with any family member. Nor does any family member have a right to know what others' income is.<sup>15</sup> The general position is mitigated by basic 'maintenance' obligations owed between spouses and civil partners, though the practical significance of the obligation outside the context of divorce is limited.

### The common law duty of husbands to support wives

Having disabled wives from owning property, including any wages that they might earn through paid employment, the common law obliged husbands to maintain their wives. But the obligation was not directly enforceable:

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#### *R (Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48

##### BARONESS HALE:

53. The common law courts would not intrude into the matrimonial relationship, or trespass upon the jurisdiction of the ecclesiastical courts over that relationship, by ordering the husband to make payments to his wife. But a wife who was living with her husband did have the apparent authority to contract as his agent for the expenses of the household. And if they were living apart, the common law recognised her agency of necessity, the right to pledge her husband's credit for necessities according to her station in life. Unlike the housekeeping authority, this could not be countermanded by

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<sup>12</sup> See Smart (1984), 29–30, 47–9.

<sup>13</sup> O'Donovan (1985), 167.

<sup>14</sup> Cf various Law Commission projects in the 1970s and 1980s which explored the idea of creating joint ownership of various assets, including the home, for spouses; and the various continental European jurisdictions that have schemes of immediate community of property, conferring joint ownership of core assets immediately on marriage.

<sup>15</sup> Cf the old law which required married couples to complete a single tax return, completed by the husband, which would ensure that he knew her income, but not vice versa.

the husband. But the agency of necessity subsisted only if the wife was justified in living apart from her husband. Hence she would lose it for ever if she was guilty of adultery, no matter how badly her husband had behaved;...it would be suspended while she was in desertion...; but if they were obliged to live apart through no fault of hers, for example because of illness, the obligation continued.

The wife's agency of necessity was abolished in 1970, when the court's modern-day powers to order financial provision on divorce, judicial separation, and nullity were created.<sup>16</sup> The common law duty to maintain was superseded in practice by gender-neutral legislation empowering the courts to make enforceable maintenance orders between spouses and civil partners, and is due to be abolished by the Equality Act 2010.<sup>17</sup>

### Statutory maintenance obligations

The courts can order payment of maintenance *during* marriage and civil partnership under various statutes.<sup>18</sup> In practice, the power is exercised, if at all, only where the relationship has broken down (but is not subject to dissolution, separation, or nullity proceedings<sup>19</sup>). In order to preserve 'family privacy', the law is reluctant to intervene in the intact family.<sup>20</sup> Although orders may be made and enforced while the parties are living together, some orders for maintenance automatically expire after six months' continuous cohabitation by the parties.<sup>21</sup> The basis on which these orders may be made and enforced is very similar to that governing equivalent powers on dissolution, judicial separation, and nullity, so we shall not examine them in detail here.<sup>22</sup> Where there are minors, of course, child support is payable in the event of parental separation (whether married or not); that is far more significant than maintenance for the benefit of the spouse, which is rare.<sup>23</sup>

### One special rule of ownership: savings from housekeeping money

One statutory provision creates co-ownership of a specific pool of money, originally only within marriage. Like the presumption of advancement, the statutory rule about ownership of savings made from housekeeping money, in its original form, was something of an historical curio and raised human rights problems. It cast interesting light on historical understandings of the family and family members' roles. As originally enacted, it read as follows:

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#### Married Women's Property Act 1964, s 1

If any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes, or to any property

<sup>16</sup> Matrimonial Proceedings and Property Act 1970, s 41.

<sup>17</sup> S 198; still not in force as at August 2019.

<sup>18</sup> Domestic Proceedings and Magistrates' Courts Act 1978 (DPMCA 1978), CPA 2004, Sch 6; MCA 1973, s 27, CPA 2004, Sch 5, Pt 9; Cretney (2003a), ch 11.

<sup>19</sup> As to that, see chapter 6.

<sup>20</sup> Boden and Childs (1996), 114; O'Donovan (1985), 112, 182.

<sup>21</sup> DPMCA 1978, s 25; CPA 2004, Sch 6, para 29.

<sup>22</sup> But note the particular 'grounds' on which maintenance orders may be made in this context: DPMCA 1978, s 1; MCA 1973, s 27(1); CPA 2004, Sch 6, para 1; Sch 5, para 39. For case law examples see *Barnes v Barnes* [1972] 1 WLR 1381; *Blower v Blower* [1986] 1 FLR 292; *Robinson v Robinson* [1983] Fam 42; *Vasey v Vasey* [1985] FLR 596.

