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DISPENSING WITH THE CONSENT OF A NON-ENTITLED SPOUSE

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In circumstances where a matrimonial home is owned solely by one of the spouses, the Matrimonial Homes (Family Protection) (Scotland) Act 1981 gives to the non-owning spouse the right to occupy the matrimonial home. In principle, these occupancy rights affect third party acquirers of rights in the matrimonial home. However, section 7 of the 1981 Act allows the court to dispense with the non-owning spouse's consent to dealings with the matrimonial home. This article discusses the difficulties raised by section 7, and argues that these difficulties are not wholly resolved by amendments made by the Family Law (Scotland) Act 2006.

BACKGROUND

Nowadays matrimonial homes are probably most commonly co-owned by the two spouses. However, this need not be the case. It is perfectly possible, and was at one time more common, for one spouse to be the sole owner of the matrimonial home. What was the legal position of the non-owning spouse? The common law position was that, where the matrimonial home was solely owned by one of the spouses, the non-owning spouse's occupancy was entirely at the will of the owning spouse. The spouse who owned the matrimonial home could require the other spouse to leave the house, and if necessary would be supported by the court by means of a decree of ejection.¹ The non-owning spouse had no remedy for being turned out of the house, at least as far as property law is concerned.² The only remedy would be to raise an action for adherence, which could then be followed by an action for divorce.³

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¹ *Colquhoun v Colquhoun* (1804) Mor App (Husband and Wife) 10; *Sutherland v Sutherland* (1897) 13 Sh Ct Rep 209; *Maclure v Maclure* 1911 SC 200; *Millar v Millar* 1940 SC 56; *Macpherson v Macpherson* (1950) 66 Sh Ct Rep 125.

² This need not have been the case, at least in the case of an extra-judicial dispossession of the wife. A remedy based on the non-owning spouse's possession could perhaps have been provided, based on the idea that a possessor is entitled not to be dispossessed, without having to show any right to possession (see KGC Reid, *The Law of Property in Scotland* (1996), paras 161-162). The same principle has been used in South Africa to provide a remedy in such cases: *Oglodzinski v Oglodzinski* 1976 (4) SA 273; see also *Rosenbuch v Rosenbuch* 1975 (1) SA 181. It does not seem that this principle has ever been applied in this way in Scotland.

³ A spouse's duty to adhere could not, however, be directly enforced, with the result that it could not be used to compel the owning spouse to allow the non-owning spouse back into shared possession of the matrimonial home. This seems to have been at least part of the reason why ejection of the non-owning spouse was allowed, even where the ejection would put the ejecting spouse in breach of the duty of

This position was changed by the Matrimonial Homes (Family Protection) (Scotland) Act 1981, which was the result of proposals by the Scottish Law Commission.⁴ The 1981 Act was an attempt to improve the position of spouses who did not own a share in the matrimonial home, called "non-entitled spouses" by the 1981 Act, and also to protect spouses from domestic abuse, regardless of the ownership position. Section 1 of the Act gives a non-entitled spouse the right to occupy the matrimonial home. Further provision regulating the exercise of these occupancy rights is found in sections 2-5 of the 1981 Act, including provision in section 4 for orders excluding one spouse from the matrimonial home for the purpose of protection from domestic abuse. Equivalent provision is made for civil partnerships by the Civil Partnership Act 2004.⁵ These provisions are in substance identical to those in the 1981 Act.

It is not proposed here to enter into discussion of these occupancy rights as they affect the relationship between the spouses. This article is concerned with the effect of these occupancy rights on third party acquirers of the matrimonial home. The view was taken that it was necessary to protect the non-entitled spouse's occupancy rights against the effect of transactions by the entitled spouse with the matrimonial home.

