



# Report of the Study Group on Pre-nuptial Agreements

presented to the

Tánaiste and Minister for Justice, Equality and Law Reform,  
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## **Executive Summary and Recommendations**

### **Constitutional Considerations**

The Group concludes that pre-nuptial agreements do not offend against the constitutional protection accorded to the institution of marriage and the right to marry. Nonetheless, the constitutional requirement of proper provision and the date of the assessment of such, prevent pre-nuptial agreements from being automatically enforceable in any given case. Instead, a degree of recognition should be afforded to such agreements, to be considered in light of various other relevant factors in ancillary relief proceedings.

### **The Current Legal Status of Pre-nuptial Agreements in Ireland**

The Group is of the view that pre-nuptial agreements are enforceable and capable of variation under existing Irish statute law. The weight to be attached to an agreement would be determined by the courts in the light of the requirement for proper provision and the relevant statutory criteria.

### **Legal Status of Pre-nuptial Agreements in Other Jurisdictions**

Pre-nuptial agreements have been considered and legislatively regulated in many other jurisdictions. The experiences of other jurisdictions are instructive and assist in the identification and consideration of the issues to be considered in addressing and possibly reforming this area of law. Whilst few jurisdictions will rigidly enforce pre-nuptial agreements where to do so would cause grave injustice, the varying approaches to the issues of formalities and fairness suggest that these issues will require legislative and/or judicial consideration under Irish law. Certainly it appears that legislative provisions which outline the circumstances where a pre-nuptial agreement will not be enforceable is a favoured approach which can serve to eliminate doubt in respect of formal requirements surrounding the execution of a pre-nuptial agreement. Broader concepts of unconscionability and inequitable outcomes unavoidably rely upon the exercise of judicial discretion which focuses on the particular circumstances of a case.

### **Public Policy Considerations**

Public policy objections to pre-nuptial agreements have been diminished through the introduction of divorce in Ireland and may no longer be valid in view of socio-economic and population changes.

### **The Common Good**

A legislative rule of universal application seeking to prohibit pre-nuptial agreements on the basis that they offend the common good would probably be deemed unconstitutional. Instead the common good would be better served if the validity and effect of a pre-nuptial agreement be determined by the courts in each individual case.

### **Private Ordering of Financial Affairs**

In considering the case in favour of the enforceability of pre-nuptial agreements, it is arguable that clarity in the law would result in increased predictability and reduced costs. This argument does not invariably withstand scrutiny as couples may embark on litigation on the preliminary issue contesting the enforceability of a pre-nuptial agreement in advance of seeking ancillary relief orders. In fact, it is possible that there could be an increase in costs.

## **Arguments against Pre-nuptial Agreements**

There exist arguments against pre-nuptial agreements which must be considered. They may not always provide a fair solution to marital break-up, they may prompt litigation and drain marital resources, and they may be viewed as offending public policy to a degree. However, on balance it is difficult to conclude that they should universally be excluded from consideration.

## **Recommendations**

### **The Study Group recommends that express statutory provision be made for pre-nuptial agreements by way of introducing a new section 16 (2) A of the Family Law Act 1995 and new section 20 (3) A of the Family Law (Divorce) Act 1996 (Chapter 9)**

Provision should be made for pre-nuptial agreements to be scrutinised by the court in separation and divorce proceedings in much the same way as separation agreements are currently dealt with under section 20 (3) of the Family Law (Divorce) Act 1996.

Pre-nuptial agreements are subject to different considerations than separation agreements and therefore a discrete provision should be inserted into each Act to require a court to have regard to these agreements. This could be achieved by inserting a new section 16 (2) A into the 1995 Act and section 20 (3) A into the 1996 Act.

### **The Study Group recommends that no amendment be made to section 16(2) of the Family Law Act 1995 and section 20(2) of the Family Law (Divorce) Act 1996 (Chapter 10)**

The inclusion of the execution of a pre-nuptial agreement as one of the factors listed in section 16(2) of the 1995 Act and section 20(2) of the 1996 Act would not represent a sufficiently transparent way of showing whether or what weight had been attached to the agreement.

### **The Study Group recommends that pre-nuptial agreements be reviewable on death (Chapter 11)**

It runs contrary to our succession law to allow interference with the freedom of testation on broad discretionary grounds. It is likely that in certain circumstances a surviving spouse may be unfairly affected by the provisions of a pre-nuptial agreement, e.g. as a result of the passage of time or other intervening events. Therefore, the Study Group recommends the introduction of a statutory basis upon which a court may make financial provision for such a spouse notwithstanding the existence of a pre-nuptial agreement.

### **The Study Group recommends that procedural safeguards be imposed as a matter of law and that these should be expressed in clear terms so that parties making a pre-nuptial agreement would be both informed and protected (Chapter 12)**

The Group recommends that the Family Law Act 1995 and the Family Law (Divorce) Act 1996 should be amended to include a definition of a pre-nuptial agreement such that an enforceable agreement must be: in writing, signed and witnessed; made after each party has received separate legal advice; made with disclosure of financial information; and made not less than 28 days before the intended marriage.

# 1

## Introduction

- I. Background to the Report
- II. Account of the Work of the Study Group
- III. Outline of the Report

## 1. Introduction

### Background to the Report

The Study Group on Pre-nuptial Agreements was established by Mr Michael McDowell, T.D., Tánaiste and Minister for Justice, Equality and Law Reform, in December 2006. The establishment of the Study Group followed a commitment made by the Tánaiste in Seanad Éireann on 18 October 2006 to commission a study on the operation of the law with respect to pre-nuptial agreements.

The terms of reference of the Study Group were:

**"To study and report on the operation of the law since the introduction of divorce in 1996 with respect to pre-nuptial agreements taking into account constitutional requirements."**

The Tánaiste asked the Group to report to him, and to make recommendations for changes in the law it considers necessary, by 31 March 2007. The Tánaiste also indicated that it was his intention to publish the report and any recommendations made.

In establishing the Study Group the Tánaiste was responding to a Private Members Motion moved in the Seanad by Senator Fergal Browne . The Motion called on the Attorney General to request the Law Reform Commission to examine and report within nine months on the current status of pre-nuptial agreements in Irish Courts. In his response in the Seanad the Tánaiste indicated that the Government accepted that there may be aspects of the law with respect to pre-nuptial agreements that could be examined having regard to the operation of the law since the introduction of divorce but that the Law Reform Commission was not in a position to do an urgent report.

The Government offered an amendment with a view to making rapid progress on the issue. The Seanad adopted the amended Motion. This noted that policy in the law on proper provision in divorce proceedings is circumscribed by the Constitution, that the law already gives some recognition to pre-nuptial agreements and welcomed the Tánaiste's proposals to commission and publish a study of the operation of the law in this area.

### Account of the Work of the Study Group

The Study Group met on ten occasions with the first meeting held on 8 January 2007. The Study Group examined the following range of issues on the basis of papers prepared and presented by members of the Group:

- What is the current legal status of pre-nuptial agreements in Ireland?
- The case in favour of enforceability.
- Why is it desirable and necessary to have enforceable pre-nuptial agreements in Ireland?
- Why it is neither desirable nor necessary to have enforceable pre-nuptial agreements in Ireland.
- The constitutional considerations to change in this jurisdiction.
- What is the status of pre-nuptial agreements in other jurisdictions?
- Position prior to 1996.

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<sup>1</sup> Official Report of Seanad proceedings Vol 184 No.20

- The provisions of section 9(1)(c) of the Family Law Act 1995 and section 14(1)(c) of the Family Law (Divorce) Act 1996.
- What are possible models for reform?
- Can the use and enforcement of pre-nuptial agreements properly protect the position of the vulnerable spouse?
- Judicial views relating to the interpretation and application of the different elements of section 16 of the Family Law Act 1995 and section 20 of the Family Law (Divorce) Act 1996.
- Public Policy.
- Pre-nuptial agreements and the “Common Good”.
- Impact of a pre-nuptial agreement on a surviving spouse.
- Pre-nuptial agreements – Formalities.

The analysis in the report draws on these papers and informs the Study Group’s recommendations in Chapters 9 to 12.

In view of the limited time available to complete its work, the Study Group chose not to invite submissions from the public. Instead the Group invited written and oral presentations from a range of persons with relevant legal, political and equality expertise and experience. Details of the written and oral presentations made are listed in Appendices 2 and 3.

### **Outline of the Report**

Chapter 2 examines pre-nuptial agreements in the context of the constitutional protection accorded to marriage and the right to marry, and the overriding constitutional imperative of proper provision on divorce. Chapter 3 considers the current legal status of pre-nuptial agreements in Ireland and Chapter 4 sets out the legal status of pre-nuptial agreements in other jurisdictions.

Public policy and common good considerations are examined in Chapters 5 and 6. Chapter 7 looks at benefits derived from the private ordering of financial affairs by the use of pre-nuptial agreements while Chapter 8 considers arguments against pre-nuptial agreements.

Chapters 9 to 12 contain the Study Group’s recommendations. Chapter 9 contains the Study Group’s core recommendation that discrete provision be made in both the Family Law Act 1995 and the Family Law (Divorce) Act 1996 requiring the courts to have regard to existing pre-nuptial agreements. Chapter 10 examines whether the existence of a pre-nuptial agreement should be added to the list of factors to which a court must have regard when making orders on divorce or judicial separation. Chapter 11 considers the effect of a pre-nuptial agreement on the surviving spouse. Chapter 12 examines and makes recommendations on the necessary formalities for proper execution of pre-nuptial agreements.



# Current Constitutional and Legal Position of Pre-nuptial Agreements

# 2

## Constitutional Considerations

- I. The Importance of Marriage in the Constitution
- II. Pre-nuptial Agreements and the Institution of Marriage
- III. Pre-nuptial Agreements and the Right to Marry
- IV. A Shadow Cast by *Ennis v Butterly*?
- V. The “Proper Provision” Criterion
- VI. At What Stage Must “Proper Provision” Be Determined?
- VII. The Interaction of Pre-nuptial Agreements and the Constitutional Requirement of “Proper Provision”
- VIII. The Elusive Nature of Finality in Ancillary Relief Cases
- IX. Summary
- X. Conclusion

## 2. Constitutional Considerations

### The Importance of Marriage in the Constitution

Since the founding of the State the institution of marriage has occupied a prominent role in Irish society. This was recognised in the Constitution and accorded protection in Article 41.3.1<sup>o</sup>:

“The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.”

As marriage forms the basis on which the family is founded it has benefited from added protection as the family is deemed to be “the natural primary and fundamental unit group of Society”.<sup>2</sup>

There are, however, two forms of constitutional protections concerning marriage: first, the institution of marriage, and second, the right to marry. The institution of marriage is protected under Article 41.3.1<sup>o</sup>. In Irish law marriage is viewed as being a status institution, as opposed to a relationship model based on contract. This philosophy has important ramifications in that marriage is deemed to be a unit in society rather than a private arrangement between two individuals. As a result, society has a role in determining what constitutes a valid marriage and also the consequences of parties forming, and terminating, a marriage. It is because of this interpretation of marriage that the institution of marriage is specially protected in Irish law.

The nature of the constitutional protection afforded to the right to marry is less clear. Debate surrounds the origins of this right. It has been held that as the family is one based on marriage, the right to marry is a derivative of the right to found a family and as such has its origins in Article 41 of the Constitution<sup>3</sup>. There is, however, strong argument that this right is better construed as a personal right under Article 40.3.<sup>4</sup> The reasoning behind this distinction is that rights pertaining to the family under Article 41 are deemed to be “inalienable and imprescriptible”. This phrase has been interpreted as:

“‘Inalienable’ means that which cannot be transferred or given away while ‘imprescriptible’ means that which cannot be lost by the passage of time or abandoned by non-exercise.”<sup>5</sup>

As is evident, these rights are heavily protected by the Constitution, whereas rights under Article 40.3 are protected “as far as practicable” from “unjust attack”. It would appear to be somewhat easier to justify a restriction on the right to marry founded in Article 40.3 rather than that founded in Article 41, and such restrictions are manifest in the Irish legal system, for example, laws concerning consanguinity and marriage, and age limits on marriage.

Accordingly it is necessary to consider whether pre-nuptial agreements, if given recognition in Irish law, could withstand the constitutional protection afforded to the institution of marriage and also the right to marry.

### Pre-nuptial Agreements and the Institution of Marriage

The institution of marriage is to be protected from “attack”. The question to be considered is whether pre-nuptial agreements constitute an “attack” on the institution of marriage. In order to answer this question it is necessary to consider the nature of the subject being “attacked”.

<sup>2</sup> Bunreacht na hÉireann, Article 41.1.1<sup>o</sup>.

<sup>3</sup> Zappone and Gilligan v Revenue Commissioners and Ireland Unreported, High Court, Dunne J., December 14th, 2006.

<sup>4</sup> Murray v Ireland [1985] I.R. 532; McGee v Attorney General [1974] I.R. 284, Fitzgerald C.J. dissenting. Furthermore, counsel for the respondents in Foy v An t-Ard Chlárúitheoir Unreported, High Court, McKechnie J., July 9th, 2002, conceded that the right to marry was founded in Article 40.3.

<sup>5</sup> Ryan v Attorney General [1965] IR 294 at 308.

The case of *Zappone and Gilligan v Revenue Commissioners and Ireland*<sup>6</sup> represents the most recent judicial determination on this issue. Dunne J., in the High Court, held that a lesbian couple was not entitled to have their Canadian marriage recognised in this jurisdiction for the purposes of obtaining tax relief.<sup>7</sup> In determining the meaning and nature of marriage, as it exists in the Constitution, Dunne J. relied on the Supreme Court decision in *Sinnott v Minister for Education*<sup>8</sup> and the mode of constitutional interpretation that derived from that decision. The judge held that the concept of marriage, as it appears in the Constitution, ought to be interpreted and defined in the light of the practice and understanding of 1937, whereas corollaries to the concept of marriage, e.g. the capacity to marry, ought to be interpreted and understood in light of contemporary mores.

An institutional model, as opposed to a contractual model, attaches to the interpretation of marriage in Irish jurisprudence. Adoption of this interpretation presents questions as to the nature of pre-nuptial agreements and the role they may be accorded in an Irish legal context. Irish courts have adopted the language of contract and partnership when referring to marriage in a number of cases. However, this is done in the context of the interaction of the parties in an existing marriage or on marital breakdown and the subsequent ordering of ancillary relief, rather than in the context of the formation and foundations of marriage.<sup>9</sup> Therefore, as the formation of marriage *per se* cannot be said to be based on a contract between the parties, a pre-nuptial agreement could not be viewed as constituting a material aspect of the formation of the marriage. By virtue of the overarching interpretation of marriage being that of an institution in society, pre-nuptial agreements in an Irish context could only be said to constitute a corollary to the said institution, and as such ought to be interpreted, in light of the constitutional protection of the institution of marriage, by contemporary mores.

Therefore, rather than establishing a basis for a marriage, a pre-nuptial agreement would seek to regulate the course, conduct and, if necessary, the termination of a marriage. The private ordering of marital relationships has been an objective fostered and promoted by both the legislature and the courts. Sections 5 and 6 of the Judicial Separation and Family Law Reform Act 1989, and sections 6 and 7 of the Family Law (Divorce) Act 1996 require solicitors to discuss the possibility of parties engaging in mediation prior to initiating legal separation proceedings. This represents an attempt by the legislature to promote the private ordering and resolution of disputes. The recognition of separation agreements upon divorce is also indicative of this approach.<sup>10</sup> Similarly, on numerous occasions the courts have welcomed the private ordering of disputes in marital proceedings.<sup>11</sup>

On this basis it is thought that a pre-nuptial agreement interpreted in light of contemporary views and understandings would not constitute an “attack” on the institution of marriage as protected under Article 41.3.1° of the Constitution.

### Pre-nuptial Agreements and the Right to Marry

As noted above, the right to marry can be found in either Article 41 or Article 40.3 of the Constitution. If such a right is deemed to have its origins in Article 41 then it is to be protected from “attack” and the preceding section analyses pre-nuptial agreements in this context. If, however, the right to marry is held to be properly founded in Article 40.3 then it is to be protected “as far as practicable” from “unjust attack”. For a pre-nuptial agreement to constitute an “unjust attack” it must be constructed in such a manner so as to prevent a party from entering marriage. Arguably, however, this does not constitute an attack on the right to marry; rather, it represents a situation whereby one of the parties to the impending marriage chooses not to marry.

<sup>6</sup> Unreported, High Court, Dunne J., December 14th, 2006.

<sup>7</sup> It is noted that this decision is being appealed to the Supreme Court.

<sup>8</sup> [2001] 2 I.R. 545.

<sup>9</sup> In re Article 26 and the Matrimonial Home Bill 1993 [1994] 1 I.R. 305, at 326 per Finlay C.J.; J.D. v D.D. [1997] 3 I.R. 64, at 95 per McGuinness J.; C.O’R. v M.O’R. Unreported, High Court, O’Donovan J., September 19th, 2000; D.T. v C.T. [2003] 1 I.L.R.M. 321, at 374-7 per Murray J.

<sup>10</sup> Family Law (Divorce) Act, 1996, section 20(3)

<sup>11</sup> Coulter, Family Law Matters, (Courts Service, Dublin, 2007), Vol. 1 No. 1.<sup>12</sup> Marston, “Planning for Love: The Politics of Prenuptial Agreements” (1997) 499 Stan. L. Rev. 887 at 891.

Pre-nuptial agreements could arguably facilitate the exercise of this right to marry. Those who consider entering marriage but refuse to do so on the basis of wishing to protect a vested interest, e.g. wealth, could be provided with a form of reassurance by means of the terms of a pre-nuptial agreement. Such a situation is particularly pertinent when one considers the prospect of second marriages. This is set to become an increasing phenomenon given that divorce has been available for the past ten years. Parties entering a second marriage may wish to set aside certain assets or means of income so as to provide for children from a former marriage or to secure their welfare. A pre-nuptial agreement would be a means of achieving this. Interestingly, in the United States of America 5% of all marriages are based on a pre-nuptial agreement, and 20% of second and subsequent marriages are so formulated. Not only does this argument represent the facilitation of the right to marry but it is equally cogent in relation to protecting and promoting the institution of marriage. A pre-nuptial agreement viewed in this light, and in particular in the context of second marriages, provides an incentive to marry thereby promoting the institution of marriage.

### **A Shadow Cast by *Ennis v Butterly*?<sup>13</sup>**

The case of *Ennis v Butterly* concerned a cohabiting couple who were married, but not to each other, and had entered into an agreement to marry and to cohabit as man and wife until such time as they would be legally entitled to marry. In consideration for living together as husband and wife, the plaintiff would discontinue her business and work as a full-time housewife and homemaker. In striking out the plaintiff's claim in contract, Kelly J. held that cohabitation contracts seeking to replicate the marital relationship were contrary to public policy and unconstitutional, as to enforce such contracts would undermine the institution of marriage.

The reasoning of Kelly J. in this case does not appear to affect the potential validity of pre-nuptial agreements. The main premise upon which the contract in *Ennis v Butterly* was deemed unconstitutional was that it sought to replicate the marital relationship and thereby place cohabitants on an equal footing to those who are party to a marriage. This was deemed repugnant to the Constitution as Article 41.3.1° affords a special protection to the institution of marriage, thereby placing it at the apex of any hierarchy of relationship models in Irish society.<sup>14</sup>

A pre-nuptial agreement by definition cannot promote other relationship models above marriage. The essential and necessary element for a pre-nuptial agreement is the anticipated marriage. As such, a pre-nuptial agreement by-passes the difficulties encountered in *Ennis v Butterly*. On this basis it is thought that *Ennis v Butterly* does not cast a shadow on the potential validity of pre-nuptial agreements in Ireland.

### **The "Proper Provision" Criterion**

Most pre-nuptial agreements will come to be tested in the context of an application for judicial separation because of the minimum four year wait required by the divorce legislation. Alternatively it will come to be considered by parties in the negotiations leading to a separation agreement. In these cases the pre-nuptial agreement can be assumed to have merged in the separation decree or deed and may never come before the court for scrutiny in divorce proceedings, which have the mantle of protection of proper provision under the 1996 Act and the constitutional imperative.

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<sup>12</sup> Marston, "Planning for Love: The Politics of Prenuptial Agreements" (1997) 499 *Stan. L. Rev.* 887 at 891.

<sup>13</sup> [1996] 1 I.R. 426; [1997] 1 I.L.R.M. 28.

<sup>14</sup> *ibid.* at 438-9; 38-9.

The 1995 Act as first enacted contained, in section 16, a reference to the making of “adequate” and “reasonable” provision for the spouses and dependent members of the family, but proper provision was inserted by section 52(h) of the 1996 Act, thus bringing the two statutes into line. The constitutional imperative of course is confined to divorce, as distinct from judicial separation. Insofar as the enactment of legislation to regulate pre-nuptial agreements might seek to amend the 1995 and the 1996 Acts it should be borne in mind that the law makers cannot rely on the constitutional imperative as a regulator of fairness in separation matters and it is for this reason that any legislation should contain adequate and clear provisions to ensure the preservation of judicial discretion. The requirement to legislate for the variation of a pre-nuptial agreement is necessary in this context.