<sup>23</sup> There are no data on use of this jurisdiction: Cretney (2003a), 472–3.

acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to the husband and wife in equal shares.

This explicitly gendered provision—husbands earn wages from which an ‘allowance’ for housekeeping is made to housewives (who receive no personal income)—was introduced to protect the interests of the thrifty housewife who made savings from the housekeeping money.<sup>24</sup> It followed a case which held that, in the absence of any other agreement, the husband solely owned that money or any property acquired with it, in that case, a winning football pools coupon.<sup>25</sup> Although applauded for treating marriage as a partnership which should give rise to joint ownership of property, the provision was criticized as far too narrow. Why, for example, should joint ownership only arise from housekeeping money, and not from savings made directly by the husband from his wage for expenditure on items for the family’s use?<sup>26</sup>

Like the presumption of advancement, this provision appeared to be incompatible with Article 5 of the Seventh Protocol. The Equality Act 2010 is accordingly due to amend the provision prospectively (relabelling it ‘Matrimonial Property Act 1964’) to make it gender neutral—so it applies equally to savings made by a husband to whom an allowance is made by the wife—and to extend it to civil partners.<sup>27</sup> Whether many, if any, couples will ever rely on it is doubtful, given the substantial decline of the housekeeping allowance money management system, particularly among young couples.<sup>28</sup>

### Leaving it to the parties

In the absence of any effective legal regulation of family finances during the currency of relationships, the matter is left to the parties. This raises concerns that by keeping out of the family, the law simply protects the more economically powerful, who can decide whether to share their money with the rest of the family. Research on money management in opposite-sex relationships suggests that where couples do not pool their resources and give each party equal decision-making power over and access to the funds, there can be marked imbalances between the parties, prejudicing the lower earning party (often the woman). The resulting strain on the relationship may even precipitate separation.<sup>29</sup>

It has been argued that the failure to give an entitlement to share in the family finances (and the family home) to those undertaking unpaid work in the home encourages the perception that that work is of no value.<sup>30</sup> One campaigning organization seeks ‘wages for housework’ from the state. In 2012, household clothing and laundry services alone were worth £97 billion, equivalent to 5.9 per cent of GDP.<sup>31</sup> A state-paid wage for housework seems unlikely. But the value of this work—and the economic sacrifices made by those who devote themselves to home and family, in terms of lost opportunity to develop and maximize earning capacity—needs to be

<sup>24</sup> See Thompson (2018). Cf the gender-neutral Scottish presumptions: Family Law (Scotland) Act 1985, ss 25–6, and Family Law (Scotland) Act 2006, ss 26–7.

<sup>25</sup> *Hoddinott v Hoddinott* [1949] 2 KB 406.

<sup>26</sup> Kahn-Freund (1959), 250–1.

<sup>27</sup> Ss 200–1: again, still not in force as at August 2019.

<sup>28</sup> On the practices of under-35s, see Vogler (2009).

<sup>29</sup> Vogler (2005).

<sup>30</sup> Taub and Schneider (1998), 334.

<sup>31</sup> Fludger and Dougherty (2014).

recognized. As explored in chapter 6, they are acknowledged on divorce. But should they receive firmer recognition *during* relationships by the conferment of further private law entitlements?

## MARRIAGE AND THE HOME

### The rights of the wife at common law

At common law, a wife with no right to occupy the matrimonial home under the general law enjoys a personal right to occupy it<sup>32</sup> simply by virtue of being a wife. This is an aspect of the wife's common law right to be maintained by the husband.<sup>33</sup> The nature and scope of this right has been explored by the House of Lords:

***National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1229–30, 1232–3**

#### LORD UPJOHN:

[T]he law has never adjudicated between the parties where or how they are to live. It is for the spouses to decide where and in what state they and the family are to live, be it in the Ritz or a caravan. The choice from time to time of the matrimonial home is entirely a matter for decision within the domestic forum; though, no doubt...where there is a difference of opinion between the spouses as to the place of the matrimonial home someone must have the casting vote. A wife on entering a matrimonial home, the property of her husband, has no rights, even inchoate, in that home which the law will recognise or protect...But, on the other hand, having regard to the duty of the spouses to live together the court does not, during the subsistence of the marriage, merely give effect to the strict legal and equitable rights of a spouse qua owner of the property as though the spouses were strangers. Recognising the obligations of the spouses to live together<sup>34</sup> the court will only make orders with regard to the occupation of the matrimonial home subject to those obligations...