The Scottish Law Commission's original proposal was that the non-entitled spouse should be able to have the court "annul", or reduce, any conveyance by the entitled spouse without the non-entitled spouse's consent.⁶ This was dependent on the non-entitled spouse registering in the Land Register or recording in the Register of Sasines a "matrimonial home notice", notifying any potential enquirer of the non-entitled spouse's interest in the property.⁷

The final position enacted in the 1981 Act departed, however, from the Commission's proposals in important respects.⁸ The 1981 Act provided that, in principle, occupancy rights continue in effect following a "dealing" with the property.⁹ The non-entitled spouse's right to occupy continues to be enforceable, therefore, against a new owner. By contrast with the Scottish Law Commission's proposals, this enforceability against third parties arises by force

adherence: *Colquhoun v Colquhoun* (1804) Mor App (Husband and Wife) 10 at 13, 14; *Maclure v Maclure* 1911 SC 200 at 204-205 (Lord President).

⁴ Scottish Law Commission, *Report on Occupancy Rights in the Matrimonial Home and Domestic Violence* (Scot Law Com No 60, 1980).

⁵ Sections 101 et seq.

⁶ Scottish Law Commission, n.4 para 3.5.

⁷ Scottish Law Commission, n.4 paras 3.27-3.28. Alternative provision is made in paras 3.39-3.41 for matrimonial homes held on the basis of a lease or trust liferent.

⁸ For the reasons for this, see Scottish Law Commission, *Report on Family Law* (SLC No 135, 1992) paras 11.3-11.4; D I Nichols & M C Meston, *The Matrimonial Homes (Family Protection) (Scotland) Act 1981*, 2nd edn (1986) para 6-01; E M Clive, *The Law of Husband and Wife in Scotland* 4th edn (1997) para 15.062.

⁹ 1981 Act, s. 6(1). The term "dealing" is not defined except that it "includes the grant of a heritable security and the creation of a trust but does not include a conveyance under section 80 of the Lands Clauses Consolidation (Scotland) Act 1845". It is, however, accepted that a sale of the matrimonial home would constitute a dealing: DJC, "'Dealing' under the Matrimonial Homes Act" 1990 JR 229 at 229; G L Gretton & K G C Reid, *Conveyancing* 4th edn (2011), para 10-06; Clive, para 15.066.

of law, without any action having to be taken by the non-entitled spouse. However, this is heavily qualified by provision that the occupancy rights will be extinguished, as far as a purchaser is concerned, if the purchaser is in good faith and there is produced to him a written declaration that there are no occupancy rights¹⁰ or what bears to be a renunciation of occupancy rights or consent to the dealing by the non-entitled spouse.¹¹ This will be the effect even if the written declaration is false, or the renunciation or consent is a forgery.¹²

SECTION 7

Occupancy rights are, therefore, easy to get rid of. The entitled spouse need only lie about their existence. The result will be that, as a result of being told in the correct way, that lie will become the truth. However, a conveyancer should of course not be party to such deceit. Suppose, then, that there is a non-entitled spouse, able but unwilling to consent to the dealing. What is the honest conveyancer to do?

Some apparent assistance is provided by section 7(1)(a) of the 1981 Act, which provides that the court may dispense with the consent of a non-entitled spouse to a proposed dealing, or a dealing that has already taken place, where "such consent is unreasonably withheld". It is provided by section 7(2) that consent is taken to have been unreasonably withheld where the non-entitled spouse has led the entitled spouse to believe that he or she would consent to the dealing, or the entitled spouse has not been able to obtain an answer to the request for consent, despite having taken all reasonable steps. It has been held, however, that section 7(2) is not exhaustive,¹³ and that such other factors may be taken into account as are considered appropriate in the circumstances.

Indeed, subsection (2) is supplemented by subsection (3), which requires the court to take into account the matters listed in section 3(3) of the 1981 Act. These are:

"(a) the conduct of the spouses in relation to each other and otherwise;

"(b) the respective needs and financial resources of the spouses;

"(c) the needs of any child of the family;

¹⁰ The 1981 Act was amended to this effect by the Family Law (Scotland) Act 2006, s. 6. Formerly, an affidavit was required.

¹¹ 1981 Act, s. 6(3)(e).

¹² One may wonder, therefore, what the point is of requiring the written declaration, consent or renunciation, rather than merely requiring good faith. The procedure has been referred to, fairly enough, as a "rigmarole" (G L Gretton & K G C Reid, *Conveyancing* 4th edn (2011), para 10-07.

¹³ *Fyfe v Fyfe* 1987 SLT (Sh Ct) 38 at 41L.

