GROUNDS FOR DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES

REPUBLIC OF IRELAND

Geoffrey Shannon

Law Society of Ireland, Dublin

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A. GENERAL

1. What is the current source of law for divorce?

From 1922 to 1937 there was no specific prohibition on the granting of divorce decrees in Ireland. Article 41.3.2º of the Irish Constitution of 1937 introduced such a prohibition and stated that 'no law shall be enacted providing for the grant of a dissolution of marriage'. On 24 November 1995, the Irish people, by the slimmest of a majority, voted to remove the absolute Constitutional ban on the dissolution of marriage.

Article 41.3.2º was incorporated into the Irish Constitution on 17 June 1996, upon the Fifteenth Amendment to the Constitution Bill being signed by the President. This Article provides that a court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that:

- at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- there is no reasonable prospect of a reconciliation between the spouses,
- such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
- any further conditions prescribed by law are complied with.

On 27 November 1996, the Family Law (Divorce) Act 1996[1] was passed and came into operation three months thereafter, on 27 February 1997. With the Family Law (Divorce) Act 1996, Ireland adopted a no-fault divorce system. The scheme of divorce entered into continues the old common-law tradition of a life-long spousal support obligation. The Family Law (Divorce) Act 1996 is closely modeled on the Irish Judicial Separation and Family Law Reform Act 1989[2] as amended by the Family Law Act 1995.[3]

While the date of the coming into operation of the Family Law (Divorce) Act 1996 was 27 February 1997, the first divorce granted in Ireland was on 17 January 1997, pursuant to the provisions of Article 41.3.2º of the Irish Constitution.[4] Barron J. considered the various grounds for the granting of a divorce decree. He stated that the court derived its jurisdiction to grant a divorce decree from the Constitution and not from the Family Law (Divorce) Act 1996.

Part III of the Family Law (Divorce) Act 1996 sets out the court's powers to make preliminary and ancillary relief orders in divorce proceedings. The Family Law (Divorce) Act 1996 in its ancillary relief orders provides that both spouses and ex-spouses can seek ancillary relief. Consequently, support obligations after divorce continue for the lifetime of the spouses, except in certain very limited circumstances.

2. Give a brief history of the main developments of your divorce law.

The introduction of divorce in Ireland marked a watershed in Irish legal and social history. It also led to the introduction of a substantial and wide-ranging new body of law. The enactment of the Family Law (Divorce) Act 1996 brought to a close several years of protracted campaigning to permit the dissolution of marriage in Ireland. Five years after the event, a review of the available statistical data on divorce reveals a modest increase in the number of applications made and granted. It is interesting to note that female divorce applications

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1 No. 33 of 1996.
2 No. 6 of 1989.
3 No. 26 of 1995.
4 *R.C. v C.C.* [1997] 1 ILRM 401.

outnumber male applications by two to one.[5] Much has been made of the conservative number of divorce applications, but this cannot be altogether surprising in view of certain factors. The figures are not indicative themselves of the rate of marital breakdown in Ireland. To some extent they reflect the apprehension of people towards relatively new legislation and their reluctance to re-open existing satisfactory arrangements.

Prior to the divorce referendum in Ireland on 24 November 1995, it was argued by many opponents of divorce that men would be the first to make applications for decrees of divorce in an attempt, in many cases, to 'impoverish their spouses'.

The Irish High Court, in *R.C. v C.C.*,[6] the first divorce case in Ireland, considered the constitutional requirements to be satisfied prior to the granting of a divorce decree. An important part of this judgment, and one likely to arise in future applications, was the reference to non-dependent children. The court noted the provisions of Article 41.3.2º of the Irish Constitution:

> [S]uch provision as the court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law.

This differs from the corresponding statutory provision in section 5(1)(c) of the Family Law (Divorce) Act 1996:

> [S]uch provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependant members of the family.

The distinction relates to the issue of dependency. Clearly, the wording of the constitutional provision does not preclude the

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6 [1997] 1 ILRM 401.

possibility of non-dependent children having provision made for them.

The issue of whether or not a clean break, or a full and final settlement, is facilitated by the Irish Family Law (Divorce) Act 1996 rumbles on with little guidance from the courts, save for the remarks of McGuinness J. in the case of *J.D. v D.D.*[7] In that case, she noted that no 'clean break' provision could be made when financially re-ordering a broken marriage. The learned judge noted that the Oireachtas had legislated to permit repeat applications to court concerning ancillary relief so that finality could not be achieved:

> [I]t appears to me that by the subsequent enactment of the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996, the Oireachtas has made it clear that a 'clean break' situation is not to be sought and that, if anything, financial finality is virtually to be prevented…The court, in making virtually any order in regard to finance and property on the breakdown of a marriage, is faced with the situation where finality is not and never can be achieved. This also appears to mean that no agreement on property between the parties can be completely final, since such finality would be contrary to the policy and provisions of the legislation. The statutory policy is, therefore, totally opposed to the concept of the 'clean break'. [At p. 89].