Proper provision cannot be defined; instead, its meaning is dependent on the context of each and every case and therefore is determined through the exercise of judicial discretion. Instead of seeking to define proper provision, the legislature has set out a list of criteria, the application of which is intended to achieve proper provision. The factors set out in section 16(2) of the Family Law Act 1995 and section 20(2) of the Family Law (Divorce) Act 1996 are the means of assessing this. These factors are to be referred to by a judge in determining what constitutes proper provision in a case concerning ancillary relief.<sup>15</sup> It should also be noted that the opinions of the parties to divorce proceedings as to what constitutes proper provision will also be taken into account.<sup>16</sup> Furthermore, where achievable, a clean break divorce can accommodate this proper provision requirement.<sup>17</sup>

In contrast to dicta from several English decisions, the Irish courts are concerned with *provision* and not *division*.<sup>18</sup> As a result, proper provision does not necessarily mean that assets should be split equally upon divorce. In fact, percentages and other modes of mathematical calculations ought to be discouraged, and instead reliance should be placed on the factors as set out in section 16(2) of the 1995 Act and section 20(2) of the 1996 Act.

It is important to note that proper provision does not just mean that the dependent spouse ought to receive financial support to provide merely for his/her basic needs. Moreover, any surplus wealth following the satisfaction of the financial needs of the parties should be distributed amongst both parties to the marriage, rather than remaining with the earner. Murray J expressly noted this, stating:

“But the Oireachtas did not limit the ‘proper provision’ for a spouse solely to his or her financial needs and responsibilities. The 1996 Act requires regard to be had to all the relevant considerations set out in s.20 always with the objective of making proper provision. Proper provision should seek to reflect the equal partnership of the spouses. Proper provision for a spouse who falls into the category of a financially dependent spouse (where the other spouse is the source or owner of all or the bulk of income or assets of the marriage) should seek, so far as the circumstances of the case permit, to ensure that the spouse is not only in a position to meet her financial liabilities and obligations and continue with a standard of living commensurate with her standard of living during marriage but to enjoy what may reasonably be regarded as the fruits of the marriage so that she can live an independent life and have security in the control of her own affairs, with a personal dignity that such autonomy confers, without necessarily being dependent on receiving periodic payments for the rest of her life from her former husband.”<sup>19</sup>

<sup>15</sup> M.K. v J.P. (otherwise S.K.) [2001] 3 I.R. 371.

<sup>16</sup> M.K. v J.P. (otherwise S.K.) [2003] 1 I.R. 326, where at 344 O’Neill J. stated “I should add that the approach adopted by the parties in setting out at the start of the trial what they considered to be a proper provision is of great assistance to the court.”

<sup>17</sup> D.T. v C.T. [2003] 1 I.L.R.M. 321.

<sup>18</sup> *ibid.* at 340.

<sup>19</sup> *ibid.* at 377.

Referring to this passage, MacMenamin J. recently stated:

“As can be clearly seen from this and the other judgments in that decision therefore, ‘proper provision’ should be based on a consideration of all the circumstances of the case including the financial resources and needs of both spouses and dependants; their obligations and responsibilities both present and future; the standard of living of the parties before the breakdown of the marriage, their respective ages; the duration of the marriage and terms of any separation agreements; the role of the spouses in relation to the welfare of the family; their contribution to looking after the home or caring for the family; the effect on their earning capacity as a result of the marital responsibilities they assumed; the degree to which future earning capacity was impaired by reason of the spouse having relinquished the opportunity of remunerative activity in order to look after the home or care for the family whether one spouse contributed directly or indirectly to the resources of the other and to the corresponding detriment suffered by that spouse in terms of their own resources.”<sup>20</sup>

It is therefore clear that the meaning of proper provision is very much case-dependent. The means of satisfying this constitutional requirement is to take into account all the circumstances of the marriage, with reference to the factors set out in section 20(2) of the Family Law (Divorce) Act 1996, and determine what is proper for both parties in the interests of justice.

### **At What Stage Must “Proper Provision” Be Determined?**

It is necessary to consider when is the appropriate time to determine what constitutes proper provision. This question is of particular relevance with respect to pre-nuptial agreements. There are a number of potential answers: it could be before marriage; at the date of separation; at the date of the divorce hearing; or at some date post-divorce. A pre-nuptial agreement would seek to calculate proper provision before marriage, but would this calculation equate with what is proper at the date of judicial separation or termination of the marriage? An analysis of the case law concerning pre-existing separation agreements in divorce is of some assistance in this regard.

Section 20(3) of the Family Law (Divorce) Act 1996 requires the Court to “have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force” when determining proper provision in a divorce case. O’Neill J. in the case of *M.K. v J.P. (otherwise S.K.)*<sup>21</sup> dealt with the weight of consideration to be given to such an agreement and stated that the Court ought to:

“examine that agreement to ensure that at the time of the application, the agreement, in the light of the circumstances of the party, either at that time ‘makes a proper provision’ or that it contains obligations which will ensure that such provision will be made.”<sup>22</sup>

The judge was of the opinion that the appropriate time to consider what constitutes proper provision is the date of the divorce hearing. Therefore, pre-existing separation agreements executed in recent times would be given more weight in subsequent ancillary relief proceedings than those of a more distant origin in time, as in this case where the deed of separation was executed twenty-one years before the hearing date. This is in line with the decision of the Supreme Court in *D.T. v C.T.*,<sup>23</sup> where the Court held that the appropriate time to assess the assets of a marriage for the purposes of determining proper provision was the date of trial.

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<sup>20</sup> L.B. v Ireland Unreported, High Court, MacMenamin J., July 7, 2006.

<sup>21</sup> [2003] 1 I.R. 326.

<sup>22</sup> *Ibid.* at 346.

<sup>23</sup> *Supra* n.17

Hardiman J. (on circuit in the High Court) in *W.A. v M.A.*<sup>24</sup> appeared to assess the validity of such an agreement in subsequent divorce proceedings in a different manner. In that case the judge was concerned with the validity and effect of the separation agreement at the time of execution which was eleven years prior to the hearing, rather than the position of the parties at the date of the divorce hearing. He ultimately held that, at the time of execution, the separation agreement was fair and just and that upon divorce the wife was not entitled to claim any additional ancillary relief.

In *R.G. v C.G.*,<sup>25</sup> Finlay Geoghegan J. had to consider the weight to be given to a consent order entered into by the parties following a judicial separation five years prior to the divorce hearing. Such an order did not constitute a separation agreement for the purposes of section 20(3) of the Family Law (Divorce) Act 1996, but notwithstanding this the judgment is still relevant for present purposes. The judge held that proper provision must be assessed at the time of the divorce hearing. The acknowledgement of proper provision in the consent order was made merely in contemplation of a future divorce, rather than an imminent divorce. As the husband had acquired wealth in the interim period in excess of that contemplated by the parties to the consent order it was necessary to make further ancillary relief orders so as to ensure proper provision between the parties.

In considering the judgments in *W.A. v M.A.* and *R.G. v C.G.* O’Higgins J. has since commented:

“The weight to be attached to a prior settlement will vary from case to case depending on many factors including the length of time since it was reached, the financial background against which such settlement was reached, when compared with the present circumstances, and the reasonable expectations of the parties at the time of the settlement. The relative importance of these factors themselves will vary according to the circumstances of a case.”<sup>26</sup>

The jurisprudence in this area suggests that the appropriate time to determine what constitutes proper provision is the date of the divorce hearing, although it has recently been suggested that an assessment post divorce may be permitted.<sup>27</sup> Agreements seeking to set out proper provision will be given weight in subsequent ancillary relief proceedings, but the weight accorded to such agreements is very much dependent on the length of time the agreement has been in existence and also the manner in which it reflects the reality of the situation between the parties at the date of performance.

### **The Interaction of Pre-nuptial Agreements and the Constitutional Requirement of “Proper Provision”**

Although it is difficult to postulate any definitive principles concerning the proper provision requirement, or to instil a sense of clarity to such matters, one conclusion that is clear is that it gives licence to the courts to consider the substantive issues in any ancillary relief matter pertaining to a divorce application. Judicial discretion is a fundamental feature in this area of the law, and will remain so. Therefore, a pre-nuptial agreement is unlikely ever to fully regulate the division of assets and satisfy the proper provision requirement upon divorce.

This overriding discretionary element of our law will set Ireland apart from other jurisdictions when it comes to the enforcement of pre-nuptial agreements. Some jurisdictions merely require that the procedural aspects of a pre-nuptial

<sup>24</sup> [2005] 1 I.R. 1.

<sup>25</sup> [2005] 2 I.R. 418.

<sup>26</sup> *M.P. v A.P.* Unreported, High Court, O’Higgins J., 2 March 2005.

<sup>27</sup> *J.C. v M.C.* Unreported, High Court, Abbott J., 22 January 2007.

agreement are in accordance with the law without any consideration of the substantive issues in the agreement. Any law enacted in this jurisdiction recognising pre-nuptial agreements must account for the proper provision requirement, thereby necessitating a substantive review of any such agreement in subsequent judicial separation and divorce proceedings. Furthermore, the satisfaction of the proper provision requirement will be assessed at the date of trial, rather than the date when the agreement was entered into. This could render many pre-nuptial agreements ineffective due to the passage of time and the probable increase of wealth in the family. In assessing proper provision Irish courts must have regard to the contributions that both parties made to the marriage, both financial and non-financial. Such contributions might not be accurately accounted for in a pre-nuptial agreement thereby also rendering it ineffective at the enforcement stage.

It is therefore clear that for a pre-nuptial agreement to be enforced in this jurisdiction it must account for proper provision. This will always be the overriding consideration no matter what level of recognition/enforcement is accorded to such agreements in Irish law. Guidance as to what might constitute proper provision in any given case can be obtained from an analysis of the factors set out in section 16(2) of the Family Law Act 1995 and section 20(2) of the Family Law (Divorce) Act 1996, and the application of such to the circumstances of the parties. It is therefore thought prudent to construct any pre-nuptial agreement in a manner accounting for these factors, thereby increasing the possible weight that might be given to such an agreement should it be relied on.

### **The Elusive Nature of Finality in Ancillary Relief Cases**

The constitutional requirement of proper provision mandates a level of judicial discretion in this area of law. What constitutes proper provision differs from case to case, and therefore the application of the law must account for this, hence the level of discretion afforded to the judiciary. As a consequence a degree of uncertainty is cast over this area of law, thus depriving the parties to ancillary relief proceedings from a desired feeling of closure. Nonetheless, this level of judicial discretion is necessitated by the possibility of the circumstances of the parties to a divorce changing, and the need for the law to accommodate this so as to ensure that the requirement of proper provision has been satisfied.

This was the rationale for expressly precluding the possibility of a clean break divorce in the Family Law (Divorce) Act 1996. Nonetheless the Supreme Court has held that, where possible, a clean break divorce can be given effect so as to bring an element of certainty and finality to proceedings.<sup>28</sup> Although it was noted by the Court that theoretically a party to a clean break divorce could apply to the Court in the future seeking further or varied ancillary relief, the success of such an application would be doubtful. Therefore clean break divorce has to an extent tackled the elusive nature of finality to ancillary relief proceedings brought about by the proper provision requirement. In addition to this, the emergence of full and final settlement clauses in separation agreements and divorce orders have contributed to the quest of instilling certainty and finality into this area of law.

Notwithstanding this trend, the constitutional requirement of proper provision may, on the facts of any case, preclude the possibility of a clean break and/or trump a full and final settlement clause. Furthermore, it is now becoming apparent that this constitutional imperative may entail a second assessment after divorce of the position of the parties to determine whether proper provision has been truly achieved. In the recent case of *J.C. v M.C.*<sup>29</sup> Abbott J. noted that although certainty and finality were desirable objectives, particularly in light of *D.T. v C.T.*, the Family Law (Divorce) Act 1996 and the underlying constitutional

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<sup>28</sup> *Supra* n.17

<sup>29</sup> *Supra* n.27

imperative of proper provision give licence to the Court to revisit ancillary relief matters between parties to an already executed divorce. The judge held that the 1996 Act, and Article 41.3.2°(iii) of the Constitution, ensured the jurisdiction of the Court to vary existing ancillary relief orders or to grant fresh orders. Furthermore, the existence of a full and final settlement clause did not preclude the Court from varying ancillary relief of a periodic nature, although it might exclude the court from making fresh ancillary relief orders on matters already executed at the original divorce hearing.

It is clear, therefore, that a pre-nuptial agreement cannot provide parties with a definitive sense of certainty and clarity as to the possible outcome of any future divorce proceedings. Nonetheless, such an agreement might go some way towards having such matters determined in a manner akin to the intention of the parties as expressed in the agreement. That in itself is worthwhile.

### Summary

Constitutional protection is accorded to both the institution of marriage and the right to marry. The concept of marriage, as interpreted in Irish law, is one of a status institution as opposed to a contractual model, and by virtue of Article 41.3.1° is to be protected from attack. Pre-nuptial agreements do not constitute a material aspect of the institution of marriage, but instead represent a corollary to the said institution. Therefore, when considering the constitutionality of such agreements in relation to the institution of marriage a contemporary interpretation should be adopted.

In light of such an interpretation the Study Group concludes that pre-nuptial agreements do not fall foul of the constitutional protection given to the institution of marriage. With reference to the right to marry, the Group concludes that pre-nuptial agreements do not constitute an attack, but can actually protect and promote this right. Furthermore, the ramifications of the High Court decision in *Ennis v Butterly*<sup>30</sup> do not apply to pre-nuptial agreements.

The Group concludes that the overriding constitutional imperative of proper provision in any divorce case and possibly to a lesser extent in a judicial separation case means that a pre-nuptial agreement would rarely, if ever, determine all ancillary relief matters. Indeed a judge, in exercising discretion, could only attach a certain degree of weight to such an agreement and consider its effect in light of the many other factors pertaining to divorce cases. Notwithstanding this, the Group believes that such agreements are worthwhile as they provide a means for the parties to an intended marriage to express their intentions at that time.

### Conclusion

The Group concludes that pre-nuptial agreements do not offend against the constitutional protection accorded to the institution of marriage and the right to marry. Nonetheless, the constitutional requirement of proper provision, and the date of the assessment of such, prevent pre-nuptial agreements from being automatically enforceable in any given case. Instead, a degree of recognition should be afforded to such agreements, to be considered in light of various other relevant factors in ancillary relief proceedings.

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<sup>30</sup> Supra n.13

# 3

## Current Legal Status of Pre-nuptial Agreements in Ireland

- I. Introduction
- II. Pre-nuptial Agreements to date
- III. Cohabitation Agreements
- IV. Pre-nuptial Agreements Recognised by Statute
- V. Are Pre-nuptial Agreements Void *ab initio* or Unenforceable?
- VI. Variation of Ante-nuptial Settlements
- VII. Summary
- VIII. Conclusion

### 3. Current Legal Status of Pre-nuptial Agreements in Ireland

#### Introduction

There is nothing in Irish law which precludes individuals intending to marry from signing a pre-nuptial agreement. Equally it would appear that the courts are currently not obliged to enforce such agreements should the parties separate or divorce. Irish family law grants to the judiciary a wide and virtually unfettered discretion over the distribution of a separating or divorcing couple's assets, and this is a discretion which is, in light of the constitutional and statutory obligations of the courts, unlikely to be diluted in the future. This discretion, however, can in many ways be said to lead directly to uncertainty and a lack of predictability for couples who are separating or divorcing before the courts. It has been suggested that if pre-nuptial agreements were enforceable under statute that much of this uncertainty would be alleviated. It is surprising therefore that there has not been a greater demand for their introduction.

It is also surprising that there has not been a greater interest in the introduction of pre-nuptial agreements since the coming into operation of the Family Law (Divorce) Act 1996 which has changed the status of marriage from the indissoluble union which it once was. It does not appear, however, that too many pre-nuptial agreements or contracts have been executed, and most certainly it does not appear that too many of them have been tested before the courts. Shannon is of the opinion that:

“While interest has increased, it appears that a Pre-nuptial Agreement remains a relatively rare occurrence in Ireland. It is most likely in relationships characterised by one or more of the following:

1. People entering a second marriage seeking protection for the properties they had before they wed;
2. A significant asset imbalance between the parties;
3. A foreign national marrying an Irish person who wants to protect property owned in his own country should the marriage break down;
4. The presence of a family business which one spouse wishes to protect.”<sup>31</sup>

Because of the impact that orders made pursuant to the 1995 and 1996 Acts can have on property ownership, it is probable that more people will begin to seek to ensure the protection of property in an agreed way in the event of marital breakdown. It is interesting, therefore, to note that pre-nuptial agreements have been available under statute since 1965<sup>32</sup> and have been recognised in various cases by the courts albeit for different purposes and in different guises.

The view has also been expressed that if pre-nuptial agreements become enforceable in this jurisdiction, there will naturally be a limiting of judicial discretion in making ancillary relief orders because the parties themselves will have pre-determined some or maybe all of those issues. The question therefore arises, what is the current legal status of pre-nuptial agreements in Ireland?

#### Pre-nuptial Agreements to date

There has to date been little litigation in connection with pre-nuptial agreements, concerning either financial or non-financial matters. In *Re Tilson (Infants)*<sup>33</sup> concerned an agreement referred to as an “ante-nuptial agreement” which had been entered into between parties intending to marry concerning the future religious upbringing of any children of the marriage.

<sup>31</sup> Shannon “Pre-nuptial Agreements in Ireland”(September 2003) IFL at Page 132

<sup>32</sup> S.113, Succession Act 1965

<sup>33</sup> [1951] I.R. 1

The case concerned what is colloquially referred to as a mixed marriage, being the union of a protestant husband and a roman catholic wife. Prior to the marriage taking place, the parties signed an agreement that all children of the marriage would be brought up as roman catholic. The ante-nuptial agreement in that case did not refer to anything other than the religious upbringing of the children.

The Supreme Court held that an ante-nuptial “agreement” made by parties to a marriage, dealing with matters which may arise during the marriage, and which comes into force after the marriage is effective. The Court also held that where an ante-nuptial “agreement” had been entered into concerning the religion in which the children of the marriage were to be brought up, such agreement could not be revoked by one party alone, and that the revocation required the consent of both parties. It was ultimately directed that the children be returned to the mother to be educated by her in the roman catholic faith, in line with the terms of the agreement.

It is clear that in the *Re Tilson* case the ante-nuptial agreement very specifically referred to the single issue of religion. It should therefore be distinguished on those facts, as clearly it did not herald the widespread use of pre-nuptial agreements for any other purpose. The case is of little assistance in this area and indeed of little relevance to a changed Ireland.

### **Cohabitation Agreements**

There is evidence that agreements are frequently drawn up between parties who purchase property together but these agreements are not typically drawn up in contemplation of a future marriage. Such an agreement was the subject of the case of *Ennis v Butterly*<sup>34</sup> (discussed in detail in the previous chapter). The agreement in that case could not be strictly referred to as a pre-nuptial or ante-nuptial agreement, a point strongly made by Kelly J. who held that a promise by a married person to marry one who is already married was unenforceable as being against public policy. Kelly J. stated that agreements by persons to co-habit have long been held to be unenforceable at common law as being injurious to morality and marriage and referred to the constitutional primacy of the family and the pledge of the State to guard with special care the institution of marriage.

It is worth noting that this case was heard and determined prior to the introduction of divorce. However, there is no doubt that the primacy of marriage and the family under the Constitution as referred to by Kelly J. remains as influential a factor today as it was at the time of this decision.

In the opinion of the Law Reform Commission<sup>35</sup> the decision in *Ennis v Butterly* does not prohibit all cohabitation agreements, just those that seek to replicate the marriage contract, i.e. that seek to establish a marriage-like relationship. Agreements seeking to regulate only financial and property matters are permissible and advisable.

### **Pre-nuptial Agreements Recognised by Statute**

Section 113 of the Succession Act 1965 recognises the right of spouses to regulate their financial or property affairs by executing an agreement prior to, or during the course of the marriage, which would have the effect of renouncing the legal right share to which they would be entitled on the death of the other spouse. Section 113 states as follows:

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<sup>34</sup> *Supra* n.13

<sup>35</sup> Law Reform Commission, Rights and Duties of Co-habitants (LRC 8202006) at 3.07  
[www.lawreform.ie/publications/reports.html](http://www.lawreform.ie/publications/reports.html)

“The legal right of a spouse may be renounced in an ante-nuptial contract made in writing between the parties to an intended marriage, or may be renounced in writing by the spouse after marriage and during the lifetime of the testator.”

It is clear that over 40 years ago, the legislature saw the necessity of permitting parties to a forthcoming marriage to order some of their financial affairs prior to the marriage taking place, although clearly section 113 limits this to renouncing or otherwise ordering the legal right share to which one or both of the parties would be entitled. Obviously the ordering of affairs as contemplated by section 113 was not to be carried out in contemplation of a separation which might occur at some future date, and therefore section 113 did not offend against public policy. Statutory acknowledgment was given to the fact that before some marriages would take place, the parties could decide to enter into an agreement which would regulate the distribution of certain assets at some time in the future.