"(d) the extent (if any) to which-

(i) the matrimonial home...is used in connection with a trade, business or profession of either spouse; and

"(e) whether the entitled spouse offers or has offered to make available to the non-entitled spouse any suitable alternative accommodation."

CASE LAW

Shortly before coming into force, the provisions of section 7 were described as "straightforward and sensible".¹⁴ Such optimism has, unfortunately, proved ill-founded. Difficulties have arisen in the case law with respect to both the timing of the application under section 7 and the criteria applied.

In *Dunsmore v Dunsmore*,¹⁵ H and W were co-owners of the matrimonial home,¹⁶ but had separated and H was living elsewhere. H raised an action for division and sale of the matrimonial home, and added to this a motion seeking to have W's consent to a sale dispensed with. The sheriff held that this was "a proposal to sell, not a proposed sale".¹⁷ The sheriff seems clearly correct to consider H to have acted prematurely in seeking to have W's consent dispensed with.¹⁸ The action for division and sale, while a necessary step, was only a preliminary step. The property could not be marketed until those proceedings had been completed. However, the sheriff went further and specified a test for a proposed sale, namely "whether there is a third party [*i.e.* a prospective purchaser] upon whom the court might order intimation of the motion".¹⁹ This suggests, therefore, that it is necessary to have marketed the property and entered into negotiations with a prospective purchaser before it will be possible to have the non-entitled spouse's consent dispensed with under section 7.

In *O'Neil v O'Neil*,²⁰ H and W had two houses. One was in Edinburgh, where W worked, and was owned by W. The other, described as an "overnight pad", was in Dundee,

¹⁴ D J McNeil, "The Matrimonial Homes Act: The Implications for Conveyancers" (1982) 27 JLSS 369 at 374.

¹⁵ 1986 SLT (Sh Ct) 9.

¹⁶ There was therefore no non-entitled spouse. However, section 9 applies to co-owning spouses the principle that a dealing by one spouse is not to prejudice the rights of the other spouse.

¹⁷ 1986 SLT (Sh Ct) 9 at 10-11.

¹⁸ In any case, as the sheriff pointed out (at page 11), section 19 of the 1981 Act makes specific provision for the situation before the court.

¹⁹ 1986 SLT (Sh Ct) 9 at 11.

²⁰ 1987 SLT (Sh Ct) 26. This case is somewhat unusual in that the purchaser had actually moved in before the entitled spouse sought to have the non-entitled spouse's consent dispensed with.

where H worked, and was owned by him. H normally returned to the Edinburgh house at the weekend. H sold the Dundee house, and sought to have the consent of W dispensed with.

The sheriff held, first, that the Dundee house was a matrimonial home, having been provided or made available as a family home.²¹ This appears to be correct, on the language of the statute, even though in fact only three overnight stays by W were proved over a period of three years. The definition of "matrimonial home" in section 22(1) does not require that the non-entitled spouse (or indeed the entitled spouse) has ever actually lived in the property, only that it has "been provided or has been made available...as...a family residence".

The sheriff held further that consent could not be said to be unreasonably withheld except in relation to a specific dealing.²² A non-entitled spouse could not be asked to consent in the abstract, and so the sheriff required greater specification of the dealing that had taken place, even though he had in fact already reached the view that W was withholding her consent unreasonably.²³

Finally, in *Fyfe v Fyfe*,²⁴ the entitled spouse, the husband, sought order dispensing with wife's consent. At the time of the action, she had been ill in hospital for an extended period. It was disputed whether she was capable of returning home, but she was actively attempting to enforce her occupancy rights.²⁵ Again, the court refused to dispense with the consent of the non-entitled spouse, as in *O'Neil* holding that the refusal of consent had to relate to a specific dealing. As the sheriff principal said in *Fyfe*:

"In my view, the non-entitled spouse is entitled to fair notice of the nature of the proposed dealing before he or she can be reasonably required to grant or refuse consent. I do not consider that in the present case the respondent has been afforded fair notice, if only because the price which the matrimonial home will fetch is unknown. I agree with the learned sheriff that 'a proposed dealing' requires that a stage of negotiations has been reached in which proposals in regard to price and other conditions are being discussed."²⁶

It has been said that there is "little doubt that the decisions of the sheriffs in *Fyfe* and in *O'Neil* are correct."²⁷ However, there does in fact seem to be good reason to doubt the decisions, with respect both to the required timing of the application under section 7 and the criteria used in

²¹ 1987 SLT (Sh Ct) 26 at 29E-G.