The case of *J.C.N. v R.T.N.*[8] demonstrates the difficulties in achieving finality in circumstances of increasing age and decreasing financial resources.

Part II of the Family Law (Divorce) Act 1996 comprises sections 5 to 10, which deal with obtaining a decree of divorce, pursuant to the provisions of Article 41.3.2º of the Constitution. The apparent simplicity of the key terms of section 5(1)(a) of the Family Law (Divorce) Act 1996 is misleading. Such terms have not been defined. The absence of a definition of 'living apart' has caused particular difficulty. 'Living apart' was first introduced into Irish law in the Irish

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7 [1997] 3 IR 64.
8 unreported, High Court, 15.01.1999.

Judicial Separation and Family Law Reform Act 1989 as a ground for judicial separation. Section 2(3) of the Irish Judicial Separation and Family Law Reform Act 1989 contained a definition of 'living apart':

> [S]pouses shall be treated as living apart from each other unless they are living with each other in the same household, and references to spouses living with each other shall be construed as references to their living with each other in the same household.

The first judicial guidance on the no-fault ground of 'living apart' in Irish divorce proceedings came in the case of *McA. v McA.*[9] The case was also the first reported contested divorce in Ireland dealing with ancillary reliefs. McCracken J. considered the law on 'living apart'. He noted that the Family Law (Divorce) Act 1996 did not provide any definition or guidance. In supporting the proposition that intention was a very relevant matter in determining whether the parties had been living apart, McCracken J. noted that there were a number of instances in which the matrimonial relationship continues even though the parties are not living together under one roof, such as while one party is in hospital or obliged to spend a lot of time away from home for the purposes of employment. McCracken J. stated in relation to the test for 'living apart':

> I do not think one can look solely at where the parties physically reside, or at their mental or intellectual attitude to the marriage. Both of these elements must be considered, and in conjunction with each other. [At p. 8].

In essence, this is a mixed test: one that encompasses an objective element, though it is primarily subjective in any case where the parties have physically separated.

Divorce in Ireland, post *McA.*, is not concerned with where the parties live or whether they live under the same roof, and just as physically separated parties can maintain a full matrimonial relationship, parties

9 [2000] 2 ILRM 48.

who live under the same roof may live apart from one another. In determining whether the parties are living apart, it now appears that the Irish court will look at both where the parties reside and their mental attitude to the marriage. The *McA.* judgment has prompted Irish practitioners to adopt a more relaxed approach to the four-year rule.

On the introduction of divorce the Irish courts were granted unfettered discretion to deal with the economically valuable assets of the parties to the marriage. This discretion is exercisable within a framework of criteria as well as the constitutional and statutory requirements that proper provision be made for the spouses and dependent children of the marriage. Section 20 of the Family Law (Divorce) Act 1996 sets out those individual factors which must be taken into account by the Irish court before deciding to make any order of ancillary relief. Section 20(2)(f) of the Family Law (Divorce) Act 1996 requires the Irish court to have regard to:

> the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family.

It is worthy of particular note in that its interpretation since the enactment of the Family Law (Divorce) Act 1996 represents a growing tendency by the Irish legislative and the Irish courts to look beyond the financial contributions of each spouse. For example, in *F. v F.*[10] O'Neill J. held that the applicant wife who had assisted the respondent husband in the administration of his business in the early days was entitled to a 50% share in the marital property and in other property. Accordingly, the learned judge made an order transferring the family home (which represented roughly 50% of the value of the assets) to the wife free of encumbrances. A similar approach was adopted in *P.O'D. v J.O'D.*[11]. In that case, Budd J. accepted the evidence of the applicant

[10] unreported, High Court, 02.12.1999.
[11] unreported, High Court, 31.03.2000.

wife that she had made a significant contribution to the building up of her husband's property portfolio. The learned judge held that the justice of the case required that the property be divided equally.

Discretion in the re-ordering of assets on divorce and the weight to be given to a separation agreement existing between the parties prior to their application for a decree of divorce are issues currently before the Irish courts. Section 20(3) of the Family Law (Divorce) Act 1996 requires the court, in deciding whether to make an order for ancillary relief, to have regard to the terms of a prior separation agreement (which is still in force). In *M.G. v M.G.*[12], Buckley J. stated that where parties have had the benefit of legal advice before entering a separation agreement, which is of recent date, a court should be very slow to make radical alterations on divorce unless there have been sufficient changes in the circumstances of the parties. In *K. v K.*,[13] the Irish Supreme Court, in considering the application of the terms of section 20(3) of the Family Law (Divorce) Act 1996, doubted the existence of any common law rule of equal division of resources between husband and wife. McGuinness J. stated:

> While I would of course accept that the wife of a rich man (or the husband of a rich woman) could always expect a substantially greater award both in income and in capital than the parties to the average marriage, I very much doubt that a policy of equal division of assets between husband and wife has prevailed under common law rule since the beginning of the 19th century, or even the 20th century, either in this jurisdiction or in England. In both jurisdictions the division of matrimonial assets on separation or divorce has, since the mid 20th century at least, been governed by statute. Explicit mandatory guidelines for the courts have been set out in these statutes. [At p. 14].