Spierin in his commentary on the Succession Act<sup>36</sup> says that it is important that the renouncing spouse has the benefit of independent, legal and financial advice, and that the absence of same could undermine such an agreement.

The question as to whether a renunciation, once effected, is irrevocable is not addressed in the Succession Act 1965. Spierin suggests one interpretation of the section to be that because no such provision is expressly included, the renunciation is therefore final and cannot be withdrawn in the absence of some vitiating factor such as mistake, fraud or undue influence. On the other hand, Spierin makes the point that a renunciation made pursuant to contract could possibly be retracted in accordance with the terms of the contract, or by agreement with the other parties to the contract. If the renunciation is voluntary and without consideration, it may be possible to retract same in certain circumstances, and where the other spouse has not altered his/her position on foot of the renunciation.

### **Are Pre-nuptial Agreements Void *ab initio* or Unenforceable?**

Prior to the introduction of divorce in Ireland there was a strong line of authority to the effect that a pre-nuptial agreement was void at common law on the grounds that it was contrary to public policy. Such contracts were generally categorised under the rubric of “contracts which subvert the sanctity of marriage” as evidenced by the case of *Marquess of Westmeath v Marquess of Salisbury*<sup>37</sup>. This is an old Irish case which was an appeal from the Court of Chancery in Ireland to the House of Lords and involved two deeds signed by a married couple for the purposes of an anticipated separation. The parties continued to live together after the execution of the first deed and intermittently after the second deed. The first deed was held to be null and void but this was because the parties had lived together after it was executed, the second deed was held to be unenforceable as a matter of public policy as it anticipated the breakdown of the union.

The philosophical basis for the old common law rule was that such agreements undermined the institution of marriage as a life long union. Having regard to the removal of the constitutional prohibition of divorce in Ireland and having regard further to the enactment of the Family Law Act 1995 and the Family Law (Divorce) Act 1996, that basis has been invalidated.

If an agreement is deemed to be void at common law it is deemed to be void *ab initio*. There is some judicial support for the proposition that a contract which is void *ab initio* on the grounds of public policy is more properly described as unenforceable. It should therefore be contrasted with an illegal contract, i.e. a contract to commit a criminal act or which is itself a criminal act. In those circumstances the entire contract is tainted and will fall.

<sup>36</sup> The Succession Act 1965 & related legislation – A commentary Third Edition (Page 668)

<sup>37</sup> (1830) 5 BL1 339

A contract which is void for reasons of public policy falls into what is described in the English case of *Goodilson v Goodilson*<sup>38</sup> as being in the category of the “second kind of illegality”, i.e. one in which the illegal or void term may be severed. Arguably, where a pre-nuptial agreement also contained provisions dealing with the day to day management of matrimonial assets or incomes during the marriage, some terms of that agreement might be enforceable. There does not appear to be any case in which this question was raised but the Law Reform Commission<sup>39</sup> did draw attention to a possible distinction in a co-habitation agreement between the agreement to co-habit and other elements of a contract entered into between co-habiting couples. Certainly in the area of contracts restraining trade the court has adopted a wide jurisdiction to sever or sometimes even tamper with a covenant if it failed to meet a test of proportionality or reasonableness and thus saved the contract as a whole.

### Variation of Ante-nuptial Settlements

Section 9(1)(c) of the 1995 Act, which is repeated in Section 14 (1)(c) of the 1996 Act, provides that the Court may make an Order *inter alia* providing for:

“the variation for the benefit of either of the spouses and of any dependent member of the family and of any or all of those persons of any ante-nuptial or post-nuptial settlement (including such a settlement made by Will or Codicil) made on the spouse.”

The provisions of the English Matrimonial Causes Act 1973 are substantially similar and were considered by the House of Lords in *Brooks v Brooks*<sup>40</sup>. In that case a private pension fund was deemed to be a post-nuptial settlement which could be varied for the benefit of the wife.

Perhaps the most illuminating judgment in this jurisdiction is that of McKechnie J. in the case of *FJWT v CNRT & by Order Trust Corps Services Ltd*<sup>41</sup>. These proceedings were brought under the 1995 Act and the court was asked to vary for the benefit of the wife and the dependent members of the family a discretionary trust known as the “Repus” Trust. The trustees were joined as notice parties. The husband was the settlor and the original beneficiaries were the children of the marriage, their spouses, their issue and the spouses of such issue. Any widow of the settlor was also included in the definition of settlor. The trustees had a power to vary the category of beneficiary and to exclude any of the persons named in the deed. This trust was not established for any purpose to do with the marriage and was entered into as a result of property and taxation advice. McKechnie J. referring to this fact, held that he was satisfied that the husband:

“acted genuinely and in a bona fide manner and was simply endeavouring to achieve the most tax efficient manner of succeeding to his estate. At no stage, nor is there any question of this, was the aforesaid scheme devised so as to diminish the assets of the family or otherwise to disadvantage his wife and children.”

The court went on to take the view that it was never the intention of the parties that this major asset would be excluded from consideration in the event of the marriage not ultimately succeeding.

It was argued by Counsel on behalf of the wife that the trust was a “post-nuptial” settlement which was governed by Section 9(1)(c). Counsel on behalf of the trustees submitted that the instrument did not come within the provisions of the Act and

<sup>38</sup> (1954) 2QB 1118

<sup>39</sup> *Supra* n.35

<sup>40</sup> [1995] 3 A11ER 256

<sup>41</sup> [2005] 2 I.R. 247

that it was not “made on the spouses” and further that as the trust was a discretionary trust in which no one of the individual nominated beneficiaries had any anticipation of receiving a benefit, the allocation of which was at the absolute discretion of the trustees.

It is clear from the judgment that the court was not prepared to give a narrow meaning to the term “settlement” as used in the legislation and in particular refused to give it the meaning used in a conveyancing instrument or other contexts where the term has a strict meaning and is confined to deeds or instruments which create a succession of estates. The one factor that was required to bring the trust within the meaning of the section was that the instrument should confer some financial benefit on one or both of the spouses as spouses and with reference to their marital status.

The following dicta of McKechnie J. is significant:

“In my view, therefore, these cases over a lengthy period of time demonstrate an approach of the Court to statutory provisions almost identical, for the present purposes, to Section 9(1)(c) of the 1995 Act. That approach leads to a result that once arrangements confer a benefit on the spouses or either of them in their capacity as husband or wife and was provided for, with and by reference to their married status, then same should be treated as a settlement within the said statutory provision.”<sup>42</sup>

This case does not of course much advance our understanding of whether all pre-nuptial settlements are enforceable in Irish law but certainly some agreements (those which fall within the wide definition of settlement) are enforceable and capable of being varied under the provisions of Section 9(1)(c). If such a pre-nuptial settlement can be capable of variation then the fear of the common law which rendered such agreements void could no longer prevail.

### Summary

There exists an express statutory provision for a limited form of pre-nuptial agreement under section 113 of the Succession Act 1965, but these agreements are not drawn up in contemplation of future separation. There has been little judicial analysis of any other form of pre-nuptial agreement. Furthermore, the case law would suggest that a pre-nuptial agreement would fall within the class of agreement that is capable of variation by the court under section 9 of the 1995 Act and section 14 of the 1996 Act.

### Conclusion

The Group is of the view that pre-nuptial agreements are enforceable and capable of variation under existing Irish statute law. The weight to be attached to an agreement would be determined by the courts in the light of the requirement for proper provision and the relevant statutory criteria.

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<sup>42</sup> *ibid* at p. 33

# 4

## Legal Status of Pre-nuptial Agreements in Other Jurisdictions

- I. England and Wales
- II. Scotland
- III. United States of America
- IV. California
- V. Australia
- VI. New Zealand
- VII. Hague Convention on the Law Applicable to Matrimonial Property Regimes
- VIII. France
- IX. Netherlands
- X. Conclusion

## 4. Legal Status of Pre-nuptial Agreements in Other Jurisdictions

### England and Wales - Statutory Law and Policy

The current law governing the distribution of assets on marital breakdown, the Matrimonial Causes Act 1973, does not make any express reference to any agreement or private ordering between the parties or how the court might or should take this into account.<sup>43</sup> However, the law relating to pre-nuptial agreements has been under both legislative and judicial review, with a generally positive regard for their potential enforceability, subject to a number of required safeguards. In 1998 the Lord Chancellor, Lord Irving of Lairg, confirmed that the Government was considering whether pre-nuptial agreements should, where they exist, be legally binding.<sup>44</sup> He stated that to include the drawing up of a pre-nuptial agreement as an aspect of marriage preparation would "give couples a greater degree of certainty about the ownership of property if a marriage should end in divorce; and could, therefore, help to remove some of the grounds for conflict, as well as contribute to our objectives of certainty, clarity and the reduction of costs."

This was followed in 1999 by the publication of the Home Office Green Paper, *Supporting Families: A Consultation Document*<sup>45</sup>. One aspect of the consultation document considered the issue of agreements concerning marital property and concluded that to permit pre-nuptial agreements would give people more choice and allow them to take more responsibility for ordering their own lives. Rather than weakening the union, it was suggested that such an agreement would help the couple to build a solid foundation for their marriage by encouraging them to look at the financial issues that were likely to arise once they were married. Another advantage identified was that such an agreement could provide for the children of a first marriage who might otherwise be overlooked at the time of the second marriage.

In the event that pre-nuptial agreements should be recognised as lawful, the Green Paper set out six scenarios, each of which would operate to negate the potentially binding effect of a pre-nuptial agreement:

- i where there is a child of the family, whether or not that child was alive or a child of the family at the time when the agreement was made;
- ii where under the general law of contract the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party who had not agreed in advance;
- iii where one or both of the couple did not receive independent legal advice before entering into the agreement;
- iv where the court considers the enforcement of the agreement would cause significant injustice (to one or both of the couple or a child of the marriage);
- v where one or both of the couple have failed to give full disclosure of assets and property before the agreement was made;
- vi where the agreement is made fewer than 21 days prior to the marriage.

By including the safeguards set out above it appears that the court would retain significant power to ignore or alter the terms of the agreement in many cases, particularly in light of the over-arching exception set out in point vi, above, which permits the

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<sup>43</sup> Section 7 of the Matrimonial Causes Act 1973 provides legislative guidance for the court in circumstances where the parties have a pre-existing "agreement or arrangement made or proposed to be made between them, being an agreement or arrangement which relates to, arises out of, or is connected with, the proceedings for divorce which are contemplated or, as the case may be, have begun...". Where such an agreement exists (and this provision could quite reasonably be interpreted to include a Pre-nuptial agreement between the parties), section 7 has provided that "...provision may be made by rules of court for enabling the parties to a marriage, or either of them, on application made either before or after the presentation of a petition for divorce, to refer to the court" to any such agreement or arrangement and permits the court "to express an opinion, should it think it desirable to do so, as to the reasonableness of the agreement or arrangement and to give such directions, if any, in the matter as it thinks fit."

However, the legislature has not, to date, enacted any rules of court to give effect to this provision.

<sup>44</sup> In his speech to Relate's Diamond Jubilee Annual Conference, St. Catherine's College, Oxford, 28 June 1998

<sup>45</sup> [www.homeoffice.gov.uk/vcu/suppfam.htm](http://www.homeoffice.gov.uk/vcu/suppfam.htm)

court to ignore the pre-nuptial agreement in the case of a significant injustice. Given that a central motivation for executing a pre-nuptial agreement is to avoid inter-spousal statutory obligations and rights, a court might quite easily regard an agreement that achieves this as giving rise to a “significant injustice”.

In 2006, the Law Society of England published a document entitled *Family Law Protocol*<sup>46</sup> which set out appropriate protocols for the making of ancillary relief orders on marital breakdown. The protocols note the ongoing rapid changes and developments in the law relating to marital agreements, including agreements made before marriage. In addition they identify the current trend for “the courts to show an increasing willingness to respect agreements freely entered into between the parties, especially in relation to pre-nuptial agreements, i.e. contracts entered into before marriage whereby the parties seek to regulate their financial liabilities and responsibilities to one another in the event of a divorce.”<sup>47</sup>

### Case Law

The courts in England and Wales have in recent years provided conflicting statements on the impact and effect of pre-nuptial agreements. In *F v F*<sup>48</sup> Thorpe J. rejected the existing pre-nuptial agreement as being of no significance. Wilson J. in *S v S*<sup>49</sup> confirmed the appropriateness of this approach, but equally stated that “...there will come a case...where the circumstances surrounding the pre-nuptial agreement and the provision therein contained might, when viewed in the context of the other circumstances of the case, prove influential or even crucial.”<sup>50</sup>

In *N v N*<sup>51</sup> Cazalet J. was of the view that the existing pre-nuptial agreement “...would be a relevant circumstance in determining an application for financial relief in England but...would not conclude the matter.” Similarly in *N v N*<sup>52</sup> Wall J. was of the view that although the existing pre-nuptial agreement was not specifically enforceable, its existence was a factor to be taken into account, having regard to the circumstances of the case as mandated by section 25. The particular facts of *G v G*,<sup>53</sup> involving a one-year marriage, lent themselves to a swift resolution of all matters and saw the pre-nuptial agreement being amended and subsequently converted to a separation agreement, confirmed by the court as the “complete resolution” of the matter.

O’Connell J. gave much consideration to the impact of pre-nuptial agreements when hearing the case of *M v M*<sup>54</sup>. He was of the view that the court should look at the agreement and decide in the particular circumstances what weight should, in justice, be attached to it. With reference to the particular facts of this case, involving a pregnant bride and a subsequent five year marriage, O’Connell J. opined that whilst it would be unjust to the husband to ignore its existence and terms, it would equally be unjust to the wife to apply its terms strictly. Therefore he deemed it appropriate to consider the existence and terms of the pre-nuptial agreement as “one of the more relevant circumstances of the case.”<sup>55</sup>

More recently in *K v K*<sup>56</sup> the trial judge, Rodger Hayward Smith QC, discussed the relevance of the existing pre-nuptial agreement at length. He regarded it as appropriate that the agreement be considered as one of the circumstances of the case under section 25(2)(g) of the Matrimonial Causes Act 1973. As the parties had executed an agreement, he was of the view that it would be unjust to disregard it. However, with reference to the sacrifices and ongoing contributions made by the wife in caring for the child of the marriage, he concluded that it would be unjust to preclude her from maintenance pursuant to the terms of the pre-nuptial agreement.

<sup>46</sup> <http://www.lawsociety.org.uk/documents/downloads/dynamic/flppart4.pdf>

<sup>47</sup> *Ibid* at para 4.20.1.

<sup>48</sup> [1995] 2 FLR 45

<sup>49</sup> [1997] 1 WLR 1200

<sup>50</sup> *Ibid* at 1203-4

<sup>51</sup> [1997] 1 FLR 900

<sup>52</sup> [1999] 2 FLR 745

<sup>53</sup> [2000] 2 FLR 18

<sup>54</sup> [2002] 1 FLR 654

<sup>55</sup> *Ibid* at 664

<sup>56</sup> [2003] 1 FLR 120

## Scotland

In the course of their reform process prior to the enactment of the Family Law (Scotland) Act 1985, the Scottish Law Commission considered the appropriateness of state involvement and debated the theoretical possibility of making no statutory provision for financial accommodation on divorce. The notion of eliminating state involvement and permitting the parties to “go their own ways financially and economically after divorce” was contemplated.<sup>57</sup> Although the report recognised that a useful starting point for any discussion on financial provision on divorce is to assume that the parties should be economically independent after divorce, it recognised the almost unavoidable need for state intervention to ensure justice is achieved. In many cases it was observed that the parties’ property and income “will be distributed between them in a more or less haphazard way at the end of the marriage – and certainly not in the way which they would have agreed had they been planning for the post-divorce situation since the beginning of the marriage”.<sup>58</sup>

Under Scottish matrimonial law there exists a rebuttable statutory presumption of equal division of matrimonial property. This presumption is supported by reliance upon detailed statutory provisions under sections 9 to 11 of the Family Law (Scotland) Act 1985. Section 9 identifies five principles to be applied by the court in deciding what order for financial provision, if any, to make. In applying these principles to the decision making process, section 8(2)(b) requires that any order made must also be “reasonable having regard to the resources of the parties”. Thus orders for financial relief under the 1985 Act must be both justified by the statutory principles and reasonable in light of the resources of the parties. However, the section 9 principles do not make any reference to the impact of existing agreements nor are they referred to as a factor to influence the fact and terms of any orders for financial relief.

Separately, section 16 of the 1985 Act addresses the issue of the impact of agreements on financial provision. It expressly provides that where parties to a marriage have entered into an agreement as to the financial provision to be made for the parties on divorce, the court is permitted to set aside or vary the agreement, or any term of it:

- relating to a periodical allowance where the agreement expressly provides for the subsequent setting aside or variation by the court of that term; or
- where the agreement was not fair and reasonable at the time it was entered into.

Thus the court has a statutory power to set aside the entire agreement or any term of the agreement where justice so requires. However, it was confirmed in *Gillon v Gillon*<sup>59</sup> that an uneven distribution of the assets between the parties does not give rise to a presumption of unfairness.

## United States of America

The US Federal position is governed by the Uniform Premarital Agreement Act 1987 (UPAA) which regulates the enforceability, content, regulation and termination of pre-nuptial agreements in the signatory states. The UPAA has been adopted by 26 states and the District of Columbia.<sup>60</sup> It is given effect within each of those states by way of comprehensive yet particular state legislative enactments which permit the enforcement of pre-nuptial agreements by regulating the issue pursuant to the legislative requirements of each state. The statutory regime in California is examined below as one example of the UPAA as it applies in an individual state.

<sup>57</sup> Scottish Law Commission Reports on Aliment and Financial Provision (Scot. Law Com. No. 67) at para 3.34.

<sup>58</sup> *Ibid.*

<sup>59</sup> 1994 SLR 984

<sup>60</sup> Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia, Wisconsin.

Under the UPAA, the courts are now required to decide the enforceability of a pre-nuptial agreement without regard to the spouses' ignorance of the marital rights waived, the length of the marriage, intervening circumstances or other equitable arguments available at common law. Retrospective unconscionability alone is insufficient to void an agreement.

Section 6(a) of the UPAA permits a spouse to avoid enforcement of a pre-marital agreement only by proving that the agreement was not executed voluntarily or that the agreement was unconscionable at the time it was *executed*. In order to prove unconscionability, the party challenging the agreement must show that he or she was not provided with reasonable disclosure of the financial assets and obligations of the other party before execution of the agreement, that the party did not waive the right to disclosure, and that the party had no independent knowledge of the other's assets or debts.

If the conditions in section 6(a) are not met, then section 6(b) provides an additional avenue to avoid enforcement of an agreement which affects spousal support. If an agreement limiting this support causes one party to be "eligible for support under a program of public assistance" at the time of separation or divorce, then a court may require the other party to provide support to the extent necessary to avoid that eligibility. Atwood refers to the system introduced by the UPAA as "stepped-up enforceability."<sup>61</sup>

This model of enforcement does serve to increase predictability, as one can be relatively certain that, if correct procedures are followed, the pre-nuptial agreement will be water-tight and no amount of children, promotions or demotions will change this. However, in Ireland it is unlikely that we will ever reach the stage where contractual autonomy is paramount and harsh bargains must be adhered to.

## California

California is a signatory to the UPAA and marital agreements are very much acceptable under Californian law. Whilst section 2550 of the California Family Code requires the court to divide the community property<sup>62</sup> of the parties equally, it has no such power where a valid written agreement executed by the parties provides otherwise.

Pre-nuptial agreements are referred to as "marital agreements" under Californian law and are specifically authorised by Family Code sections 850 to 853. Section 850 provides that:

- "...married persons may by agreement or transfer, with or without consideration, do any of the following:
- (a) Transmute community property to separate property of either spouse.
  - (b) Transmute separate property of either spouse to community property.
  - (c) Transmute separate property of one spouse to separate property of the other spouse."

Section 852 requires such an agreement to be "...made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected."<sup>63</sup>

<sup>61</sup> Atwood, "Ten Years Later: Lingering Concerns About the Uniform Pre-Marital Agreement Act" (1993) 19 Journal of Legislation 127.

<sup>62</sup> Section 760 of the Cal. Fam. Code defines community property as follows: "Except as otherwise provided by statute, all property, real or personal wherever situated, acquired by a person during the marriage while domiciled in this state is community property".

<sup>63</sup> Such an agreement cannot impact upon or affect the law governing characterisation of property in which separate property and community property are commingled or otherwise combined.

Whilst chapter two of the Family Code gives effect to the terms of the UPAA, it also sets out procedural requirements that are particular to Californian law. Sections 1610-1617 are collectively entitled "Pre-marital agreements" and they outline the formalities to be adhered to if such agreements are to be enforceable. It is instructive to consider these provisions as an example of a detailed legislative approach to the regulation of the execution of pre-nuptial agreements.