[A] wife does not remain lawfully in the matrimonial home by leave or licence of her husband as the owner of the property. She remains there because as a result of the status of marriage it is her right and duty so to do and if her husband fails in his duty to remain there that cannot affect her right to do so. She is not a trespasser, she is not a licensee of her husband, she is lawfully there as a wife, the situation is one sui generis...

But apart from authority, what is the extent and ambit of her right to continue in occupation? I have already pointed out that...she has no special rights in the particular house where the spouses are living...[I]f the husband deserts the wife, her] rights as a wife continue as before, they are not increased by breach of duty on the part of the husband, but being in breach himself he may find it difficult to turn her out of the house where she is lawfully living awaiting his return and the court may prevent the husband by injunction from dealing with his property to the prejudice of the wife without safeguarding her position...But then many things may happen: he may offer alternative accommodation to the wife: he may offer her substantial maintenance to go and live elsewhere...[P]rovided the wife's marital rights are adequately safeguarded in some such way the court would not normally refuse to evict a wife if the husband wants to deal with his property. Or he may return and resume cohabitation [at which point] the domestic forum resumes exclusive jurisdiction. Or the wife may change her position. She may commit a matrimonial offence which may lead the court to refuse her the right to continue under her husband's roof;<sup>35</sup> she may obtain (as in this case) a decree of judicial separation which at all events brings the husband's desertion to an

<sup>32</sup> The right only applies to property which is or has been the matrimonial home: *Hall v King* [1988] 1 FLR 376; in relation to other property, the wife may have only a bare licence. It is unenforceable if the home is owned by or with third parties: *Chaudhry v Chaudhry* [1987] 1 FLR 347

<sup>33</sup> Query whether it might therefore be abolished by the Equality Act 2010 if those provisions are implemented.

<sup>34</sup> See the concept of consortium, at p 57 of the main text; the action for restitution of conjugal rights was abolished in 1970: see Cretney (2003a), ch 4.

<sup>35</sup> Cf the regulation of statutory home rights under FLA 1996, s 33; see 4.5.3.

end... Such a decree must necessarily be an important though not conclusive factor if the husband is seeking to turn his wife out of occupation. Finally, any right on the part of the deserted wife to remain in occupation terminates when the marriage terminates.

It is unclear whether a husband enjoys equivalent common law rights against a property-owning wife.<sup>36</sup> Civil partnership, a creature of statute, confers no such common law entitlements (which presumably do not apply to same-sex marriage either). However, the significance of any common law right to occupy is superseded by statutory 'home rights' which are enjoyed equally by spouses and civil partners.

### Statutory 'home rights'

In order to appreciate the significance of home rights (formerly called 'matrimonial home rights' and outlined in chapter 4 at 4.5.3), it is necessary to review the background to their creation. One of Lord Denning's initiatives to protect wives' interests in the family home was the 'deserted wife's equity': could the wife's common law right to occupy the matrimonial home (as wife rather than co-owner) be enforced both against the husband who had deserted her and against a third party to whom the deserting husband had sold or mortgaged the property? Several Court of Appeal decisions held that it could. However, while a wife may still be able to assert her common law right to occupy as against a landlord in leasehold cases,<sup>37</sup> the House of Lords in *Ainsworth* held that no such right was enforceable against third parties in the context of freehold land:

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#### ***National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1233–4, 1242**

##### **LORD UPJOHN:**

The right of the wife to remain in occupation even as against her deserting husband is incapable of precise definition, it depends so much on all the circumstances of the case, on the exercise of purely discretionary remedies, and the right to remain may change overnight by the act or behaviour of either spouse. So as a matter of broad principle I am of opinion that the rights of husband and wife must be regarded as purely personal inter se and that these rights as a matter of law do not affect third parties [even if they have full notice of the desertion].

In this case your Lordships are dealing with essentially conveyancing matters. It has been the policy of the law for over a hundred years to simplify and facilitate transactions in real property. It is of great importance that persons should be able freely and easily to raise money on the security of their property. Of course an intending purchaser is affected with notice of all matters which would have come to his notice if such inquiries and inspections had been made by him as ought reasonably to have been made (section 199 of the [LPA] 1925<sup>38</sup>). But surely any inquiry, if it is to be made reasonably, must be capable of receiving a positive answer as to the rights of the occupier and lead to a reasonably clear conclusion as to what those rights are? The answer "I am a deserted wife" (if given) only gives notice of a right so imprecise, so incapable of definition, so impossible of measurement in legal phraseology or terms of money that if he is to be safe the mortgagee will refuse to do business and much unnecessary harm will be done... It does not seem to me that an inquiry as to the marital status of a woman in occupation of property is one which the law can reasonably require to be made; it is not reasonable for a third party to be compelled by law to make inquiries into the

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<sup>36</sup> *Seel v Watts and Butterworth* [1954] CLY 2861 concluded not; but compare *Harman v Glencross* [1985] Fam 49, 58.