²² 1987 SLT (Sh Ct) 26 at 30E-F.

²³ 1987 SLT (Sh Ct) 26 at 30A-D.

²⁴ 1987 SLT (Sh Ct) 38.

²⁵ In these circumstances, it may be seen as perfectly reasonable for the non-entitled spouse to withhold her consent to the dealing. However, the case was not decided on those grounds.

²⁶ 1987 SLT (Sh Ct) 38 at 41J-K.

²⁷ DJC, n.9 at 230.

determining whether an order should be made dispensing with the non-entitled spouse's consent.

First, the decisions in these cases lead to clear practical problems. If the court will not dispense with the non-entitled spouse's consent until the matrimonial home has been marketed, a buyer found and the terms of the sale substantially agreed, the result will be that the property cannot be sold without the non-entitled spouse's consent, however unreasonably withheld that consent may be.²⁸ Especially in market conditions where there is pressure from purchasers to conclude missives quickly, it will simply not be possible to seek the non-entitled spouse's consent, give him or her time for consideration (including, very likely, the time required to seek independent legal advice), and then successfully seek the court's approval of the proposed dealing with the effect of dispensing with the non-entitled spouse's consent.²⁹

Of course, all that this proves is that the decisions in these cases are inconvenient, not that they are wrong. Indeed, the sheriff principal in *Fyfe* readily accepted that the approach taken imposed "considerable handicaps".³⁰ If the decisions are correct, we must live with them unless and until the position is changed by statute: as, indeed, has been done to some extent, as we shall see. All the same, though, it is curious indeed if these decisions are correct. Very often the court proceedings under section 7 will be a waste of the time of the court and the entitled spouse, and add needless expense and delay to the process of sale, in that it will often be obvious from the beginning that the non-entitled spouse's refusal of consent is unreasonable, either because one of the grounds in section 7(2) is satisfied or for some other reason. This was the case in *O'Neil*, for example, yet the sheriff nonetheless felt constrained to require greater specification of the dealing in question.

Second, the view of the sheriff principal in *Fyfe*, that the non-entitled spouse's consent could not be dispensed with until a stage of negotiations had been reached, was based on a view that the provisions in section 6(3), regarding the effect of consent, required that the consent "relate to a particular transaction".³¹ What the relevant provisions of section 6(3) do is provide that third parties will not be affected by the occupancy rights if the non-entitled spouse "consents or has consented to the dealing" or the court has made an order under section 7 "dispensing with the consent of the non-entitled spouse to the dealing". It is certainly plausible to take this wording to relate to a specific transaction. However, with

²⁸ J Thomson, "The Family Law (Scotland) Bill 2005" (2005) 73 SLG 55 at 56.

²⁹ DJC, n.9 at 230.

³⁰ 1987 SLT (Sh Ct) 38 at 41J.

³¹ 1987 SLT (Sh Ct) 38 at 41H-I.

respect to the sheriff principal, it is not at all clear that this is the necessary interpretation.³² In any case, the language of section 7 itself is different, referring (in subsection (1)) to "a proposed dealing", language that is capable of including within its scope a case where a stage of negotiations has not yet been reached. It is interesting to note that a similar phrase, "a proposed sale", is used in section 7(1A)³³ in a context that clearly envisages a situation where the property has not yet been marketed. Finally, it may be noted that the Scottish Law Commission envisaged that consent might be sought "before taking any steps towards that sale",³⁴ although of course the system proposed by the Commission was quite different from the one contained in the 1981 Act.