Section 1610 defines both pre-marital agreements and the nature and extent of the property which they can govern. A pre-marital agreement is defined as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage". Property is defined as an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings. Section 1611 requires a pre-marital agreement to be executed in writing and signed by both parties. It also provides that such an agreement is enforceable without consideration. What can be dealt with by the terms of a pre-marital agreement is exhaustively outlined by section 1612:

- "(a) Parties to a premarital agreement may contract with respect to all of the following:
- (1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.
  - (2) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property.
  - (3) The disposition of property upon separation, marital dissolution, death, or the occurrence or non-occurrence of any other event.
  - (4) The making of a will, trust, or other arrangement to carry out the provisions of the agreement.
  - (5) The ownership rights in and disposition of the death benefit from a life insurance policy.
  - (6) The choice of law governing the construction of the agreement.
  - (7) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.
- (b) The right of a child to support may not be adversely affected by a premarital agreement.
- (c) Any provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement. An otherwise unenforceable provision in a premarital agreement regarding spousal support may not become enforceable solely because the party against whom enforcement is sought was represented by independent counsel."<sup>64</sup>

Finally, the comprehensive approach of the Californian legislature is reflected in section 1615 which sets out the circumstances where a pre-marital agreement will not be enforceable:

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<sup>64</sup> Section 1614 provides that after marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration.

- “(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following:
- (1) That party did not execute the agreement voluntarily.
  - (2) The agreement was unconscionable when it was executed and, before execution of the agreement, all of the following applied to that party:
    - (A) That party was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party.
    - (B) That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.
    - (C) That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.
- (b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.
- (c) For the purposes of subdivision (a), it shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record all of the following:
- (1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.
  - (2) The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.
  - (3) The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.
  - (4) The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement.
  - (5) Any other factors the court deems relevant.”

Such a detailed legislative approach removes a significant element of judicial discretion as certainties are introduced in respect of what can or cannot be enforced by the courts. Whilst such an absolutist approach is not to be encouraged necessarily, and indeed most probably would be an unconstitutional approach under Irish law, the identification by the legislature of formalities that are essential for the validity or otherwise of a pre-nuptial agreement would be instructive for any presiding judge considering the fairness of both the execution and content of a pre-nuptial agreement in given circumstances.

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## Australia

Pre-nuptial agreements, known as "binding financial agreements", are enforceable in Australia since the enactment of the Family Law Amendment Act 2000. They are governed by the very detailed provisions of Part VIII of that Act regulating content, execution, termination and other aspects of the agreements. For a financial agreement to be binding it must be executed in writing, signed by both parties and copies given to both parties. Further, it must specify the extent of any spousal maintenance to be provided, and state that both parties have received independent legal advice, appending a certificate of an independent lawyer to that effect. In addition, an agreement will not be binding if one or more of the following circumstances can be proven:

- the agreement was obtained by fraud,
- the agreement was made under duress, by mistake, or by virtue of undue influence,
- it is impracticable for all or part of the agreement to be carried out,
- there has been a material change in the care of a child leading to hardship,
- a party engaged in unconscionable conduct when making the agreement, such as where one spouse is at a disadvantage and the other spouse knows it,
- the agreement runs contrary to good conscience.

## New Zealand

Pre-nuptial agreements have been permitted in New Zealand since the enactment of the Matrimonial Property Act 1976, renamed the Property (Relationships) Act 1976 by the Property Relationships Amendment Act 2001.<sup>65</sup> The general rule of distribution is that of equal division of community property, which is regarded as property purchased or secured during the relationship. However, section 21 of the Property (Relationships) Act 1976 permits married couples to execute "opt-out agreements" with respect to the status, ownership and division of their property, including future property. Whilst the original 1976 Act permitted the courts to set aside a pre-nuptial agreement where its terms would cause injustice, the 2001 Act has limited the exercise of this discretionary judicial power to circumstances where the implementation of the pre-nuptial agreement would cause "serious injustice". The effect of this statutory reform is to make marital agreements more enforceable, thereby providing greater certainty for the parties involved.

## Germany

Germany's domestic provisions expressly authorise the use of pre-nuptial agreements and statutorily regulate their validity or otherwise. An agreement must be executed in writing by both parties in the presence of a notary, although interestingly independent legal advice is not a pre-requisite for its provisions to be deemed enforceable.

Once the necessary formalities are complied with, the validity of the agreement will be determined on the basis of fairness and equity in the circumstances. In this regard the courts will examine the terms of the agreement both at the time of its execution and at the time of the separation of the parties. In examining the agreement at the time of its execution, the courts are seeking to identify if, at that time, the agreement was so partial that to give effect to its terms would "be considered *contra bonos mores*"; in such an instance the agreement will be declared partially or entirely void.<sup>66</sup> In addition or alternatively, the court can consider the impact of the agreement at the time of the separation of the parties. It is provided

<sup>65</sup> The 2001 Act extended the property division regime to the division of the relationship property upon separation or death of married couples, partners in de facto relationships and partners in same sex relationships.

<sup>66</sup> Scherpe J "A Comparative View of Pre-nuptial Agreements" March [2007] IFL 18, with reference to section 138 of the German Civil Code.

<sup>67</sup> *ibid.* with reference to s. 242 of the German Civil Code.

that the agreement or part of the agreement can be declared void if it is considered to be inequitable in the circumstances when compared with the entitlements under the statutory regulation of entitlements on divorce.<sup>67</sup>

The German courts have adopted disparate approaches in respect of agreements relating to the distribution of matrimonial property generally, as distinct from agreements, or elements thereof, which seek to dictate the issue and extent of maintenance obligations in advance. In this regard whilst the former are only likely to be considered to be inequitable in “truly extraordinary circumstances” the latter are considered much more closely and will more readily be set aside. Scherpe has noted that maintenance “carries enormous weight in German family law and is considered the main protection for the weaker party”.<sup>68</sup>

### Hague Convention on the Law Applicable to Matrimonial Property Regimes

The Hague Convention on the Law Applicable to Matrimonial Property Regimes, which specifically authorises pre-nuptial agreements, has 5 contracting states.<sup>69</sup> Its provisions determine the law applicable to matrimonial property disputes and provide that in the absence of a concluded marriage contract, the internal law of the State in which they both have their habitual residence shall be deemed the applicable law in the event of a dispute between the parties. The validity of pre-nuptial agreements is provided for by virtue of Article 12 which states:

“The marriage contract is valid as to form if it complies either with the internal law applicable to the matrimonial property regime, or with the internal law of the place where it was made. In any event, the marriage contract shall be in writing, dated and signed by both spouses.”

Further, Article 13 provides:

“The designation of the applicable law by express stipulation shall comply with the form prescribed for marriage contracts, either by the internal law designated by the spouses, or by the internal law of the place where it is made. In any event, the designation shall be in writing, dated and signed by both spouses.”

### France

France is one of the signatories to the Hague Convention. In addition the French legislature has enacted specific provisions concerning pre-nuptial agreements.<sup>70</sup> Under French domestic law, future spouses who wish to enter into a pre-nuptial agreement must appear together before a notaire prior to the wedding and select one of the *regimes matrimoniaux* offered by the French Civil Code. The parties can select their preferred property regime, choosing between several versions of the community property and other regimes, including *separation de biens* (separate property). Whatever statutory regime is selected, it can be modified to accommodate their specific needs, subject to certain public policy limits. Where parties choose not to enter into a pre-marital agreement, the default *regime de communauté légale*, a community property regime, governs the legal relationship of the spouses.

### Netherlands

The Netherlands is another signatory to the Hague Convention on the Law Applicable to Matrimonial Property Regimes, and authorises pre-nuptial and post-nuptial agreements. In the Netherlands, parties may enter into a pre-nuptial agreement at the time of concluding their marriage, or a post-nuptial agreement during the marriage itself, but in the latter case the approval of the courts is required. Interestingly, 25% of marriages in the Netherlands have a pre-nuptial agreement.<sup>71</sup> In drafting an

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<sup>68</sup> *ibid.* at 21.

<sup>69</sup> Austria, France, Luxembourg, Netherlands and Portugal.

<sup>70</sup> Code Civil Français, art.1387 et seq.

<sup>71</sup> Smith “The Law and Economics of Marriage Contracts” (2003) 17 *Journal of Economic Surveys* 201.

agreement, the parties can choose between one of three models described in the regulatory code, or regulate their property relations, with some limitations, as they wish. The pre-nuptial agreement must take the form of a deed, sworn by a notary and must be entered in a matrimonial property register.

### **Conclusion**

Pre-nuptial agreements have been considered and legislatively regulated in many other jurisdictions. The experiences of such other jurisdictions are instructive and assist in the identification and consideration of the issues to be considered in addressing and possibly reforming this area of law. Whilst few jurisdictions will rigidly enforce pre-nuptial agreements where to do so would cause grave injustice, the varying approaches to the issues of formalities and fairness suggest that these issues will require legislative and/or judicial consideration under Irish law. Certainly it appears that legislative provisions which outline the circumstances where a pre-nuptial agreement will not be enforceable is a favoured approach which can serve to eliminate doubt in respect of formal requirements surrounding the execution of a pre-nuptial agreement. Broader concepts of unconscionability and inequitable outcomes unavoidably rely upon the exercise of judicial discretion which focuses on the particular circumstances of a case.

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# 5

## Relevance and Desirability of Pre-nuptial Agreements

- I. Public Policy
- II. Is there a Recurring Need to Reconsider Public Policy Determinations?
- III. Public Demand – Changing Socio-economic Conditions in Ireland
- IV. Summary
- V. Conclusion

## 5. Public Policy Considerations

This chapter draws together many issues already examined in earlier chapters for discussion from a public policy perspective.

### Public Policy

Pre-nuptial agreements have traditionally been held by the courts to be void on public policy grounds, on the basis that no contract envisaging the dissolution of a marriage should be enforceable. The removal of the constitutional prohibition on divorce in Ireland has obviously weakened that public policy justification. However, the treatment of pre-nuptial agreements in Irish law must nevertheless still be considered in the context of the constitutional and statutory provisions relating to marriage.

### Is there a Recurring Need to Reconsider Public Policy Determinations?

Marriage in Irish law has been described in the following terms by McCarthy J. in *N (otherwise K) v K*<sup>72</sup>:

*“Marriage is a civil contract which creates reciprocating rights and duties between the parties but, further, establishes a status which affects both the parties to the contract and the community as a whole. The contract is unique in that it enjoys, as an institution, a pledge by the State to guard it with special care and to protect it against attack.”*<sup>73</sup>

Marriage was defined at common law as “the voluntary union for life of one man and one woman to the exclusion of all others.”<sup>74</sup> It was because of the lifelong nature of marriage that pre-nuptial agreements were traditionally considered to be contrary to public policy as they contemplated a future separation of the married couple. However, once divorce became available in Ireland, marriage need no longer be for life. The question arises as to whether this development has sufficiently removed the public policy objection to pre-nuptial agreements to permit them to be accommodated and enforced in the system.

The manner in which divorce was introduced in Ireland is such that it does not create a regime which would accommodate binding pre-nuptial agreements. The requirement that proper provision “exists or will be made for the spouses and any children of either or both of them and any other person prescribed by law”<sup>75</sup> ensures that pre-nuptial agreements will have to be considered within the spirit of this constitutional requirement at the date of the dissolution of the marriage.

However, divorce in Ireland was also introduced in a manner that gives rise to a persuasive argument that pre-nuptial agreements may be desirable. The fact that Irish divorce law is a “no fault” regime would suggest that parties who marry in good faith should be entitled to protect their interests where the failure of the marriage cannot be attributed to them.

### Public Demand – Changing Socio-economic Conditions in Ireland

Changes in Irish society indicate that there may be a need to reconsider public policy determinations with the passage of time. People are approaching marriage at a later stage in life, often well into their thirties when many of them have accumulated a degree of wealth. In addition, since the introduction of divorce there is an increasing number of couples marrying for a second time. There has also been an increase in the number of international marriages (i.e. marriages between two persons of different nationality or between two persons of the same non-Irish nationality).

<sup>72</sup> [1985] I.R. 733

<sup>73</sup> *ibid* at p 754

<sup>74</sup> *Hyde v Hyde* (1866) LR 1 P&D 130

<sup>75</sup> Bunreacht na hÉireann, Article 41.3.2. (iii)

People contemplating marriage may be anxious to secure a degree of legal certainty in their arrangements should the marriage fail. There is, however, a question as to whether certainty can be accommodated in a divorce regime system such as that introduced in Ireland.

There has been considerable amount of judicial consideration of the extent to which it is possible to provide for a clean break divorce under the Family Law (Divorce) Act 1996. In this regard there appears to have been a subtle shift in judicial thinking. At one end of the spectrum is the dictum of McGuinness J. in the case of *MK v JP*<sup>76</sup> wherein she states:

“In this jurisdiction the legislature has, in the Family Law (Divorce) Act, 1996, laid down a system of law where a ‘clean break’ solution is neither permissible nor possible.”<sup>77</sup>

At the other end of the spectrum are the various dicta expressed by members of the Supreme Court in the case of *D.T v C.T.*<sup>78</sup> to the effect that in assessing proper provision a court might, if appropriate in the circumstances, seek to achieve certainty and finality, subject to review under section 22 of the Act of 1996, if applicable. In the words of Keane C.J.:

“It seems to me, that, unless the courts are precluded from so holding by the express terms of the Constitution and the relevant statutes, Irish law should be capable of accommodating those aspects of the “clean break” approach which are clearly beneficial.”<sup>79</sup>

There is a greater chance of securing certainty and finality where the couple understands and agrees how matters will be arranged on the breakdown of the marriage. Where this is arranged through a fair and balanced pre-nuptial contract between fully informed and consenting adults it no longer seems appropriate that a judge might totally disregard the express wishes of the parties.

Social mores have changed considerably in Ireland over recent decades. An increasing number of couples are choosing to cohabit informally (although, for many, cohabitation may be a precursor to marriage). There is acceptance of a need on public policy grounds to accord legal recognition and protection to the increasing cohort of cohabitants. This is acknowledged by the publication of the Options Paper on Domestic Partnership by the Department of Justice, Equality and Law Reform in November 2006<sup>80</sup> and in the Law Reform Commission Report on the Rights and Duties of Cohabitants published in December 2006<sup>81</sup>.

Yet marriage is still regarded, certainly in constitutional terms, as the cornerstone of family life. If it is a desirable public policy goal to encourage people to regularise their relationship through marriage then it might be appropriate to encourage parties to personalise their marriage contracts to a degree by affording recognition to the terms on which they wish to enter the marriage.

### International Law Concerns

The objective of facilitating free movement of people within the European Union has prompted the EU Commission to introduce policy initiatives in the area of family law. The Brussels II Regulation deals with issues of jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility<sup>82</sup>. As far as matrimonial matters are concerned the Regulation applies to decrees of divorce, legal separation and marriage annulment only. They do not

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<sup>76</sup> *Supra* n.15

<sup>77</sup> *ibid.* at p 382

<sup>78</sup> *Supra* n.17

<sup>79</sup> *ibid.* at p 364

<sup>80</sup> [www.justice.ie/publications](http://www.justice.ie/publications)

<sup>81</sup> *Supra* n.35

apply to ancillary relief. However, where jurisdiction is established in Ireland under the Regulation, Ireland's divorce law is such that all ancillary matters must be addressed in advance of a decree of divorce being granted by the courts.

Ireland recently declined to exercise its option under the Fourth Protocol of the Amsterdam Treaty to participate in the negotiation and implementation of a proposed measure designed to introduce uniform applicable law rules in divorce and legal separation proceedings throughout the European Union by way of a revision of the Brussels II Regulation. This means that Irish judges will continue to apply Irish law in all cases including those involving nationals of other EU Member States. It is acknowledged, however, that due to the increase in "mobile marriages" it is likely that more and more international couples will seek matrimonial relief in Irish courts.

In some jurisdictions pre-nuptial agreements are enforceable and are reviewable only as to procedural matters. International couples may be surprised to find that their clearly expressed intentions in what they considered to be a valid pre-nuptial agreement can be totally disregarded in matrimonial proceedings in Ireland should the judge choose to do so. There is currently no statutory obligation to consider such agreements in an assessment of proper provision. While it is possible that such agreements may be taken into consideration as part of a general assessment of the relevant issues under section 20 of the Family Law (Divorce) Act 1996, without an express mention of them in the legislation there is no legal certainty whatsoever attaching to them.

The EU Commission Green Paper on Conflict of Laws in Matters concerning Matrimonial Property regimes<sup>83</sup> launched a wide ranging consultation exercise on the legal questions which arise in an international context as regards matrimonial property regimes and the property consequences of other forms of relationships. This initiative is at an early stage and has consisted so far of a series of questions on relevant factors to be considered in preparation of a Commission proposal for a Regulation to govern private international law aspects of these matters. It is impossible at this stage to predict how this proposed instrument will take shape and what attitude the Government will take to it; but it will undoubtedly put pressure on Ireland to reconsider whether in the face of international opinion it is acceptable to ignore pre-nuptial agreements in assessing the equitable distribution of property on the dissolution of marriage. The autonomous wishes of the parties and the arrangements they make on entering marriage must have relevance if justice is to meet the citizen's practical needs.

Given the increased mobility of European citizens and the increased incidence of international marriage, it is likely that pre-nuptial agreements are going to come before the Irish courts more frequently. It does not seem to be acceptable that they should be ignored. They should at the very least, in the context of the constitutional and statutory requirements of Irish family law, be taken into consideration in the judicial assessment of proper provision.

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<sup>82</sup> Council Regulation (EC) No. 2201/2003

<sup>83</sup> COM (2006) 400

**Summary**

Public policy objections to pre-nuptial agreements have been substantially diminished since divorce was introduced into Irish law by way of constitutional referendum and by the passing of the Family Law (Divorce) Act 1996. Socio-economic changes, including the rise in the average age of marriage, the greater wealth of many at the time of marriage, second marriages, and the increase in cohabitation are among the reasons why traditional public policy considerations in respect of pre-nuptial agreements might no longer be valid. An increase in the number of international couples seeking access to Irish courts to secure matrimonial relief may give rise to a requirement that agreements regarded as valid in the jurisdiction in which they were concluded should be afforded recognition in Irish law.

**Conclusion**

Public policy objections to pre-nuptial agreements have been diminished through the introduction of divorce in Ireland and may no longer be valid in view of socio-economic and population changes.

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# 6

## The Common Good

- I. The Common Good
- II. The Relationship between Marriage and the Common Good
  - The Institution of Marriage and the Common Good
  - The Right to Marry and the Common Good
- III. The Nexus between the Common Good and the Protection of Rights from Unjust Attack
- IV. When does the Common Good Justification become Operative?
- V. Pre-nuptial Agreements, Family Autonomy and the Common Good
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## 6. The Common Good

This chapter considers whether the common good has any role to play in considering whether pre-nuptial agreements ought to be recognised in this jurisdiction. The distribution of wealth throughout society is in the common good, and arguably a pre-nuptial agreement that seeks to protect the assets of one party to a marriage to the detriment of the welfare of the other party should it end in divorce, is contrary to this objective. It is therefore typically asserted that pre-nuptial agreements are undesirable as they are contrary to the common good. In examining this argument it is necessary to have a firm understanding of what constitutes the common good and its interaction with marriage.

### The Common Good

Owing to the natural law philosophy that underlies our Constitution, the common good is a feature of particular importance. It is therefore necessary to have a clear understanding of this concept within the context of the Irish Constitution. There are many interpretations as to what the common good constitutes. It is the Thomistic philosophy, however, that was adopted by the drafters of the 1937 Constitution. This philosophy accords the State a paternal role in the regulation of individual rights, as it is thought that the pursuit of the common good is the best means of protecting individual rights. This is evident in the Preamble:

“And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations.”

Millen defines the Thomistic philosophy of the “common good” as:

“the individual [being] a part of the entire community just as one portion is part of an entire living organism, and as such, the needs of the whole are superior to the needs of the part.”<sup>84</sup>

Under this model the State adopts the primary role of guardian of the common good, thereby relegating the rights of individuals to a secondary position.

The Irish Courts have recognised the Thomistic foundations to our Constitution and accorded the relevant weight to the concept of the common good. In *Ryan v Attorney General Kenny J.* alluded to the dominant position of the common good in relation to individual rights, stating:

“None of the personal rights of the citizen are unlimited: their exercise may be regulated by the Oireachtas when the common good requires this.”<sup>85</sup>

Similarly Walsh J. in *McGee v Attorney General* stated:

“the individual, as a member of society and the family, as a unit of society, have duties and obligations to consider and respect the good of that society.”<sup>86</sup>

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<sup>84</sup> Millen, *The Right to Privacy in the United States and Ireland*, (Blackhall Publishing, Dublin, 1999), at p138.

<sup>85</sup> [1965] I.R. 294 at 312.

<sup>86</sup> *McGee v Attorney General* [1974] I.R. 284 at 310

There are two possible interpretations of the role which the common good plays in the Constitution:

1. The Common Good as a Political/Social Ideal.
2. The Common Good as a Safeguard of Rights.<sup>87</sup>

References to the common good in a manner akin to the Preamble, quoted above, suggest that it is a political/social ideal to be achieved in relation to which the State is the necessary mechanism. Where the common good is expressed as a limitation on the exercise of certain individual rights, it is done on the basis that it is necessary to safeguard the rights of others and society as a whole.