<sup>37</sup> E.g. *Metropolitan Properties Co Ltd v Cronan* (1982) 44 P&CR 1. The position is now covered by FLA 1996, s 30(4).



delicate and possibly uncertain and fluctuating state of affairs between a couple whose marriage is going wrong. Still less can it be reasonable to make an inquiry if the answer to be expected will probably lead to no conclusion which can inform the inquirer with any certainty as to the rights of the occupant. These considerations give strong support to the opinion I have already expressed that the rights of the wife must be regarded as purely personal between herself and her husband.

**LORD WILBERFORCE:**

The ultimate question must be whether such persons can be given the protection which social considerations of humanity evidently indicate without injustice to third parties and a radical departure from sound principles of real property law.

The House of Lords held they could not. However, Parliament promptly filled the gap with ‘matrimonial home rights’, originally in 1967; the relevant provisions are now consolidated in the FLA 1996 – we extract the core parts of relevant provisions in chapter 4 of the main text at 4.5.3. That legislation, unlike the common law, is gender-neutral, and applies to civil partners. These rights are enforceable against the other spouse or partner, provide eligibility to apply for an occupation order against the other spouse or partner, and (if registered on the appropriate land register) are enforceable against third parties as a charge. These statutory home rights are ‘purely personal’: they do not entitle that spouse to give any other person a right to occupy the property, and cannot be assigned or disposed of.<sup>39</sup> However, home rights are more concrete than wives’ old common law right: they do not depend for their continued existence on the parties’ conduct (e.g. there is no need for the owning spouse to have deserted the other), but they may be terminated by court order.<sup>40</sup> The rights may be asserted against the other spouse over more than one property and against property co-owned by the other spouse with third parties,<sup>41</sup> but can only be registered and so bind third parties in relation to one.<sup>42</sup> In order to bind a third party, they must be appropriately registered. Readers requiring discussion of the law relating to the impact of home rights on third parties should refer to Land Law textbooks.

### **Decision-making about sale and other transactions affecting the matrimonial home**

At 7.3.2 of the main text, we outlined the limited circumstances in which a family member will enjoy any decision-making power over the family home under the general law. Here, we explore the specific family law protections that spouses enjoy.

#### ***No right as family member to be consulted about or veto transactions***

English law does not straightforwardly provide any family member with a right to be consulted about transactions regarding the family home, in that capacity, rather than as a co-owner of the property. Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* considered that such a requirement would ‘create impossible difficulties for those dealing

<sup>38</sup> Cf registered land: LRA 2002.

<sup>39</sup> *Wroth v Tyler* [1974] Ch 30.

<sup>40</sup> See FLA 1996, s 33; conduct is a relevant factor: s 33(6); see 4.5.3.

<sup>41</sup> *Abdullah v Westminster CC* [2011] EWCA Civ 1171.

<sup>42</sup> FLA 1996, Sch 4, para 2.

with the property of a married man', requiring, as it would, the wife's consent to all dealings affecting the home.<sup>43</sup> Nor does English law prevent or limit use of the family home as security for business loans, preferring instead to maximize the marketability of that asset.<sup>44</sup> Such loans may be essential for the livelihood of a family dependent on that business. But that may not of itself justify depriving family members of a say in whether their home should be used for that purpose, given the risks involved.<sup>45</sup>

The FLA 1996 provisions regarding home rights give spouses and civil partners some leverage over such decisions *if they have registered* their rights as a charge on the property.<sup>46</sup> But it has been asked whether the owner-spouse should be obliged to give the other advance notice of any proposed transaction which would affect the latter's right of occupation, alerting the other to the need to take steps to protect his or her home rights. The law could even require that the latter's active consent to any such transaction be obtained, so that any purported sale or mortgaging of the family home would be void without it.