Third, as we have seen, the sheriff principal in *Fyfe* placed great weight on the fact that the price to be received for the matrimonial home was not yet known. If this is a relevant factor, and the non-entitled spouse has an interest in the price of the property, the approach taken in these cases is an odd way to go about protecting this interest. It seems more likely, in fact to have an adverse effect. A requirement to seek the court's approval of a transaction after it has been agreed is unlikely to be acceptable to the typical house purchaser.³⁵ In practice, presumably the property would have to be marketed as requiring the court's ratification of any sale. This would be likely to depress levels of interest in the property, with a resulting effect on the price. The approach taken in *Fyfe* is therefore self-defeating in terms of the interest the sheriff principal seems to be attempting to protect. It therefore seems reasonable to suggest that it is less likely to have been the approach intended by Parliament in enacting the 1981 Act.

Fourth, it is not in any case clear that the purchase price is a relevant consideration. What concern is it of the non-entitled spouse? It is true that the non-entitled spouse may have an interest in the value of the matrimonial home should a divorce follow.³⁶ However, that is an entirely separate matter, outside the scope of the 1981 Act. It would be a mistake to think of the 1981 Act as having conferred some kind of pseudo-common ownership on the non-entitled spouse. That is not what was done. The 1981 had in fact a much more limited

³² By contrast, the required wording of the consent, contained in the Matrimonial Homes (Form of Consent) (Scotland) Regulations 1982 (SI 1982/971), clearly does require the consent to relate to a specific transaction.

³³ This provision is considered further below.

³⁴ Scottish Law Commission, n.4, para 3.57.

³⁵ Although one such as a developer or a buy-to-let investor may be willing to accept this if the property is sufficiently desirable.

³⁶ The default rule is that matrimonial property should be divided equally between divorcing spouses: Family Law (Scotland) Act 1985, s. 9(1)(a), read with s. 10(1). A disposal by one spouse of matrimonial property is a factor that may, in the circumstances of the case, justify departing from that default position: 1985 Act, ss. 10(6)(c) and 11(7)(a). If the matrimonial home was sold for its market value, the net value of the matrimonial property would not be reduced, and so presumably these provisions would not be engaged. If the sale price was less than market value, that would arguably give grounds for holding the purchaser to be in bad faith and so remove the purchaser's protection from the enforcement of occupancy rights by the non-entitled spouse.

purpose. The aim was to secure the non-entitled spouse against "sudden dispossession", and to ensure that vulnerability to domestic abuse was not increased by dependence on the entitled spouse for accommodation.³⁷

The non-entitled spouse's rights, therefore, are directed purely at the house as accommodation rather than representing any kind of broader interest in the house. The factors in section 3(3) reinforce that point. This is why they are called occupancy rights, and this is why the non-entitled spouse's consent was clearly unreasonably withheld in *O'Neil*: she had no intention of occupying the house on any kind of extended basis. Instead, it was a "bargaining lever" against the entitled spouse for use in relation to certain disputed matters connected with the break-up of their marriage.³⁸ The non-entitled spouse is given a right to occupy, and nothing more. The Scottish Law Commission said:

"It would not...be right to impede a sale of a matrimonial home where arrangements had been made by the husband for the provision of suitable alternative accommodation for his wife and children."³⁹

The view taken here is then that the occupancy rights of the non-entitled spouse are intended solely to protect the ability to occupy the matrimonial home. This view is further supported by the decision of the sheriff in *East Ayrshire Council v McKnight*.⁴⁰ That case concerned the refusal of the defender (a non-entitled spouse) to consent to the renunciation of a local authority tenancy when his wife took up a new tenancy at a different house. The sheriff found on the evidence that, contrary to what was claimed by the defender and his wife, they had not in fact separated. Given this finding, the defender's refusal to consent was therefore considered unreasonable, as he had reasonable alternative accommodation at the new house.

Taken together, it is suggested that these points suggest that section 7 should be interpreted to allow the relevant order to be sought earlier, before the property is marketed. Furthermore, it is suggested that, in proceedings under section 7, the question before the court is whether, in the circumstances, the non-entitled spouse's interest in occupation of the property should be protected. Other factors, such as the purchase price, should properly be considered irrelevant for these purposes.

³⁷ Scottish Law Commission, n.4 para 2.3.

³⁸ 1987 SLT (Sh Ct) 26 at 30A-D.