Walsh J. (writing extra-judicially) defined the common good as:

“[T]he satisfaction (in so far as possible) of the greatest proportion of interests of all persons with the least sacrifice, the least friction, and the least waste...”<sup>88</sup>

Costello J. (writing extra-judicially) defines it as:

“[T]he whole ensemble of conditions which collaboration in a political community brings about for the benefit of every member of it.”<sup>89</sup>

### **The Relationship between Marriage and the Common Good**

With this understanding of the common good, it is necessary to determine what role it adopts within the context of marriage. As already discussed in this report, marriage features in two capacities within the Constitution<sup>90</sup>; firstly, the protection of the institution of marriage and secondly the right to marry. The common good may interact differently with these constitutional considerations of marriage, therefore each shall be dealt with accordingly.

### **The Institution of Marriage and the Common Good**

The Constitution does not expressly draw a relationship between marriage and the common good. Nonetheless, it may be possible to infer such a relationship. Article 41.1 states:

“1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family and its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.”

Article 41.3.1° states:

“The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.”

<sup>87</sup> Clarke, “The Concept of the Common Good in Irish Constitutional Law”, (1979) 30 NILQ 319.

<sup>88</sup> Walsh, “Existence and Meaning of Fundamental Rights in the Field of Education in Ireland” (1981) 2 Hum. Rts. L. J. 319 at 327.

<sup>89</sup> Costello, “Limiting Rights Constitutionally” in O’Reilly (ed.), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Roundhall Press, 1992), 178 at 178.

<sup>90</sup> See Chapter 2 Constitutional Considerations above.

The Constitution only expressly protects the institution of marriage from attack. It does not expressly promote marriage as a positive contribution to the common good or as an element of the common good. The family, however, is presented in such a light, as it is categorised as the “necessary basis of social order and as [being] indispensable to the welfare of the Nation and the State”, thus suggesting it is a mechanism through which the common good is promoted. Within this context the Constitution refers to the formation of the family, which is marriage, and therefore one can import marriage into the domain of the common good. The essential reasoning behind drawing this nexus between marriage and the common good is that marriage, in an Irish context, is viewed as a status institution, rather than the alternative contract model.

The Irish courts have given weight to this theory in the past. McCarthy J. in *N v K* stated:

“Marriage is a civil contract which creates reciprocating rights and duties between the parties but, further, establishes a status which affects both the parties to the contract and the community as a whole.”<sup>91</sup>

Recently, however, the Courts have adopted the language of contract and partnership in describing the relationship of marriage. It is submitted, however, that this language is used in a descriptive sense in illustrating the type of relationship *intra* the parties to a marriage, in contrast to the relationship of marriage with the community. This distinction is evident in the dicta of Murray J. (as he then was) in *D.T. v C.T.* where he stated:

“[M]arriage itself remains a solemn contract of partnership entered into between a man and woman with a special status recognised by the Constitution...The moment a man and woman marry their bond acquires a legal status.”<sup>92</sup>

Thus, the relationship between marriage and the common good derives from our interpretation of marriage as being a status institution, which represents the foundations of the family and thereby occupies a necessary and indispensable role in society.

The role of marriage and its relationship with the common good can be described as one falling under the interpretation of the common good as being a political/social ideal. Marriage, and the resultant formation of the family, is a mechanism through which the common good can be promoted and achieved. Can it therefore be said that the common good requires any limitations on the institution of marriage, as it is merely an objective and not a concomitant part of the institution of marriage? It is at this point that an important distinction needs to be made. The common good in this context concerns the institution of marriage and not the right to marry. Therefore, arguably it does not act as a limitation of an individual right, but rather as an ideal or objective. As such, the relationship between marriage and the common good posited thus far is one of a positive nature whereby the common good is a desirable objective, rather than in a negative manner whereby the common good acts as a restrictive limitation. Consequently the question still remains as to whether the common good is a valid consideration *within* the context of marriage. In an attempt to contend with this issue it is necessary to analyse the constitutional right to marry, and determine its constituent elements in order to ascertain whether the common good occupies a legitimate position within this debate.

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<sup>91</sup> [1985] I.R. 733 at 754.

<sup>92</sup> *Supra* n.17

### The Right to Marry and the Common Good

Although marriage is expressly referenced in the Constitution, there is no enumerated right to marry. Yet, the courts have held that the constitutional right to marry does exist, but have failed to reach consensus as to its origins. If the right to marry is held to derive from Article 41, then the common good is a factor to be considered, as discussed above. However, in this context the common good would act in a negative manner i.e. as a restriction on the exercise of the right to marry. As already analysed in Chapter 2 of this report, if the right to marry is found in Article 41 then it is to be protected from attack.

If the right to marry is held to be a personal right found under the doctrine of unenumerated rights in Article 40.3, then this right is protected from unjust attack. Notwithstanding this, Kenny J. in establishing the doctrine of unenumerated rights stated:

“None of the personal rights of the citizen are unlimited: their exercise may be regulated by the Oireachtas when the common good requires this.”<sup>93</sup>

Therefore, it would appear that the “common good” is a valid factor to be considered when one discusses the scope and exercise of the right to marry, irrespective of its origins. It now becomes necessary to consider the interaction between the common good and what constitutes an unjust attack on the right to marry. The dichotomy between these two concepts is of particular importance for present purposes because if one argues that a pre-nuptial agreement that seeks to ring fence the assets of one party to an impending marriage is contrary to the common good and is therefore void, and this causes that party to opt out of entering marriage, has the “common good” objective constituted an unjust attack on that person’s right to marry?

### The Nexus between the Common Good and the Protection of Rights from Unjust Attack

Jurisprudential problems arise when one considers the possibility of a person exercising a personal right in a manner that may not be conducive to the common good. In such circumstances the courts or legislature can act in a manner to restrict the exercise of that right in the name of the common good, but would such a restricting act represent an unjust attack? The interaction of these two concepts has generated considerable debate within the context of property rights.<sup>94</sup> The jurisprudence in that area concludes that State action in accordance with the common good cannot by definition constitute an unjust attack on the exercise of personal rights. Whilst the objective of the common good cannot constitute an unjust attack, the means of achieving this objective can, and it is in this context that the doctrine of proportionality has gained increasing support in Irish constitutional jurisprudence.

With the view that the distribution of wealth is in the common good and that pre-nuptial agreements that pertain to protect the assets of one party to a marriage from the other is contrary to the “common good”, could it be said that a law prohibiting pre-nuptial agreements was justified as being a proportionate means of protecting the common good? Arguably such a law would not be so justified as there are other more proportionate means of achieving this objective, e.g. taxation. The philosophical concept behind taxation is to distribute the private wealth of a nation amongst as many as possible so as to lessen the gap between the social classes and to provide a standard level of services to all. It would seem to stretch the boundaries of the common good justification to interfere with the financial circumstances of certain members of society, i.e. those wishing to enter marriage on foot of a pre-nuptial agreement, and not others, i.e. those who do not. The courts have taken it upon themselves to determine what is in the interests of the common good<sup>95</sup>, and therefore it is thought better to

<sup>93</sup> Supra n.85

<sup>94</sup> *Dreher v Irish Land Commission* [1984] I.L.R.M. 94; *Cafolla v O'Malley* [1985] I.R. 486; *Pine Valley Developments Ltd. v Minister for the Environment* [1987] I.R. 23; *Iarnród Éireann v Ireland* [1996] 3 I.R. 321.

<sup>95</sup> See *In re Art 26 of the Constitution and the Offences Against the State (Amendment) Bill 1940* [1940] I.R. 470, at 481. Furthermore, the courts have expressly adopted the role of determining the common good where necessary, rather than it being within the exclusive remit of the Oireachtas, see *Buckley v Attorney General* [1950] I.R. 67; *McDonald v Bord na gCon* [1965] I.R. 217; *McGee v Attorney General* [1974] I.R. 284; *The State (Healy) v Donoghue* [1976] IR 325, at 335.

allow the courts to carry out this task in each individual case involving a pre-nuptial agreement, rather than imposing a blanket universal rule affecting all pre-nuptial agreements, as arguably this would equally not be in the common good.

Moreover, in utilising the common good as a justification for what would otherwise constitute an unjust attack on personal rights, one could actually give effect to adverse ramifications for the common good. Effectively the common good justification can sometimes act as a double edged sword. Budd J. seemed to allude to this in the High Court judgment in *An Blascaod Mór Teo v Commissioner of Public Works (No.3)* stating:

“[T]he word ‘exigencies’ has a connotation of more than ‘useful’, ‘reasonable’ or ‘desirable’, it means ‘necessary’ and implies the existence of a pressing social need. The notion of necessity is linked to that of a ‘democratic society’. A measure cannot be regarded as necessary in a democratic society, based on tolerance and broadmindedness, unless it is proportionate to the legitimate aim being pursued. Furthermore, when the exigencies of the common good are called in aid to justify restrictions on the exercise of the rights of private property, being fundamental rights spelt out in the Constitution, *it should be remembered that the protection of the fundamental right, is one of the objects which needs to be secured as part of the common good.* Has a pressing social need been demonstrated which justifies the impugned legislation and its encroachment on the basic rights of private property? Is the amount of the encroachment proportionate to a legitimate aim being pursued and to the difference in the Plaintiffs' situation which requires the delimitation of their rights?”<sup>96</sup>

With this in mind it now becomes pertinent to consider what circumstances give rise to reliance on the common good to vindicate the restriction of the exercise of personal rights, and the extent to which it can do so. Such a consideration might determine whether the legislature can justifiably prohibit all pre-nuptial agreements.

### **When does the Common Good Justification become Operative?**

In seeking to best protect the common good the legislature faces an unenviable conundrum in that it cannot utilise the common good to justify every and any encroachment on individual rights, nor can it neglect the common good through inaction. Walsh J. alluded to the balancing act inherent in this problem:

“...the legislature is not free to encroach unjustifiably upon the fundamental rights of individuals or of the family in the name of the common good, or by act or omission to abandon or to neglect the common good or the protection or enforcement of the rights of individual citizens.”<sup>98</sup>

Thus, an element of proportionality is required in the discharge of the common good as a restriction on the exercise of individual rights. In postulating the doctrine of unenumerated rights, Kenny J. discussed the need for this balanced approach, for to allow the unlimited encroachment of individual rights would beg the question of what rights would be constitutionally guaranteed at all:

“When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the

<sup>96</sup> Unreported, High Court, Budd J., 27th February 1998, at p111 (emphasis added). Hogan & Whyte state that this point was not expressly addressed by the Supreme Court in the subsequent appeal: [2000] 1 IR 6; [2000] 1 IRLM 401. Kelly, *The Irish Constitution*, (4th Ed. 2003), at 2009, fn188.

<sup>97</sup> *McGee v Attorney General* [1974] I.R. 284, at 310.

<sup>98</sup> *Supra*, n.87, at 324: “What one needs to know is: if individual rights are systematically subject to the demands of the common good, and if the latter is a rather flexible concept in the political and judicial traditions of a country, in what sense are any fundamental rights constitutionally guaranteed at all?”

common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen.”<sup>99</sup>

The question is whether the common good is a self-enacting justification for the encroachment on individual rights, or does it require a negative action to justify its application. This in turn relates to the proportionate use of the common good justification in the interference with individual rights. A pure Thomistic interpretation of the common good only permits the regulation of acts that injure the common good, thereby restraining the intrusion on the realm of individual rights to an apparently proportionate level. This approach requires a basis for utilising the common good justification, otherwise “where the breach is not one which injures the common good then it is not the State’s business to intervene”.<sup>100</sup>

Therefore, it would appear that the State can only utilise the common good justification for the encroachment on the exercise of individual rights where the exercise of such rights might *injure* the common good, thus begging the question for present purposes: Does a party to a marriage who ‘ring fences’ his/her assets by way of a pre-nuptial agreement *injure* the common good?

### Pre-nuptial Agreements, Family Autonomy and the Common Good

The distribution of wealth through a marriage would seem to be within the remit of the common good, by virtue of marriage being a status institution and an important element in our social formation. Moreover, this is the philosophy that underpins our ancillary relief system which provides for the distribution of wealth from a marriage for an indefinite period following termination of the said marriage. However, this presupposes that the distribution of wealth is an essential element of marriage, although it is upon the termination of marriage.

That said, the nature of any rule which the legislature might enact in order to regulate such Pre-nuptial agreements and the distribution of wealth between the parties must be considered. The jurisprudence resulting from the cases of *B.L. v M.L.*<sup>101</sup> and *In re Article 26 and the Matrimonial Home Bill 1993*<sup>102</sup> is instructive in this regard. Although ultimately overruled, the judgment of Barr J. in *B.L. v M.L.* still provides a valuable insight into this issue. Furthermore, elements of his judgment were approved by the Supreme Court or not dealt with, thereby according it with some remaining force. In considering the manner in which the parties to a marriage should hold property, Barr J. seemed to implicitly recognise the possibility of pre-nuptial agreements and/or similar arrangements, stating:

“However, in either case [whether the husband purchased the house by lump sum or with a mortgage] the right of the wife to a share in the ownership of family property on the basis which I have postulated is *subject to any particular arrangement or understanding there may have been between the parties in that regard*. In terms of the matter under review it is not necessary for me to consider whether a woman has any constitutional right to a share in the ownership of a matrimonial home which a husband acquired by inheritance or gift or otherwise prior to the marriage and not in contemplation of it. That may be a matter which should be dealt with by legislation.”<sup>103</sup>

<sup>99</sup> Supra n.84.

<sup>100</sup> *McGee v Attorney General* [1974] I.R. 284 at 313 per Walsh J.

<sup>101</sup> [1992] 2 I.R. 77.

<sup>102</sup> [1994] 1 I.R. 305.

<sup>103</sup> [1992] 2 I.R. 77, at 99 (emphasis added).

In the Supreme Court Finlay C.J. made the following pertinent statement:

“I would have little difficulty in appreciating the very significant social and other values which are attached to what experience would indicate is a very common modern habit, whereby the parties to a marriage and the parents of a family, by agreement between them, become joint owners of the family home. *It is difficult to deny the fact that anything that would help to encourage that basis of full sharing in property values as well as in every other way between the partners of a marriage, must directly contribute to the stability of the marriage, the institution of the family, and the common good.*”<sup>104</sup>

Again, it is evident that the distribution of wealth between the parties to a marriage is in the common good by virtue of marriage being interpreted as a status institution. Yet, the problem still arises in relation to the means of achieving this, and this was to occupy the thoughts of the Supreme Court in the Matrimonial Home Bill case. Counsel for the Attorney General in this case essentially argued that the Bill should be declared constitutional as its objective was within the common good. Submissions were summarised by Finlay C.J. as follows:

“In the submissions made on behalf of the Attorney General it was stated that - The central provision of the Bill may be regarded as an adjustment of property rights within the family, which

- (a) strengthens the family,
- (b) enhances the economic position of the dependent spouse and dependent children in relation to the family home,
- (c) recognises the connection between family life and the home in which it is conducted, and
- (d) supports the institution of marriage, in particular the view of that institution as an equal partnership.

In short the submission made was that it was these features and these objectives which constituted the particular aspect of the common good which was targeted in this Bill and which justified the provisions of it.

The ways in which it was asserted on behalf of the Attorney General that the Bill supports marriage and the family was under these headings:—

- (a) that it secures the family home for the family,
- (b) that it emphasises the partnership in marriage,
- (c) that it contains a mechanism which secures the interest of the wife working within the home, and
- (d) that it provides security for spouses and children in the event of a marital breakdown.”<sup>105</sup>

Essentially it was argued that this Bill should be declared constitutional because it was justified under the rubric of the common good. Finlay C.J. noted this, and approved of the desired objective referring to his previous decision in *B.L. v M.L.*:

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<sup>104</sup> *ibid.* at 107 (emphasis added).

<sup>105</sup> [1994] 1 I.R. 305, at 323.

“The Court accepts that the provisions of this Bill are directed to encourage the joint ownership of matrimonial homes and that such an objective is clearly an important element of the common good conducive to the stability of marriage and the general protection of the institution of the family. In this context it relies upon the views expressed in the judgments of the Court in *L. v. L.* [1992] 2 I.R. 77.”<sup>106</sup>

Ultimately the Court held the Bill to be an unconstitutional encroachment on the family domain. It was the universal nature of the proposed application of the Bill that caused it to fall foul of Article 41:

“The Court accepts, as it has indicated, the advantages of encouraging, by any appropriate means, joint ownership in family homes as being conducive to the dignity, reassurance and independence of each of the spouses and to the partnership concept of marriage which is fundamental to it. It is not, however, satisfied that the potentially indiscriminate alteration of what must be many joint decisions validly made within the authority of the family concerning the question of the ownership of the family home could reasonably be justified even by such an important aspect of the common good.”<sup>107</sup>

This case illustrates that the right to marital (i.e. family) autonomy superseded the common good. There was no doubt that the objective of this Bill was to promote and protect the common good, yet it was trumped by the right to family autonomy. It highlights the tension between the common good and the family unit within the Constitution. The conflict arises out of the fact that the family unit itself provides for the common good and was used as a conduit to further promote the common good under the *Matrimonial Home Bill 1993*. However, the protection of the family unit is also in the common good, and it was this protection (which provides for the common good) that outweighed the mechanism adopted (which also purported to provide for the common good). Thus, there would appear to be a hierarchy within the concept of the common good in the family domain, and as the family unit is a means of achieving the common good, the protection of that unit, and the autonomy of its decision making powers, must take precedence.

Arguably pre-nuptial agreements come within the protection of family autonomy in that the agreement is executed simultaneously with the entering into of marriage, and the consequential creation of a family, and thereby benefits from the rights that are instilled in that unit. If this is the case, then does a pre-nuptial agreement trump common good considerations in a manner akin to that in the *Matrimonial Home Bill* case? Importantly it was the universal application of the rule in that case that fell foul of the Constitution. Similarly, if a universal rule was to be enacted by the legislature that pre-nuptial agreements could not seek to ring-fence the assets of one party it might also be deemed unconstitutional. Nevertheless, such agreements would not be immune from court scrutiny, and an agreement that sought to ring-fence assets could be accorded little or no weight by a court in making ancillary relief in a judicial separation or divorce case.

It is therefore concluded that the common good is a valid consideration within the context of according recognition to pre-nuptial agreements. Notwithstanding this it is not a basis for a legislative rule prohibiting pre-nuptial agreements. Such a rule would apply in a universal manner and therefore could infringe upon the autonomy of a family unit that chooses to enter into a pre-nuptial agreement.

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<sup>106</sup> *ibid.* at 325.

<sup>107</sup> *ibid.* at 326-7.

**Summary**

The common good plays an important role within the Constitution. It is thought that the pursuit of the common good is the best means of protecting individual rights. It can act as a political/social ideal, or a restriction on the exercise of individual rights. The institution of marriage contributes to the common good and is protected accordingly. Nonetheless, the right to marry is also protected. Therefore, situations arise whereby the common good and the exercise of the right to marry conflict. In the context of pre-nuptial agreements the question arises as to whether pre-nuptial agreements are in the common good and, if not, whether a restriction on such agreements represents an attack on the right to marry. The Group concludes that such a matter can only be determined on a case by case basis, and therefore a legislative rule of universal application seeking to prohibit such agreements would probably be deemed unconstitutional.

**Conclusion**

A legislative rule of universal application seeking to prohibit pre-nuptial agreements on the basis that they offend the common good would probably be deemed unconstitutional. Instead the common good would be better served if the validity and effect of a pre-nuptial agreement be determined by the courts in each individual case.

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# 7

## Private Ordering of Financial Affairs

- I. Increasing Predictability and Reducing Costs in Litigation
- II. The Level of Certainty and Predictability in Ireland and England
- III. How “Proper Provision” Affects the Enforcement of Pre-nuptial Agreements
- IV. An Increase in Litigation Costs?
- V. An Incentive to Marry?
- VI. Practical Considerations: Public Demand, Levels of Wealth
- VII. Summary
- VIII. Conclusion

## 7. Private Ordering of Financial Affairs

### Increasing Predictability and Reducing Costs in Litigation

It is generally agreed that there is a lack of predictability in Irish family law cases, a factor which can prolong litigation, fails to induce settlement and leads to people incurring costs. Do pre-nuptial agreements represent a way around these problems?

One of the strongest cases to be made in favour of the enforcement of pre-nuptial agreements is the argument that the vast amount of perceived uncertainty in family law decisions may be lessened or removed entirely. By giving people the power to order their own financial affairs, it is frequently posited that the outcome to ancillary relief cases will be straightforward and predictable. The concomitant reduction in costs with this removal of the need to litigate extensively is also cited as a benefit.

However, it is submitted that these arguments rest on a number of popular assumptions which need to be examined. The first is the assumption that the decisions of family law judges are so arbitrary and varied that there is a lack of certainty for those involved in an ancillary relief case.

### The Level of Certainty and Predictability in Ireland and England

The level of judicial discretion in Irish family law has resulted in parties to divorce and judicial separation cases often feeling dissatisfied with the lack of predictability.

In the Supreme Court case of *M.K. v J.P. (otherwise SK) McGuinness* J. noted the “considerable area of discretion” available to judges under the provisions of the Family Law (Divorce) Act 1996.<sup>108</sup> In *D.T v C.T.*, the level of discretion was described as “ample” and also “extremely broad”.<sup>109</sup> Furthermore, in ample resources cases, where the assets of the parties far outweigh their needs, the courts are given “full reign”<sup>110</sup> as to the level of discretion that they may exercise.