The Law Commission's proposals for statutory co-ownership of the matrimonial home would have provided the 'incidental advantage' of giving the otherwise non-owning spouse control over dispositions of the property: a disposition without the spouse's consent (or without having dispensed with it by court order) would have no legal effect. However, consistent with the approach to statutory home rights, the right would in most cases have been enforceable against third parties only if the co-ownership interest had been registered.<sup>47</sup> The Commission rejected the view that a spouse should be entitled to prevent any disposition of the matrimonial home, regardless of whether he or she co-owned it: such a right 'would represent a drastic inroad into accepted concepts of property'.<sup>48</sup>

By contrast, many other jurisdictions give spouses statutory rights of consultation and veto which are enforceable without prior registration. Some of those countries operate full community of property during marriage, but, as Dewar suggests, there is no reason why the right to control dispositions of key assets cannot be enjoyed independently of ownership.<sup>49</sup> Since the right attaches only to spouses (and, if adopted in England, to civil partners), third parties can easily check the legal status of the person with whom they wish to transact (marital status being a matter of public record) and so ascertain whether there is a spouse whose consent must be obtained. Commonly, non-compliance with such requirements renders the relevant transaction voidable for a given period,<sup>50</sup> or even void (unless the third party is a purchaser for value in good faith, who is unaware that the vendor or mortgagor is married).<sup>51</sup> In practice, most purchasers and mortgagees check whether there are any other adults occupying the property in order to get them to waive whatever rights they may have (whether as co-owners, home rights holders, or otherwise). But English law would arguably benefit from a more formalized mechanism for obtaining consent, at least from spouses and

<sup>43</sup> [1965] AC 1175, 1248.

<sup>44</sup> See *Barclays Bank v O'Brien* [1994] 1 AC 180, 188. Compare the 'homestead' legislation of some Canadian provinces and US states, and New Zealand's Joint Family Homes Act 1964, which to a greater or lesser extent puts the home 'off limits' to creditors: Fox (2005).

<sup>45</sup> Even if those family members would not think twice about consenting: Fehlberg (1997).

<sup>46</sup> FLA 1996, s 31.

<sup>47</sup> Law Com (1978), paras 0.12 and 1.417(79)–(116); Law Com (1982a), paras 90–105.

<sup>48</sup> Law Com (1982a), para 110(iii). See also Law Com (1978), paras 2.87–2.89.

<sup>49</sup> Dewar (1998b); e.g. in Sweden, where there is no community of property during marriage.

<sup>50</sup> E.g. Swedish Marriage Code, ch 7, s 5: see generally Cooke, Barlow, and Callus (2006), ch 5.

<sup>51</sup> Irish Family Home Protection Act 1976, s 3.

civil partners, if not also from other family members.

***Can the court prevent a disposition?***

If a non-owning spouse or other family member cannot prevent the disposition privately, can he or she do so via court order?<sup>52</sup> The law here is not entirely clear. The fact that someone has statutory home rights (even if registered) or the benefit of an occupation order under the FLA 1996 does not prevent the owner from selling or mortgaging the property<sup>53</sup> or, probably, terminating a tenancy of it.<sup>54</sup> However, it may be possible to obtain an injunction prohibiting dispositions of the property. Where divorce proceedings are in progress, the courts have specific powers to prevent certain types of transaction.<sup>55</sup> It has also been held that s 17 of the Married Women's Property Act 1882 empowers the court to grant an injunction barring sale unless the husband provides alternative accommodation for the wife, as an aspect of the common law duty to provide a home for the wife; the courts might now regard wives as being subject to this duty as well as husbands. This power seems to survive the creation of statutory home rights.<sup>56</sup> Even outside the context of marriage, it might also be possible to use s 37 of the Senior Courts Act 1981 to restrain a disposition which would prejudice rights enjoyed under an occupation order or home rights.<sup>57</sup> Such an injunction could not bar dispositions of the property for any period longer than the underlying occupation order or home rights endured. Otherwise, however, the owner is free to do as he or she wishes with the property.

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<sup>52</sup> Royal Commission on Marriage and Divorce (1956) thought he or she should be able to: para 670.

<sup>53</sup> Law Com (1992), para 4.19; *Davis v Johnson* [1979] AC 264, 343 and 349. Even though the owner might be required by order to continue to pay the mortgage or rent: FLA 1996, s 40.

<sup>54</sup> *Harrow LBC v Johnstone* [1997] 1 WLR 459.

<sup>55</sup> MCA 1973, s 37; CPA 2004, Sch 5, Part 14: see p 420 of the main text.

<sup>56</sup> *Lee v Lee* [1952] 2 AC 489; *Halden v Halden* [1966] 1 WLR 1481; *Gurasz v Gurasz* [1970] P 11.

<sup>57</sup> Cf *Moore v Moore* [2004] EWCA Civ 1243.

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