³⁹ Scottish Law Commission, n.4 para 3.63. The gender-specific language is explained by the Commission at para 1.13 as representing what appeared to them to be the more common situation. The same rules of course apply where the wife is the entitled spouse and the husband the non-entitled spouse.

⁴⁰ 2003 Hous LR 114.

THE 2006 ACT

In an attempt to resolve the practical problem raised by these cases, new provision was made by the Family Law (Scotland) Act 2006. That Act amended section 7 of the 1981 Act by inserting new subsections (1A) and (1B).⁴¹ The effect of these new provisions is that consent may be dispensed with by the court in advance of the beginning of negotiations with a purchaser. This is, however, subject to a minimum price and a deadline for concluding the contract of sale, both to be set by the court.⁴²

Does this solve the problem? It does not appear to do so, as it still considers an irrelevant factor. It would be possible for the law to give both spouses ownership rights in the matrimonial home. However, neither the 1981 Act nor any other rule of Scots law does so. That being the case, the non-entitled spouse has no concern with the price received by the entitled spouse in a sale of property that, *ex hypothesi*, is the latter's property. Suppose, for example, that the court sets a price at which, in the event, the non-entitled spouse is not able to find a buyer. Alternatively, a buyer may not be found within the time limit that has been set. Either of those things may easily happen, especially in a slow housing market. Again, a prospective buyer may be found, but negotiations drag on past the deadline set by the court. Any of those things could easily happen, but would not make the non-entitled spouse's withholding of consent any more reasonable than it was in the first place. Nonetheless, without the co-operation of the non-entitled spouse, it would be necessary to return to court to seek the court's approval, even though nothing relevant to the non-entitled spouse's interest had changed in such a manner as to justify a different decision.

FINAL COMMENTS

The argument here has been that an order under section 7 of the 1981 Act, dispensing with the consent of the non-entitled spouse to a dealing, may be sought earlier than has generally been said. Of course, the consensus to the contrary, in decisions of the courts on the point, is not lightly to be dismissed. However, it is hoped that sufficient reason has been given here to justify differing from it. To require that a stage of negotiations has been reached, before the non-entitled spouse's consent can be dispensed with, causes practical difficulties. It is also pointless where the non-entitled spouse's refusal of consent is clearly unreasonable, as in *O'Neil v O'Neil*. While this requirement is a plausible reading of the Act, it is argued here that

⁴¹ New subsections (1C) and (1D) make equivalent provision for the dispensation with the non-entitled spouse's consent to the grant of a standard security.

⁴² For the background to this change, see Scottish Law Commission, *Report on Family Law* (SLC No 135, 1992) para 11.14.

it is not the only plausible reading, and it was both possible and preferable to adopt an alternative view, allowing consent to be dispensed with before the property was marketed. Moreover, the approach taken in *Fyfe v Fyfe* introduces a factor that ought to be irrelevant and which, in any case, does not sit easily with other aspects of the approach taken. The changes made by the 2006 Act do at least reduce the practical difficulties of section 7, but they include as a consideration the same factor that ought to be irrelevant.

Even if the argument put forward here is incorrect, the law as it stands seems unsatisfactory. It leads to practical problems in conveyancing while, arguably, over-protecting the non-entitled spouse by considering factors that ought to be irrelevant. This also raises a wider point about the role of occupancy rights in conveyancing practice. There is a mismatch between sections 6 and 7 of the 1981 Act. As we have seen, section 6 allows the non-entitled spouse's occupancy rights to be extinguished very easily by a lie in the correct form, as long as the party at whom the lie is directed believes it to be true. This makes the practical difficulty of section 7 look rather odd, given that policy decisions were evidently taken with section 6 that third parties dealing in good faith with an owner of a potential matrimonial home should be able, very easily, to exclude any occupancy rights of a non-entitled spouse that may exist in relation to the property. In practice, section 6 provides no protection at all to non-entitled spouses. Why, then, should section 7 be such an obstacle, albeit a lesser obstacle than it was before the changes made by the 2006 Act? It is suggested, therefore, that it would be more appropriate to amend section 7(1B) to remove the reference to the price to be obtained in the proposed sale. This would allow an order under section 7 to be made before marketing the property, without taking into account a factor that ought to be irrelevant.