The relevance and weight of the factors set out under section 20(2) of the Family Law (Divorce) Act 1996 will depend on the facts of the case. The guiding principle is that proper provision be made for the parties and that any order made should be “in the interests of justice.”<sup>111</sup>

However, there has been some indication that there might be an emergence of a more standard approach in Irish cases. In *D.T v. C.T.*, Keane C.J. held:

“the court might be justified in treating in ‘ample resources’ cases, one third of the net assets as a yardstick at the lower end of the scale.”<sup>112</sup>

Aylward makes the interesting argument that if some kind of rough mathematical template is emerging then maybe it is more urgent than ever to allow parties to contract out of this should they wish to do so.<sup>113</sup>

<sup>108</sup> Supra n.15

<sup>109</sup> Supra n.17

<sup>110</sup> *ibid.* at 371.

<sup>111</sup> Family Law (Divorce) Act 1996, sections 20(1) and (5).

<sup>112</sup> Supra n.17

<sup>113</sup> Aylward, *Pre-nuptial Agreements* (Thomson Roundhall, Dublin 2006) at 141.

In England, the situation is similar. Having undergone a longer process of evolution, divorce law there often acts as a good comparator for Ireland's progress in the ten years since the introduction of divorce here. The emphasis in ancillary relief cases is on the concept of "fairness" and compliance with the interests of justice. In *White v White*<sup>114</sup>, Lord Nicholls conceded that "fairness, like beauty, lies in the eye of the beholder". He stated that:

"... everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires."

In the recent combined House of Lords decisions in *Miller and McFarlane*, Lord Nicholls stated:

"Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning."<sup>115</sup>

All the judges in *Miller and McFarlane* were agreed that there are three "strands" or "rationales" for a redistributive award of ancillary relief:

- (i) meeting needs;<sup>116</sup>
- (ii) providing compensation for a party who has suffered economic disparity arising from the way the marriage has been conducted;<sup>117</sup>
- (iii) sharing the financial fruits of the marriage partnership.<sup>118</sup> According to Lord Nicholls the sharing should be equal unless there is good reason against this proposition.

The ultimate objective according to Baroness Hale is "to give each party an equal start on the road to independent living".<sup>119</sup>

These guidelines are broad and flexible. The parties in divorce cases will undoubtedly remain at the mercy of a judge's assessment as to whether they deserve compensation and whether there should be equal sharing. There are also divergent views in certain specific areas, such as how the courts should define and deal with matrimonial and non-matrimonial assets.

Morley states

"At present, having a court of law resolve the financial consequences of a divorce is not unlike entering a casino, except that some games of chance have a more predictable result and the 'house' percentage in a casino is modest when compared to the enormous legal fees in a high-stakes, big-assets divorce case. In these circumstances, it makes no sense to prevent the parties themselves from creating predictability by entering into prenuptial contracts that are well drafted and reasonable."<sup>120</sup>

<sup>114</sup> [2000] 2 FLR 981

<sup>115</sup> *Miller v. Miller; McFarlane v. McFarlane* [2006] 1 FLR 1186, at 1191.

<sup>116</sup> *ibid.* at 1192 and 1219-1220

<sup>117</sup> *ibid.* at 1192 and 1220

<sup>118</sup> *ibid.* at 1193 and 1220

<sup>119</sup> *ibid.* , at 1221

<sup>120</sup> Morley, "Enforceable Prenuptial Agreements: Their Time Has Come" [2006] *Fam Law* 772 at 774.

### How “Proper Provision” Affects the Enforcement of Pre-nuptial Agreements

The second assumption behind the predictability and costs argument concerns the issue of enforcement. It is submitted that increasing predictability and reducing costs in litigation are benefits which are entirely dependent on the level of enforcement of pre-nuptial agreements.<sup>121</sup>

If the agreements may be varied, then one may find that the desired predictability at the time of execution of the agreement is subsequently rendered illusory. This observation is particularly relevant in the light of Irish constitutional provisions relating to divorce. Crowley notes that a simple “rubber-stamping” of pre-nuptial agreements will never be permitted in Ireland, in light of the constitutional and legislative requirements in this jurisdiction.<sup>122</sup>

If it is the case that a pre-nuptial agreement will be enforced only where there have been few material changes in circumstances since the date of signing, then it is submitted that there will be an increase in predictability only in cases involving short, childless marriages. If it is the case that we are only increasing predictability and reducing costs for a minority of couples in a minority of marriages, then we must perhaps reconsider whether there is a pressing need for this change in the law.

Indeed, the English case of *K. v. K. (Ancillary Relief: Prenuptial Agreement)*<sup>123</sup> (where a pre-nuptial agreement was given considerable effect in 2003) involved a 14 month marriage with one child who was *in utero* and thus contemplated whilst making the agreement. In other words, the marriage was precisely the kind where it seems less objectionable to enforce expectations and some would say positively desirable to combat the “gold-digger” syndrome. In the case, the Deputy High Court judge viewed the entry into the agreement as a factor to be considered under section 25 of the Matrimonial Causes Act 1973, and held that it comprised conduct that it would be inequitable to disregard. The judge made ancillary relief orders roughly corresponding to the terms of the agreement. He held the wife to the capital provision of the pre-nuptial agreement, i.e. £120,000, and rejected her open proposal of £1.6 million. However, the judge held that it would be unjust to hold the wife to a term precluding maintenance, and accordingly awarded her £15,000 *per annum*.

To return to Irish caselaw, the strongest analogy with the enforcement of pre-nuptial agreements is the enforcement of separation agreements.<sup>124</sup> The case of *W.A. v. MA.*<sup>125</sup> is held by some as authority for the proposition that where proper provision has been made, a private agreement between two parties to the breakdown of a marriage should be recognised and the terms upheld.

Hardiman J. in the High Court on circuit refused to alter the terms of a separation agreement on the parties’ subsequent divorce partly on the basis that:

“It is clear that the separation agreement is intended to be, as far as possible, a final agreement. Moreover the parties specifically envisaged the possibility that a divorce *a vinculo* would become available in the future and desired that the arrangements set out in the deed of separation would govern their mutual relations in that event.”<sup>126</sup>

<sup>121</sup> In this regard, see Chapter 9 – Possible Recommendations

<sup>122</sup> Crowley, “Pre-nuptial agreements: have they any place in Irish family law?” [2002] 1 *IJFL* 3 at 8.

<sup>123</sup> [2003] 1 *FLR* 120.

<sup>124</sup> See Chapter 2-Constitutional Considerations

<sup>125</sup> [2005] 1 *I.L.R.M.* 517

<sup>126</sup> *ibid.* at 531-532.

In *W.A. v. M.A.* there were no children and the separation agreement effected a near equal division of the marital assets, seeking to achieve equality between the parties and to leave them financially independent.

It seems that the separation agreement was acceptable *precisely because* such a fair division of assets was contained therein. However, wealthy couples who draw up pre-nuptial agreements often want to ring-fence assets and avoid equality at all costs!

The matter is explained by Harris, as it applies in the UK context:

“There is considerable tension here between two threads. The first is that the best prospect of ensuring enforcement of a pre-nuptial agreement rests on the argument that it effects a fair division of matrimonial assets on the lines of what the court would order. The second is the assumption that the parties have, at the behest of the instigator, entered into the agreement to enable him/her to retain a more significant share of the matrimonial assets. This tension is unlikely to prove capable of resolution while the courts have the wide discretion under MCA 1973, s 25 to distribute assets in a manner that is fair and has regard to the ‘yardstick of equality’.”<sup>127</sup>

Under Irish law, the argument could be said to run as follows:

- (i) A pre-nuptial agreement is useful in order to avoid court-ordered division of property at divorce and possibly to quarantine certain wealth or property.
- (ii) However, there is a constitutional mandate for proper provision at the date of separation and divorce.
- (iii) Thus, parties will need to consider the likely structure of the division of their assets by a court at divorce.
- (iv) Therefore, there is little utility in drawing up an agreement when there is not much room for deviation from what the Irish judges would deem to constitute “proper provision”.

### An Increase in Litigation Costs?

Furthermore, there are many pointers that pre-nuptial agreements could actually *increase* litigation costs, rather than result in the hoped-for decrease of such costs. Surveys in the USA have shown that out of 39 cases in 1992 where the validity of pre-nuptial agreements was challenged, 33 were initiated by women.<sup>128</sup> These women were anxious to escape the harsh nature of the bargain they had struck. It is not clear if there was any reduction in costs for these parties. Katz has argued that pre-nuptial agreements have become the focal point of ingenuity in that there are attempts made to have them declared invalid in various cases. He observed that, “a special body of law has developed to test the validity of ante-nuptial agreements, and it can be divided into matters dealing with process and substance.”<sup>129</sup>

It appears that the best way to ensure that a pre-nuptial agreement is relatively impervious to the “process” loopholes is to ensure that it is certified by a solicitor or registered.<sup>130</sup> All procedural defects need to be guarded against, so as to lessen the possibility of future challenge on the ground of inadequate *execution*. It is only through lessening the possibility of future challenge that we can lessen the chance of increased costs resulting from re-visited pre-nuptial agreements. The circumstances surrounding the drawing-up of a pre-nuptial agreement are such that a spouse may feel under pressure to agree to terms without quibble.

<sup>127</sup> Harris, “Pre-nuptial agreements, post Miller” NJJ July 06.

<sup>128</sup> *Supra* n.62

<sup>129</sup> Katz, “Marriage as a Partnership” (1998) 73 *Notre Dame Law Review* 1251, 1260

<sup>130</sup> In this regard, see Chapter 12-Formalities.

Some legal systems have legislation which sets out the formalities to be followed. This is examined in Chapter 12. An Irish model for the formalities may be found in recent Law Reform Commission proposals<sup>131</sup> which provide extensive detail on the question of formalities for Cohabitant Agreements.

“Cohabitation agreements must be executed in a manner which draws both parties’ attention to the significance of the steps being taken. This is to ensure that the parties are fully informed and agree with the terms of the agreement. Agreements must limit opportunities for the exercise of undue influence on the party who potentially stands to lose more as a result of the agreement.”

The Commission recommended that a cohabitant agreement should be written, signed and witnessed. Parties should receive separate legal advice before the agreement is signed and an agreement which does not comply with the suggested safeguards should not be enforceable. The contract would also be subject to general contract law principles. It is submitted that the requirement of full disclosure of assets, liabilities and income should be added to this list should it be transposed to the area of pre-nuptial agreements.

In summary, in seeking the enforcement of a pre-nuptial agreement, parties may still have a difficult and unpredictable dispute – the only difference will be a changing of the framework or issues in dispute.

Would the change be of any real benefit to divorcing Irish couples? Should we instead focus our efforts on improving predictability in the family law courts generally? Sufficient clear pronouncements are overdue from Irish judges. Several years have elapsed since the landmark *D.T. v. C.T.*<sup>132</sup> decision and family law practitioners are in need of more guidelines so as to properly advise those who are negotiating and “bargaining in the shadow of the law.”<sup>133</sup> It is submitted that pre-nuptial agreements cannot act as a panacea for a general lack of predictability.

In conclusion, this discussion has attempted to show that there are many false assumptions behind the assertion that pre-nuptial agreements will increase predictability and reduce costs. Pre-nuptial agreements could at least be a starting-point for the enforcement of the parties’ expectations. For example, an agreement that all of the fruits of the marital partnership should be split 50:50 in the case of divorce could act as a useful template for division, and in this regard, produce the benefit of predictability so longed for.

### **An Incentive to Marry?**

Morley writes:

“For many, the financial risks of marriage which result from extreme uncertainty as to the law that will apply in the event of a divorce are far weightier than the benefits. Today, people can enjoy most if not all of the benefits of family life without the need to enter into ‘the bonds of matrimony’. Prenuptial agreements allow people to structure fair and reasonable terms that are appropriate for their own situation in life instead of submitting themselves to the whims of the divorce courts. Enforceable prenuptial agreements encourage marriage. A public policy that refuses enforcement discourages marriage.”<sup>134</sup>

<sup>131</sup> Supra n.35

<sup>132</sup> Supra n.17

<sup>133</sup> Mnookin and Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” Yale Law Journal, Vol. 88, No. 5, Dispute Resolution(Apr., 1979), pp 950-997.

<sup>134</sup> Supra n.122 Morley, “Enforceable Prenuptial Agreements: Their Time Has Come” [2006] Fam Law 772 at 775

The popular media in the wake of several recent high-profile English divorce cases have said that very wealthy men may be reluctant to marry again in the future.

Stevens remarked in 1982 that:

“In our pursuit of security for the weak we have overlooked the paradoxical fact that the interests of the weakest often depend upon the security of the strong.”<sup>135</sup>

It is submitted that cohabitation, especially since it no longer involves moral and social opprobrium, might be a far more attractive proposition for Ireland’s wealthy young couples than a trip down the aisle followed by a trip to the family law courts. The attraction of never tying the knot is set to increase should the Oireachtas pass a Cohabitants Act in the mould of the recent Law Reform Commission proposals. The Commission’s draft Bill provides for the private regulation of financial and property affairs through a cohabitant agreement, so as to allow the parties to plan their future financial affairs and avoid the costs, time and emotional trauma of litigation.

It is submitted that the provision for agreements between cohabiting couples has a direct knock-on effect on the whole area of pre-nuptial agreements. If pre-nuptial agreements are not enforceable, then upon the passing of a Cohabitants Act, those contemplating marriage would be at a disadvantage compared to their cohabiting equivalents since they would be denied the same opportunity to regulate their financial affairs. There are of course constitutional implications with making marriage a less attractive proposition than cohabitation.<sup>136</sup>

### **Practical Considerations: Public Demand, Levels of Wealth**

There are currently no statistics in Ireland on the level of public support for the enforcement of pre-nuptial agreements. Irish people are getting married later in life and on occasion bringing significant wealth to the marriage. That they would seek to protect inherited wealth or other acquired assets is a natural concern, as not everyone is of the opinion that “what’s mine is yours and what’s yours is mine”. There are also an increasing number of second and subsequent marriages in this country. One of the advantages of pre-nuptial agreements is that a certain amount of wealth can be ear-marked for the benefit of children of a previous marriage. Without this provision, they face the possibility of being shut out in the cold.

The importance of having money to leave for inheritance purposes was discussed by Denham J. in the Supreme Court case of *D.T. v.C.T.*<sup>137</sup> In a case of marital assets totalling IR£14,000,000, a lump sum of IR£4,600,000 was appropriate given that it was correct for a court to consider it:

“legitimate for a spouse to have some independent estate to leave to her children. This is especially so if there are children existing or potential in a subsequent marriage of one spouse.”<sup>138</sup>

<sup>135</sup> Hamlyn lectures, ‘The Quest for Security: Employees, Tenants, Wives’

<sup>136</sup> In this regard, see Chapter Two-Constitutional Considerations.

<sup>137</sup> *Supra* n17

<sup>138</sup> *ibid.* at 356.

## Summary

Many of the strongest arguments in favour of binding pre-nuptial agreements rest on claims that there will be a resultant increase in predictability and decrease in costs for parties seeking a divorce. This assumption may not be borne out, as Ireland's proper provision mandate may entail a substantial degree of departure from the terms of the pre-nuptial agreement. Parties who seek to ring-fence assets may be wasting their time in view of the fact that a judge may deem that all of the marital wealth is "in the pot", in order to properly provide for the parties and the children of the marriage. It may be only in the case of short, childless marriages and where procedural drafting requirements are strictly complied with that there will be enforcement of the terms of the agreement, and thus concomitant predictability and reduced costs. Furthermore, there may be an *increase* in costs as parties focus their efforts on dismantling the pre-nuptial agreement. However, it is also true that certain forms of pre-nuptial agreements, such as those which set out a presumption of equality of division, for example, can increase predictability and reduce costs by at least providing a starting-point for the enforcement of expectations. Another argument in favour of having binding pre-nuptial agreements is that the *status quo* undermines the institution of marriage and may discourage the wealthy from ever marrying. With the advent of cohabitant agreements and the lack of opportunity to privately order a marital "partnership", marriage may seem too risky a venture to embark upon.

Finally, practical considerations such as public demand for pre-nuptial agreements, as well as levels of wealth in this country are all further supporting arguments in the case for enforceability.

## Conclusion

In considering the case in favour of the enforceability of pre-nuptial agreements, it is arguable that clarity in the law would result in increased predictability and reduced costs. This argument does not invariably withstand scrutiny as couples may embark on litigation on the preliminary issue contesting the enforceability of a pre-nuptial agreement in advance of seeking ancillary relief orders. In fact, it is possible that there could be an increase in costs.

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## Arguments against Pre-nuptial Agreements

- I. Fairness
- II. Would Enforceable Pre-nuptial Agreements Impoverish the Vulnerable Spouse?
- III. Should Arguments against Prevail?
- IV. Summary
- V. Conclusion

## 8. Arguments against Pre-nuptial Agreements

What impact might the use and the possible enforcement of pre-nuptial agreements have on financially vulnerable spouses – would they reduce divorce induced poverty?

### Fairness

It is arguable that if the legislative regime regulating separation and divorce is fair there should be no need for pre-nuptial agreements. There is certainly a perception that such agreements may be desired by the economically dominant spouse (frequently the man) to protect assets in the event of the break down of the marriage and to ensure that the less economically dominant spouse (frequently the woman) does not acquire too large a percentage of the marital assets. It is difficult to assess whether this view has any validity in the present circumstances where such agreements are generally regarded as unenforceable.

Whatever the assets of each of the spouses entering marriage, it remains a fact that in terms of child rearing the burden falls largely, although not exclusively, on women. This often entails an inability to actively pursue a career and ultimately means that when the relationship breaks down the spouse who has taken primary responsibility for child rearing has been disadvantaged to the detriment of future earning capacity.

It is not possible on contemplating marriage to know how events will unfold. Will children be born? Will one of the parties take a career break to accommodate family life? It is arguable that making pre-nuptial agreements enforceable could result in injustice arising whereby the non financial contribution to the marriage and the family of the spouse who has taken primary responsibility for child rearing is undervalued.

It is not always possible to contemplate in advance of the marriage what is in the interests of the individual should the marriage break down. As Baroness Hale stated in *Miller v Miller, McFarlane v McFarlane*:

“What seems fair and sensible at the outset of a relationship may seem much less fair and sensible when it ends.”<sup>139</sup>

While there may be some merit in the view that pre-nuptial agreements may in certain circumstances contribute to the impoverishment of one of the spouses and operate in an unfair manner, it should be acknowledged that such an outcome is less likely where there is a constitutional imperative that proper provision be made for the parties.

### Would Enforceable Pre-nuptial Agreements Impoverish the Vulnerable Spouse?

There is a distinct lack of Irish research available to assist in any assessment of the impact of marital breakdown, separation and divorce on the financial position of spouses. The strong Irish tradition of the homemaker arguably provides an environment conducive to illustrating the difficulties typically experienced by a non-earning spouse post separation/divorce. However, leaving aside “ample-resources” cases, typically there are not enough assets to create and finance two homes resulting in the

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<sup>139</sup> [2006] 2 WLR 1283

non-custodial spouse also being left in a very difficult financial position. Commonly the lack of sufficient funds at the time of the decree very often requires ongoing financial ties between the parties, placing financial pressures on both parties in such circumstances.

If pre-nuptial agreements are to become enforceable in this jurisdiction, depending on the manner in which the governing provisions are enacted, such agreements have the potential to remove the court's power to address the potential financial imbalance post separation or divorce. Any legislative provision which makes a pre-nuptial agreement enforceable in all circumstances mitigates against the vulnerable spouse and runs contrary to the overarching obligation to secure proper provision.

Asset distribution on marital breakdown can represent an attempt to compensate a spouse for sacrifices made in the course of the marriage, or may represent recognition of the entitlements of one or both spouses arising from the nature of their particular marital union. Notwithstanding the statutory provisions, there exists a real fear that marital breakdown impoverishes a non-earning spouse and that a traditional homemaker leaves the marriage without an independent source of income. Consequently, a homemaker remains reliant and dependent upon the spouse who was permitted to earn an independent income during the course of the marriage and can continue to do so post separation/divorce. Where a homemaker chooses or has no choice but to re-enter the workforce, she/he often does so from an inferior position and may often require retraining. In circumstances where a spouse continued to work fulltime or otherwise outside the home during the course of the marriage, the role of primary carer for the children is likely to affect that spouse's ability to work on a fulltime basis outside the home post separation/divorce.

With reference to the Irish governing provisions, McGuinness J. has previously referred to the obligation on a wealthy spouse to continue to maintain the respective roles assigned and accepted by the parties to a twenty year marriage, notwithstanding the breakdown of the marriage.<sup>140</sup> Thus it appears quite certain that in the case of a lengthy marriage, the parties will be obliged to continue the acceptance of the respective roles of the parties, even where that means a "dependent" spouse needs continuing maintenance and support, above his/her financial needs. To further strengthen the position of the dependent spouse, the House of Lords has more recently, in the case of a particularly wealthy spouse, rejected arguments that sought to discount the entitlements of a wife simply because the marriage was one of short duration.<sup>141</sup>

### **Should Arguments against Prevail?**

If pre-nuptial agreements are to be afforded formal recognition in Irish family law legislation, their fairness will have to be assessed against the constitutional requirement of proper provision. To that extent they will always be reviewable by a court. It is therefore difficult to establish a convincing argument that such agreements should be universally regarded as void or unenforceable. On balance these agreements will be neither desirable nor necessary in some cases. However there are circumstances in which they have the potential to present a fair and equitable basis for two persons to embark on married life. It is arguable that Irish society and family units already in fact operate on the basis of pre and post nuptial arrangements, regarding the role, rights and entitlements of the parties to a marriage.

<sup>140</sup> J.D. v D.D. [1997] 3 I.R. 64.

<sup>141</sup> Miller v Miller [2006] 2 AC 618.

**Summary**

Marital breakdown in Ireland often occurs in circumstances where there are insufficient means to provide for the two homes required by the parties. Thus the fact of marital breakdown often results in unavoidable spousal impoverishment. The further impoverishing of a dependent spouse by reliance upon an existing pre-nuptial agreement might arise because of the distinctly unequal bargaining positions of the parties to the marriage.

One of the main motivations for instigating a pre-nuptial agreement is to restrict the entitlements of the other spouse to financial relief post separation or divorce. If the effect of a pre-nuptial agreement is to impoverish the dependent spouse, any legislative amendment to the current position should also retain judicial discretion to give the agreement such weight as is considered proper, or to vary the terms. A fair agreement is more likely to survive judicial scrutiny. The stronger party is more likely in this context to instigate a beneficial agreement, recognising the futility of executing a very unfair agreement that fails to recognise the contributions and needs of the other spouse.

**Conclusion**

There are arguments against pre-nuptial agreements which must be considered. They may not always provide a fair solution to marital break-up, they may prompt litigation and drain marital resources, and they may be viewed as offending public policy to a degree. However, on balance it is difficult to conclude that they should universally be excluded from consideration.

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# Recommendations

## Recommendations

### Introduction

There has been no judicial pronouncement on the question but it seems reasonable to anticipate a finding in a suitable case that it would not be interests of justice<sup>142</sup> to make ancillary financial orders that run contrary to the express provisions of a pre-nuptial agreement. The judgement of Hardiman J. in *W.A v. M.A*<sup>143</sup> placed considerable weight on this statutory factor which prohibits the making of ancillary relief orders where to do so would not be in the interests of justice.

There is some English authority<sup>144</sup> for the rather contrived proposition that the fact that a couple have entered into a pre-nuptial agreement amounts to conduct<sup>145</sup> or a circumstance<sup>146</sup> to which consideration must be given in determining whether ancillary relief orders should be made and the form such orders are to take. The removal of the constitutional ban on divorce and the resultant absence of public policy considerations which might render a pre-nuptial agreement void or unenforceable must have the effect that similar arguments will be made in the Irish courts. However, the absence of express reference to a pre-nuptial agreement in the statutory scheme leaves an undesirable lack of clarity and predictability in this area.

One of the underlying policy principles in both the Family Law Act 1995 and the Family Law (Divorce) Act 1996 is the resolution of issues of conflict by the parties. Couples are encouraged to agree the terms of their separation and divorce when they have reached the conclusion that the marriage cannot continue.<sup>147</sup> Individual party autonomy is highly valued and it is well recognised that where agreement is possible it is likely to result in less emotional stress and lower financial costs. The imposition by the courts of non-consensual ancillary relief orders in separation or divorce proceedings is and should be regarded as a last resort in the process.

Recognising the agreement and enforcing it are two separate and independent concepts. Both the separation and divorce regimes as regulated by Irish law can only permit pre-nuptial agreements to be considered within the spirit of the requirement that proper provision be made for the spouses and dependent children on granting the judicial separation or divorce order sought. Thus the weight to be afforded to any agreement in proceedings, including a pre-nuptial agreement, will always be a matter for the presiding judge, determinable only by reference to the circumstances of the case at issue. However this exercise of judicial discretion can be guided and/or restricted by the legislature as it sees fit.

It is suggested that there exist two alternative options for statutory guidance in this regard:

(i) Make statutory reference to the existence of a pre-nuptial agreement in a manner similar to the existing section 20(3) of the Family Law (Divorce) Act 1996, which requires the court to take into account an existing separation agreement between the parties. This is the route recommended by the Study Group in Chapter 9;

OR

(ii) Include the existence of a pre-nuptial agreement as an additional factor in the section 16(2)(a)-(l) and section 20(2)(a)-(l) factors to which the court must have regard. The Group does not recommend this course (Chapter 10).

<sup>142</sup> Subsections 16(5) of the 1995 Act and 20(5) of the 1996 Act provide that "The court shall not make an order under a provision referred to in subsection (1) unless it would be in the interests of justice to do so."

<sup>143</sup> *Supra* n 24

<sup>144</sup> *N-v-N* [1999] 2FLR. 745; *G-v-G* [2000] 2FLR. 18; *M-v-M* 2002 1FLR. 654

<sup>145</sup> Section 16(2)(i) of the Family Law Act 1995 and section 20(2)(ii) of the Family Law (Divorce) Act 1996

<sup>146</sup> Section 16(1) of the Family Law Act 1995 and section 20(1) of the Family Law (Divorce) Act 1996

<sup>147</sup> See further sections 5 and 6 of the Judicial Separation and Family Law Reform Act 1989 and sections 6 and 7 of the Family Law (Divorce) Act 1996 which place a statutory obligation on solicitors to discuss the possibility of reconciliation, mediation and resolution by way of agreement with their clients prior to issuing proceedings for judicial intervention.



# 9

## Recommendation

- I. Make express statutory provision for pre-nuptial agreements by introducing a new section 16 (2) A of the Family Law Act 1995 and new section 20 (3) A of the Family Law (Divorce) Act 1996
- II. Summary
- III. Conclusion

## 9. Recommendation

**The Study Group recommends that express statutory provision be made for pre-nuptial agreements by introducing a new section 16 (2) A of the Family Law Act 1995 and new section 20 (3) A of the Family Law (Divorce) Act 1996.**

Section 20(3) of the Family Law (Divorce) Act 1996 provides:

“In deciding whether to make an order under a provision referred to in subsection (1) and in determining the provisions of such an order, the court shall have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force.”

Given that the courts are accustomed to looking at agreements between the parties and assessing their enforceability in the context of the Constitution, it seems appropriate that pre-nuptial agreements where they have been entered into should be scrutinised by the court in the same way as separation agreements currently are under this section. This provision does not give any directions as to enforceability. Were pre-nuptial agreements to be given a similar status by way of legislative amendment, the court would be required merely to have regard to the terms of any agreement still in force. Providing recognition in this way seems to be a logical and just way of ensuring that an agreement, which the parties viewed as necessary and important in their contemplation of marriage, is given due consideration by the court.

However, it would not be satisfactory simply to amend section 20(3) of the Family Law (Divorce) Act 1996 to include pre-nuptial agreements within its terms, as such agreements are fundamentally different from separation agreements. The jurisprudence that has developed in respect of separation agreements to which the court must have regard pursuant to section 20(3) will not necessarily have direct application to pre-nuptial agreements.

The decision of Buckley J. in the Circuit Court in *M.G. v M.G.*<sup>148</sup> is most instructive of the manner in which separation agreements should be regarded by the Court under this particular section. He stated that where the parties were well educated, intelligent persons who received independent legal advice before entering a separation agreement and the agreement was of recent date, the courts should be slow to make any radical changes to such an agreement.

More recently in *M.K. v J.P. (otherwise S.K.)*<sup>149</sup> O’Neill J. provided a detailed analysis of the effect of a prior existing separation agreement in divorce proceedings. He held that the ultimate concern in considering the relevance of a prior existing separation agreement is to ensure that it satisfies the proper provision requirement at the time of divorce in accordance with section 20(1). He concluded that “a recent separation deed in force in circumstances where there is no manifest changes in circumstances could be said to fulfil the requirements of section 20(1).”<sup>150</sup>

Separation agreements are concluded when the marriage breaks down. However, pre-nuptial agreements are made in advance of the marriage and are intended to a degree to regulate the course of the marriage and any termination of the marriage. To emphasise the distinction between the two and to highlight the discrete nature of pre-nuptial agreements it would seem appropriate that the legislation be amended by the insertion of a new section 20(3)A into the Family Law

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<sup>148</sup> Unreported, Circuit Family Court Dublin July 25, 2000

<sup>149</sup> *Supra* n 21

<sup>150</sup> *ibid.* at p 345

(Divorce) Act 1996 which would be drafted in similar terms to section 20(3) but would refer to any pre-nuptial agreement in force and would require the court to have regard to it.

The issue of whether or not a pre-nuptial agreement will be enforceable in whole, or in part, or at all, at the time of the divorce proceedings would be a matter for the trial judge. Whatever may have been agreed between the parties can only be assessed within the context of the constitutional obligation that proper provision be made for the spouses and dependent family members. An agreement which attempted to oust the jurisdiction of the court would offend against the Constitution. However, if a couple have considered that a pre-nuptial agreement was necessary or appropriate for whatever may be their particular reasons then it seems that a court should be required to consider the agreement in the context of the circumstances of their case.

The courts are accustomed to assessing the weight to be given to separation agreements and it is not an exact science. In that regard it is interesting to note the comment of O’Higgins J in *M.P. v A.P.*<sup>151</sup> when he stated:

“The weight to be attached to a prior settlement will vary from case to case depending on many factors including the length of time since it was reached, the financial background against which such settlement was reached, when compared with the present circumstances, and the reasonable expectations of the parties at the time of the settlement. The relative importance of these factors themselves will vary according to the circumstances of a case.”

Were a court required to have regard to pre-nuptial agreements by virtue of a new section 20(3)A it is likely that they would be assessed in a like manner and it would be for the judge to decide the weight that they should be given in the circumstances of the case.

### Summary

If pre-nuptial agreements are to be recognised in an express way in Irish law then introducing a new section 20(3)A to cover such agreements seems the simplest, fairest and most logical manner of achieving this end.

If this recommendation is adopted, consideration will have to be given to amending section 16 of the Family Law Act 1995 in a corresponding manner to require a court to have regard to the terms of a pre-nuptial agreement in judicial separation proceedings. Since prior separation agreements are not of relevance to such proceedings there is no subsection which equates with section 20(3) of the 1996 Act. However, it is at the time of separation that the pre-nuptial agreement is likely to first come into sharp focus whether the separation is finalised by way of agreement or within proceedings under the 1995 Act. It would therefore be appropriate to insert a new subsection 16(2)A into the 1995 Act and thereby to require a court hearing proceedings under the Act to have regard to the terms of any pre-nuptial in force at that time. Again, the court should retain discretion as to the weight to be given to any such agreement.

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<sup>151</sup> Unreported, High Court, O’Higgins J., March 2, 2005

**Conclusion**

Provision should be made for pre-nuptial agreements to be scrutinised by the court in separation and divorce proceedings in much the same way as separation agreements are currently dealt with under section 20(3) of the Family Law (Divorce) Act 1996.

Pre-nuptial agreements are subject to different considerations than are separation agreements and therefore a discrete provision should be inserted into the Family Law Act 1995 and the Family Law (Divorce) Act 1996 to require a court to have regard to these agreements. This could be achieved by inserting a new section 16 (2) A into the 1995 Act and section 20 (3) A into the 1996 Act.

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# 10

## Recommendation

- I. Make no amendment to section 16(2) of the Family Law Act 1995 and section 20(2) of the Family Law (Divorce) Act 1996
- II. Statutory Factors – Helpful Guide for the Judiciary?
- III. Judicial Accountability
- IV. Summary
- V. Conclusion

## 10. Recommendation

**The Study Group recommends that no amendment be made to section 16(2) of the Family Law Act 1995 and section 20(2) of the Family Law (Divorce) Act 1996**

### Statutory Factors – Helpful Guide for the Judiciary?

As a means of guiding the judicial decision-making power on separation or divorce, the legislatures of many jurisdictions have utilised a list of statutory factors in various forms. Such factors, however detailed, are often offered as the sole legislative guidance for the decision maker and exist in lieu of stated objectives. The aim of this approach in the context of asset distribution on separation or divorce, irrespective of formulation, is typically to ensure that certain aspects of the spousal relationship are taken into account by the court. These factors can include acts or omission on the part of one or both of the spouses; personal circumstances of one or both of the spouses, independent or arising from the marriage, that would be likely to impact on their economic security into the future; as well as features of the family circumstances that will require ongoing commitment or sacrifices post separation or divorce. By creating such a list of factors, the legislature is indicating those aspects of the parties' circumstances that, if relevant, should influence the distribution of their assets and financial resources. Whilst the overarching requirement might be "fairness" or "such provision as the court considers proper having regard to the circumstances",<sup>152</sup> such a requirement operates alongside a detailed list of explicit factors to be considered. Thus it appears that the factors, however detailed or numerous, are only aspects of the case that should influence the court in its determination of what orders might be necessary "in the interests of justice", and cannot in their own right absolutely determine a case.

Ultimately the over-arching requirement to achieve justice or fairness is a challenging goal in circumstances where it is often left undefined and unexplained. Despite the express articulation by the legislature of numerous explicit factors, they can never definitively decide the case without reference to this more general test of fairness. In the context of this report, it must be considered whether including the pre-nuptial agreement as another factor which the court must "have regard to" would properly reflect the weight to be given to such an agreement by the courts.

### Judicial Accountability

Section 16(1) and section 20(1), whilst obliging the courts to have regard to the twelve stated factors, do not require the elucidation of their consideration or application in light of the facts. Neither has any common law obligation to so account been developed by the courts. Consequently, the discussion of the statutory factors by the courts has been sparse and inconsistent in nature. The seminal decision in this area is that of O'Neill J in the High Court rehearing of *M.K v J.P. (otherwise S.K.)*<sup>153</sup> where the applicant wife, already a party to a separation agreement with the respondent, sought further ancillary financial relief pursuant to her application for a decree of divorce. In an earlier appeal of a lower court decision in this matter, McGuinness J. was quite convinced that the judicial discretion to make whatever orders are required is not to be exercised at large, and that the terms of section 20 set out mandatory guidelines to which the courts must have regard:

"...measuring their relevance and weight according to the facts of the individual case...a judge should give reasons for the way in which his or her discretion has been exercised in the light of the statutory guidelines."<sup>154</sup>

<sup>152</sup> Section 16(1) Family Law Act 1995 and section 20(1) Family Law (Divorce) Act 1996.

<sup>153</sup> *Supra* n 21

<sup>154</sup> *Supra* n 15

McGuinness J. considered that not only was the separation agreement relevant, but so too, under the terms of section 20(2)(a)-(l), were many other factors, including that the couple had lived apart for twenty years; the wife's financial needs; the role which she played in caring for the children; and the fact that the entirety of the husband's wealth had been accumulated subsequent to the separation of the parties. In the body of her judgment McGuinness J. sets out almost the entire provisions of section 20, and refers to the number of cases where the terms of section 20 had already been considered.<sup>155</sup> Although the judge acknowledged that the provisions of the Divorce Act "leave a considerable area of discretion to the Court in making financial provision for spouses in divorce cases", this discretion, she opined, is "not to be exercised at large." It appears that the view taken was that although discretion is exercisable on the part of the court, it is only so exercisable within the confines of the statutory guidelines set out by the legislature, guidelines referred by McGuinness J. as "mandatory guidelines".<sup>156</sup>

In delivering this judgment, McGuinness J. sought to introduce an element of accountability for the judiciary in that not only must decisions be made in light of the requirements set out in section 20, but such decisions must also be reasoned and elucidated in light of those provisions. Ultimately, O'Neill J. in the High Court followed the lead of McGuinness J. and listed each of the twelve statutory factors contained in section 20(2) and indicated the relevance and impact of each factor to the circumstances of the case.

O'Sullivan J. in the High Court case of *C.F. v. C.F.*<sup>157</sup> arising from an application for a decree of judicial separation, noted that he was guided primarily by the requirements of the statute and thus in his judgment cited in full, the lengthy provisions of sections 16(1) and 16(2). However, having quoted these two subsections in full from the 1995 Act, O'Sullivan J. did not expressly consider them any further in his judgment, nor did he specifically apply them to the facts before him. For example, he did not isolate each of the twelve factors set out in section 16(2)(a)-(l) and establish whether they had specific application to the case before him. As a result it is not possible to establish whether each factor was in itself influential to the outcome of the case or whether he was selective in applying certain factors. However, he did recognise the more general requirements of section 16(5) when noting that he was under an obligation to ensure that:

"...the court shall not make any order under a provision referred to in subsection (1) unless it would be in the interest of justice to do so."

More recently, the Supreme Court has considered the role and impact of section 20 in the ordering of ancillary relief on divorce in *D.T. v. C.T.*<sup>158</sup>. Keane CJ in acknowledging the detail of section 20(2) immediately recognised the broad discretion that this necessarily accords to the judiciary in cases where the parties are unable to agree a settlement and accepted that such breadth of discretion will unavoidably give rise to elements of inconsistency:

"...it is obvious that the circumstances of individual cases will vary so widely that ultimately, where the parties are unable to agree, the trial judge must be regarded as having a relatively broad discretion in reaching what he or she considers a just resolution in all the circumstances. While an appellate court will inevitably endeavour, so far as it can, to ensure consistency in the approach of trial judges, it is also bound to give reasonable latitude to the trial judge in the exercise of that discretion."<sup>159</sup>

<sup>155</sup> J.D. v. D.D. [1997] 3 IR 64; McA. v. McA. [2000] 1 IR 457; J.C.N. v. R.T.N. Unreported High Court 15 January 1999 and M.G. v. M.G. Unreported Circuit Court 25 July 2000.

<sup>156</sup> Op. cit. n. 154

<sup>157</sup> Unreported High Court, 11 June 2002.

<sup>158</sup> Supra n 17.

<sup>159</sup> *ibid.* at 324.

This stance was accepted by Denham J. in the same case where she considered the provisions of section 20(2)(a)-(l) to be mandatory when determining what constitutes proper provision; the relevance and weight of the individual factors would depend upon the circumstances of each case.<sup>160</sup> Similarly Fennelly J. declared that "...[i]t is for the High Court judge to decide on the weight to be accorded to each of the statutory matters."<sup>161</sup> With reference to the judgment of Lord Hoffmann in *Piglowski v. Piglowski*,<sup>162</sup> Keane CJ restated the position that a hierarchy of factors does not exist under Irish family law. Thus on the whole, despite the concerns expressed by various members of the court, and the statement of Denham J. that "...[b]etter practice would be to consider all the circumstances and each particular factor *ad seriatim* and give reasons for their relative weight in this case...", at times the consideration of the factors contained in section 16(2) and section 20(2) has been general and non-specific in nature and it is often difficult to conclude that the court does in fact consider all relevant factors.

The more recent decisions of the higher courts in Ireland have illustrated the diverse approach of the various judges to the issue of the section 16 and section 20 factors. Whilst some judges have in the course of their judgments dealt with each of the twelve factors with reference to the facts of the case,<sup>163</sup> more typically the judgments delivered in marital breakdown cases take a broader approach to the analysis of the provisions of section 20.

### Summary

The possibility of including pre-nuptial agreements in the section 16(2)(a)-(l) and section 20(2)(a)-(l) list of factors to which the court must "have regard" was considered by the Study Group. Such a decision would place the fact of the execution of a pre-nuptial agreement on a par with factors such as the age of the parties, the duration of the marriage, and the contributions of the parties. The factors currently listed in section 16(2)(a)-(l) and section 20(2)(a)-(l) focus on the performance of the parties in the course of the marriage together with a consideration of their respective circumstances at the time of the breakdown of the marriage.

By definition, the obligation to "have regard to" the list of statutory factors, equally entitles the court, where it deems it appropriate, to have regard to such an agreement and determine it necessary to disregard its existence, or some or all of its contents, in order to fulfil the overriding obligation to ensure that there exists proper provision for the parties in the circumstances. The weight to be attached to a pre-nuptial agreement would then be a matter for the court to determine in the particular circumstances. That weight would of course only be ascertainable if the presiding judge chooses to elucidate in detail the reasoning that gave rise to the decision.

### Conclusion

The inclusion of the execution of a pre-nuptial agreement as one of the factors listed in section 16(2) of the 1995 Act and section 20(2) of the 1996 Act would not represent a sufficiently transparent way of showing whether or what weight had been attached to the agreement.

<sup>160</sup> *ibid.* at 352 per Denham J.

<sup>161</sup> *ibid.* per Fennelly J.

<sup>162</sup> [1999] 1 WLR 1360.

<sup>163</sup> *MP v AP* Unreported High Court 2/3/2005; *C. v C.* Unreported High Court 25/7/2005; *CD v PD* Unreported High Court 15/3/2006.

# 11

## Recommendation

- I. Possibility of Review of Pre-nuptial Agreement on Death
- II. Succession to Property on Death – English Legislation
- III. Inheritance (Provision for Family and Dependants) Act 1975
- IV. Summary
- V. Conclusion

## 11. Recommendation

### Possibility of Review of Pre-nuptial Agreement on Death

It is an often overlooked fact that pre-nuptial agreements may arrange a scheme of division of assets in the event of the death of one of the spouses, as well as in the event of divorce and separation. In most states in the U.S.A., pre-nuptial agreements entered into to establish property rights of the spouses at the time of death were recognized as legally enforceable contracts, long before agreements used to predetermine property rights upon divorce became enforceable in all states. The UPAA<sup>164</sup> now states that a pre-nuptial agreement may address, among other things, the modification or elimination of spousal support; the disposition of property upon separation, marital dissolution, or death, and ownership rights in and disposition of proceeds from a life insurance policy.

If we are to recognise the binding effect of pre-nuptial agreements entered into to regulate property entitlement upon death in this jurisdiction, then the question arises as to whether there should be an opportunity to review the validity of any purported provision made under a pre-nuptial agreement.

When one spouse dies, then seeking a review of the pre-nuptial agreement would be similar to seeking an order under the existing provisions of section 15(A)(1) of the Family Law Act 1995 or section 18(1) of the Family Law (Divorce) Act 1996. In both instances, a surviving spouse may make an application to the Court seeking provision out of the estate of the deceased spouse, and the Court may make an order if satisfied that proper provision was not already made for the spouse during the lifetime of the deceased.<sup>165</sup> The application must be made within 6 months of the death of the spouse, and the Court must, in the making of any orders pursuant to these sections, have regard to the rights of any other person having an interest in the matter. There is an analogy here with the possibility under English law to contest the adequacy or “reasonableness” of the deceased spouse’s provision for the surviving spouse under the Inheritance (Provision for Family and Dependents) Act 1975.

The Group recommends the introduction of a statutory basis for review in a manner similar to the procedure outlined in the 1995 and 1996 Acts. It is also recommended that the duty of the personal representatives to notify the spouse of his or her legal right<sup>166</sup> should be extended so as to impose a duty to notify the spouse of his or her entitlement to seek review in the absence of reasonable financial provision. It is clear that introduction of such a process may interfere with the administration of estates. However, section 117 of the Succession Act 1965, which allows a child to bring a claim against a deceased parent, also interferes with this process and there are methods of preventing undue delay, for example by imposing time limits before which review must be sought.

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<sup>164</sup> Supra, Chapter 4 at page 30

<sup>165</sup> Section 15A(1) of the 1995 Act reads as follows:

“Subject to the provisions of this section, where, following the grant of a decree of judicial separation, a court makes an order under section 14 in relation to the spouses concerned and one of the spouses dies, the court, on application to it in that behalf by the other spouse (‘the applicant’) not more than 6 months after representation is first granted under the Act of 1965 in respect of the estate of the deceased spouse, may by order make such provision for the applicant out of the estate of the deceased spouse as it considers appropriate having regard to the rights of any other person having an interest in the matter and specifies in the order if it is satisfied that proper provision in the circumstances was not made for the applicant during the lifetime of the deceased spouse under section 8, 9, 10 (1) (a), 11 or 12 for any reason (other than conduct referred to in subsection (2) (i) of section 16 of the applicant).”

Section 18(1) of the 1996 Act reads as follows:

“Subject to the provisions of this section, where one of the spouses in respect of whom a decree of divorce has been granted dies, the court, on application to it in that behalf by the other spouse (‘the applicant’) not more than 6 months after representation is first granted under the Act of 1965 in respect of the estate of the deceased spouse, may by order make such provision for the applicant out of the estate of the deceased spouse as it considers appropriate having regard to the rights of any other person having an interest in the matter and specifies in the order if it is satisfied that proper provision in the circumstances was not made for the applicant during the lifetime of the deceased spouse under section 13, 14, 15, 16 or 17 for any reason (other than conduct referred to in subsection (2) (i) of section 20 of the applicant).”

<sup>166</sup> Section 115(4) of the Succession Act 1965.

### Succession to Property on Death – English Legislation

Three broad principles underpin the rules relating to property on death. The first and most important of these is a general principle of absolute freedom of testation. Any person who makes a will that complies with the requirements contained in the Wills Act 1837 is at liberty to dispose of his or her property as he or she wishes.<sup>167</sup> The second principle is that, where no valid will has been executed, or where there is a partial intestacy, section 46 of the Administration of Estates Act 1925 applies a “default” distribution scheme. The first two principles are qualified by the third. The courts exercise a limited statutory discretion to vary the terms of a will or the rules of intestate succession in favour of specific categories of applicant.

### Inheritance (Provision for Family and Dependents) Act 1975

The Inheritance Act confers on the courts a limited jurisdiction to make provision from the net estate of a deceased person in favour of specific categories of applicant. A claim may be made that the disposition of the deceased's estate according to the will, and/or by the intestacy rules, has failed to make “reasonable financial provision” for a particular applicant.<sup>168</sup> Where the claim is brought by the deceased's surviving spouse (unless there is a subsisting decree of judicial separation or separation order), “reasonable financial provision” is such financial provision “as it would be reasonable in all the circumstances for a spouse or civil partner to receive, whether or not that provision is required for his or her maintenance.”<sup>169</sup>

The court has a wide discretion, once it is satisfied that the applicant has not received reasonable financial provision, to order that payments be made to him/her (by way of capital sum, settlement, or periodical payments) out of the estate.<sup>170</sup> In deciding whether to make provision, and if so, how much, the court must take into account certain statutory factors, some of which apply to all categories of applicant (general factors) and others that vary according to the category of applicant (specific factors).

The general factors<sup>171</sup> include the resources and needs of the applicant and any other applicant or beneficiary, the obligations and responsibilities of the deceased, the size and nature of the estate, the disability of any applicant or any beneficiary, the conduct of any person or any other matter that the court considers relevant. The specific factors<sup>172</sup> to be taken into account include the age of the applicant, the duration of the marriage/civil partnership, any contribution by the applicant to the welfare of the family, and the “divorce analogy” or “dissolution analogy”, which is expressed as the need to have regard:

“...to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce.”

There are a number of cases decided in England on foot of the legislation described above and these include *Moody v. Stevenson*,<sup>173</sup> *In re Krubert, decd*<sup>174</sup> and *Adams v Lewis*.<sup>175</sup> These cases are instructive as to how the English courts have made provision for a surviving spouse where reasonable financial provision was not in place. In *Moody v Stevenson*,<sup>176</sup> the Court of Appeal viewed the divorce consideration as a starting-point for the determination of claims by surviving spouses, whereas in *Re Krubert*<sup>177</sup> the Court of Appeal came down in favour of an approach whereby the divorce analogy was but one factor, of no greater importance than the other factors under the Act. However, the recent decision in *Adams v Lewis*<sup>178</sup> where a widow received approximately half of the net estate shows how the impact of divorce cases which stress equality can result in substantial awards for a spouse who was under-provided for in a will.

<sup>167</sup> *Re Coventry (deceased)* [1979] 2 WLR 853 (Ch.Div); [1980] Ch 461 (CA)  
Wills Act 1837, ss.3, 7, 9.

<sup>168</sup> Section 1(1).

<sup>169</sup> Section 1(2)(a).

<sup>170</sup> Section 2.

<sup>171</sup> Section 3(1).

<sup>172</sup> Section 3(2).

<sup>173</sup> [1992] 2 WLR 641 (CA), 643

<sup>174</sup> [1997] Ch 97 (CA)

<sup>175</sup> [2001] WTLR 493

<sup>176</sup> [1992] Ch 486.

<sup>177</sup> [1997] Ch 97.

<sup>178</sup> [2001] WTLR 493

## Summary

In view of the fact that pre-nuptial agreements can detail asset division in the event of death, the question arises as to whether the court should have a residual discretion to ensure that there is no clear injustice resulting from the agreement. However, the proper provision requirement does not feature as a consideration in the event of the marriage ending by the death of one of the spouses, as it does in the event of the marriage ending with divorce. Therefore, there is no apparent mandate for the review and re-allocation of the available resources. Furthermore, there is no comparable legislation to the English Inheritance (Provision for Family and Dependents) Act 1975, other than section 15(1) of the 1995 Act, section 18(1) of the 1996 Act and section 117 of the Succession Act 1965. It is recommended that the courts should have jurisdiction to make provision for a surviving spouse where no separation or divorce decree was obtained, and where the circumstances in which the survivor finds him or herself as a result of the terms of a pre-nuptial agreement give rise to an injustice.<sup>179</sup>

## Conclusion

It runs contrary to our succession law to allow interference with the freedom of testation on broad discretionary grounds. It is likely that in certain circumstances a surviving spouse may be unfairly affected by the provisions of a pre-nuptial agreement, e.g. as a result of the passage of time or other intervening events. Therefore, the Study Group recommends the introduction of a statutory basis upon which a court may make financial provision for such a spouse notwithstanding the existence of a pre-nuptial agreement.

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<sup>179</sup> For the purposes of consistency, the Oireachtas may wish to apply the same principles to post-nuptial agreements.

# 12

## Recommendation

- I. Recommended Formalities and Content
- II. Australia
- III. United States
- IV. England and Wales
- V. Ireland
- VI. Foreign Agreements
- VII. Summary
- VIII. Conclusion

## 12. Recommendation

### Recommended Formalities & Content

The Study Group considered the formal or procedural requirements of a valid pre-nuptial agreement. While the common law provides a long and comprehensive jurisprudence on the formation of a binding contractual arrangement, it seems prudent to impose certain formal requirements on parties who wish to enter a pre-nuptial agreement. This is desirable partly because of the heightened emotional atmosphere that surrounds both the marriage contract and the months leading up to the ceremony itself. The imposition of a formal procedure required to be followed in all cases may add a necessary degree of solemnity and formality to the pre-nuptial agreement and would be of considerable assistance to a judge considering the question of enforceability.

The Group examined the approach adopted by other jurisdictions and noted in particular the procedural requirements in Australian law and in certain states in the United States of America. The position in each of these jurisdictions is outlined briefly hereunder.

#### Australia

Section 90 G of the 1975 Family Law Act (FLA) mandates that, having received independent legal advice, the fairness of the agreement should be certified by the parties, in the presence of a lawyer, who in turn certifies that the agreement faithfully represents the parties' wishes and subsequently attaches this to the contract. Having fulfilled these requirements the agreement becomes binding. The Explanatory Memorandum to the legislation indicates that "if an agreement is binding, a court will not be able to deal with the matters with which the agreement deals."

There are several grounds on which an agreement may be set aside contained in section 90 K of the Family Law Act, namely:

- Fraud;
- The agreement is void, voidable or unenforceable (i.e. there are common law contract grounds for refusing performance);
- Circumstances arising post-agreement that make it impracticable for the agreement to be carried out;
- A material change in circumstances has arisen post-agreement relating to the care, welfare and development of a child of the marriage such that the child or applicant carer will suffer hardship if the agreement is not set aside; or
- When the agreement was made one of the parties engaged in unconscionable conduct. The focus is firmly on procedural rather than substantive fairness and in the absence of a vitiating factor a court must enforce the agreement.

#### United States of America

U.S. procedural requirements vary from state to state but certain aspects of broad principle were noted, in particular full disclosure of the financial assets and liability of each party to the agreement is regarded as either necessary or desirable (see *Simeone v Simeone*).<sup>180</sup> The opportunity if not the fact of obtaining independent legal advice was also regarded as central in the case of *Gant v Gant*.<sup>181</sup>

<sup>180</sup> S v S 581 A.2d 162 (1990).

<sup>181</sup> 329 S.E. 2d 106 (1985).

The Uniform Pre-marital Agreement Act (UPAA) is mainly concerned with procedural fairness and the introduction of that Act has resulted in a move away from the analysis of the overall substantive fairness of an agreement towards a test of procedural fairness under Section 6(a). Under the Act a pre-marital agreement is not enforceable if the party against whom enforcement is sought proves that:

- (1) that party did not execute the agreement voluntarily; or
- (2) the agreement was unconscionable.

These are tests from the general law of contract. The third test is procedural, namely:

- (3) when it was executed and, before execution of the agreement, that party:
  - (i) was not provided with a fair and reasonable disclosure of the property or financial obligations of the other party;
  - (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided;
  - and
  - (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

## England and Wales

The Home Office Green Paper<sup>182</sup> recommends that certain procedural safeguards be put in place including that:

- (1) the parties should have received independent legal advice before entering into the agreement;
- (2) there should be full disclosure of assets and property before the agreement was made; and
- (3) the agreement is made no fewer than 21 days prior to the marriage (this would prevent a pre-nuptial agreement being forced on people shortly before their wedding day, when they may not feel able to resist).

The Group considered extensively the English decision of *K. v K. (Ancillary Relief: Prenuptial Agreement)*<sup>183</sup> where Judge Rodger Hayward Smith QC, sitting as a deputy High Court Judge, set out certain points of analysis necessary to determine whether a court should have regard to pre-nuptial agreements:

- (a) Did the wife/husband understand the agreement?
- (b) Was she/he properly advised as to its terms?
- (c) Did the husband/wife put her/him under any pressure to sign it?#
- (d) Was there full financial disclosure?
- (e) Was the wife/husband under any other pressure?
- (f) Did she/he willingly sign the Agreement?
- (g) Did the husband/wife exploit a dominant position either financially or otherwise?
- (h) Was the Agreement entered into with the knowledge that there would be a child?
- (i) Has any unforeseen circumstance arisen since the Agreement was made that would make

<sup>182</sup> The Home Office, Green Paper "Supporting Families: A Consultation Document" (TSO, 1998) [www.homeoffice.gov.uk/vcu/suppfam.html](http://www.homeoffice.gov.uk/vcu/suppfam.html)

<sup>183</sup> [2003] 1 FLR 120.

- it unjust to hold the parties to it?
- (j) What does the Agreement mean?
  - (k) Does the Agreement preclude an Order for Periodical Payments for the wife/husband?
  - (l) Are there any grounds for concluding that an injustice would be done by holding the parties to the terms of the Agreement?
  - (m) Is the Agreement one of the circumstances of the case to be considered under the Matrimonial Causes Act 1973?
  - (n) Does the entry into this Agreement constitute conduct which would be inequitable to disregard it under the Matrimonial Causes Act 1973?
  - (o) Am I breaking new ground by holding the wife/husband to the capital terms of this Agreement?

The Group noted that certain of the questions posed by the judge were questions which focused on the procedural fairness of the agreement but noted that his approach represented an amalgamation of tests of procedural and substantive fairness.

## Ireland

The Irish Family Lawyers Association Law Reform Committee recommended a minimum level of procedural safeguards and suggested the following minimum criteria should apply:

1. that it complies with the general contractual principles and that there has been no duress, undue influence or unconscionable bargaining;
2. that there is annexed to it a certificate by both parties' solicitors confirming that independent legal advice has been given and the legislative safeguards have been complied with;
3. that it is completed not less than five weeks prior to the date of the marriage;
4. that there is a complete schedule of disclosure similar to the Affidavit of Means under the family law legislation;
5. that it contains a clause that it would come to an end where there is a child or children of the marriage;
6. that proper provision is made for any existing children, of either or both parties, in accordance with the general welfare principles;
7. that they contain a termination date i.e. "sunset clause".

The Law Reform Commission Report on the Right and Duties of Cohabitants suggested certain minimum procedural requirements for cohabitation agreements:<sup>184</sup>

1. The cohabitation agreement should be in written form;
2. The agreement should be signed and witnessed;
3. Parties should receive separate independent legal advice prior to signing the agreement; and
4. The agreement would be subject to general contract law principles.

It was considered that, in the context of Irish law and having regard both to the constitutional protection of marriage and the statutory requirement that proper provision be made in the case of either a judicial separation or a divorce, a court should not be constrained merely by questions of procedural fairness in considering the enforceability and effect of a pre-

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<sup>184</sup> Supra n. 35

nuptial agreement. The Group therefore considered that the Australian model unduly restricted the scope for judicial review or variation of a pre-nuptial agreement and believes that this approach is neither proper nor appropriate in the Irish context. Having regard to the view that a pre-nuptial agreement should be open to review or variation by a court, the Group took the view that in order to be enforceable the pre-nuptial agreement must comply with the following procedural test which should be treated as conditions precedent to the execution of an agreement:

- (a) The agreement should be in written form, signed by both parties and witnessed. It was considered that it was not necessary that the document be witnessed by a solicitor;
- (b) The parties should each have received separate legal advice as to the effect and meaning of the agreement;
- (c) Each of the parties should have made disclosure of all relevant financial information; and
- (d) The agreement should be executed not less than 28 days before the marriage.

The Group was of the view that the procedural requirements set out at (a), (b), (c) and (d) above should be absolute, i.e. that an agreement would not be valid unless these four requirements were met. The possibility of giving a court some discretion in exceptional circumstances to recognise an agreement which was executed less than 28 days before the marriage was considered and it was concluded that it was not desirable to include such discretion in a statutory scheme. In particular it was noted that the heightened emotional state of the parties in the weeks prior to their marriage could in any case be a vitiating factor, that certainty as to a minimum cooling off period would be more easily understood and accepted by the general public, and that a clear rule is desirable in all these circumstances. The British Government's Green Paper suggested a minimum period of 21 days and it is submitted that a period of 28 days is to be preferred in this jurisdiction.

The Group was conscious of the fact that a couple might have negotiated the terms and contents of a pre-nuptial agreement over several weeks or months prior to the marriage and that a minimum and absolute time limit or cooling off period might invalidate such an agreement if it was not entered into within the statutory time limit. The Group considered that, on balance, the desirability of certainty and clarity in this instance outweighed any possible injustice in an individual case where, for whatever reason, the agreement was not executed on time.

The Group recommends that the Family Law Act 1995 and the Family Law (Divorce) Act 1996 should be amended to include a definition of a pre-nuptial agreement to provide that such an agreement should mean an agreement entered into between two persons in contemplation of their intended marriage provided the procedural requirements were met. The Group considered as an alternative that the Acts might be amended to provide that a court might not have regard to any pre-nuptial or post-nuptial agreement unless the four procedural prerequisites were met.

### **Foreign Agreements**

The Group was conscious of the possibility that an Irish court may be asked to recognise a pre-nuptial agreement entered into in a foreign jurisdiction and which complied with the procedural requirements of that jurisdiction. The Group accepted that the enforceability of such an agreement would be governed by the rules of private international law. This would mean

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that a foreign pre-nuptial agreement would be recognised if it complied with the jurisdictional requirements, either of the choice of law of the parties should one have been made by them or, in the absence of such choice, by the proper law of the contract. The Group considered that the present common law position adequately governs the question of the recognition of such foreign pre-nuptial agreements in divorce or separation proceedings between a couple who had entered into such an agreement.

### **Summary**

The Group considers that it is appropriate that any legislation which might be enacted to deal with the recognition of a pre-nuptial agreement should contain procedural guidelines. It accepted that as a matter of principle any pre-nuptial agreement would have to comply with general contractual principles and a court would have to be satisfied that the agreement was not entered into as a result of duress, undue influence and that it was not an unconscionable bargain. The Group considered the option of not making any recommendation with regard to specific procedural requirements for a pre-nuptial agreement. The possibility of a voluntary code of good practice being adopted by practitioners was considered as one form of safeguard but it was considered that this did not give adequate protection. The Group took the view that certain procedural safeguards should be imposed as a matter of law and that these should be expressed in clear terms so that parties contemplating such an agreement would be both informed and protected.

### **Conclusion**

The Group recommends that the Family Law Act 1995 and the Family Law (Divorce) Act 1996 be amended to include a definition of a pre-nuptial agreement such that an enforceable agreement must be: in writing, signed and witnessed; made after each party has received separate legal advice; made with full disclosure of financial information; and made not less than 28 days before the intended marriage.

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## Appendices

- I. Appendix 1 Membership of Study Group
- II. Appendix 2 List of Submissions Received
- III. Appendix 3 Presentations made to Study Group

## Appendix 1

### Study Group Membership

Chairperson: Inge Clissmann, Senior Counsel

Ross Aylward, LL.B

Marie Baker, Senior Counsel

Margaret Bannon, Advisory Counsel, Office of the Attorney General

Stephanie Coggans, Managing Solicitor, Law Centre, Legal Aid Board, Monaghan

Louise Crowley, Solicitor and Lecturer, Faculty of Law, UCC

John Kenny, Principal Officer, Department of Justice, Equality and Law Reform

Secretariat: Michael Flynn, Assistant Principal Officer, Department of Justice, Equality and Law Reform

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## **Appendix 2**

### **List of Submissions received**

Dublin Solicitors Bar Association Family Law Committee  
Family Lawyers' Association Law Reform Committee  
BDO Simpson Xavier, Family Business Department  
McCann Fitzgerald Solicitors  
UCD Women's Education Research and Resource Centre (WERRC)

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## Appendix 3

### Presentations to Working Group

Senator Fergal Browne: Seanad Eireann

Muriel Walls: McCann Fitzgerald Solicitors

Ailbhe Smyth: UCD Women's Education Research and Resource Centre (WERRC)

Hilary Coveney: Matheson, Ormsby and Prentice Solicitors

Audrey Byrne and Mary Griffin: Family Lawyers' Association Law Reform Committee