The Supreme Court, in remitting the case back to the High Court, commented that the Family Law (Divorce) Act 1996 gave the judiciary a considerable amount of discretion when re-ordering assets on

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12 unreported, Dublin Circuit Court, 25.07.2000.
13 unreported, Supreme Court, 06.11.2001.

divorce, which was not to be exercised at large, but rather that the statutory guidelines had to be followed:

> The provisions of the 1996 Act leave a considerable area of discretion to the court in making proper financial provisions for spouses in divorce cases. This discretion, however, is not to be exercised at large. The statute lays down mandatory guidelines. The court must have regard to all the factors set out in Section 20, measuring their relevance and weight according to the facts of the individual case. In giving the decision of the court, a judge should give reasons for the way in which his or her discretion has been exercised in the light of the statutory guidelines. [At p. 16].

It would appear from preliminary research undertaken by the author of this report, that in Ireland, practitioners are inserting 'full and final settlement' clauses into consent ancillary relief Orders in the hope that the courts will uphold such clauses in any future application. This approach would require the court to value 'certainty and finality'[14] over flexibility and the power of the court to vary under section 22 of the Family Law (Divorce) Act 1996. A 'full and final settlement' clause in consent divorce ancillary relief proceedings will no doubt be the subject of future litigation in Ireland. In the meantime, many Irish practitioners include such clauses in the hope that they will prevail. In respect of maintenance, which is the focus of much of the questionnaire being completed, it is very clearly not possible to achieve a 'clean break'. That said, Irish practitioners are in some cases capitalizing the periodical maintenance into a lump sum and are taking a risk on the willingness of the court to bind the parties to the settlement unless there is a fairly significant change in circumstances.

3. Have there been proposals to reform your current divorce law?

The divorce regime introduced in Ireland in the Family Law (Divorce) Act 1996 has been subject to academic criticism owing to its failure to provide for the possibility of a 'clean break' in financial terms, following divorce. While the 'clean break' option has the advantage of

[14] See *P.O'D. v A. O'D.* [1998] ILRM 543.

being simple, clear and final, reform in this direction is unlikely for two reasons. Firstly, it emerged very clearly during the pre-referendum debate on divorce that the Irish electorate had a strong concern for the position of the financially weaker party to the marriage. There is the perception that a 'clean break' divorce system would impact negatively on marriages where the woman entered the marriage in the expectation that her contribution to the family unit would be made within the home, and that in return, she could expect life-long material support from her husband. Secondly, the Irish people voted - by the slimmest of margins - to opt for the introduction of divorce in Ireland just over five years ago on 24 November 1995. It is therefore unlikely, at least in the short-term, that a constitutional referendum facilitating a 'clean break' divorce system would be passed.

B. GROUNDS FOR DIVORCE

I. General

4. What are the grounds for divorce?

The Irish court may grant a decree of divorce if either spouse is domiciled in Ireland on the date of the institution of the divorce proceedings or, alternatively, either of the spouses was ordinarily resident in Ireland throughout the period of one year ending on that date.[15]

Section 5(1) of the Family Law (Divorce) Act 1996 sets out the grounds upon which a court will grant a decree of divorce on application by either spouse. These grounds are as follows:

- at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- there is no reasonable prospect of a reconciliation between the spouses, and

[15] Section 39(1) of the Family Law (Divorce) Act 1996.

- such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family…

All of these grounds must be satisfied before a decree can be granted.

Section 5(1)(a) of the Family Law (Divorce) Act 1996 imposes a requirement to be separated for four years out of the previous five years before being entitled to seek a divorce. The question arises as to whether spouses can be 'living apart' although living under the one roof. The answer to this question will depend upon the facts of the individual case. The court will look at all the relevant issues very closely if called upon to determine whether, in fact, the parties are living apart for the requisite period.[16] The onus is on the applicant seeking a decree of divorce to establish the case and the court will scrutinise the facts carefully to discharge its duty under Article 41 of the Constitution.

Section 5(1)(b) of the Family Law (Divorce) Act 1996 sets out the second imperative for qualification for a decree of divorce. The court must be satisfied that 'there is no reasonable prospect of a reconciliation between the spouses', a requirement that seems to be set out more in hope than expectation in light of the requirement for a four-year separation. The direction to the court is, however, enshrined in the Constitution. Therefore, there is a duty on the court to establish in each case that there is no possibility of a reconciliation. A relevant and instructive case is *E.P. v C.P.*,[17] where McGuinness J. was satisfied that the breakdown of the marriage was irretrievable: both parties accept that there is no reasonable prospect of a reconciliation.
In granting a divorce decree in *J.C.N. v R.T.N*,[18] McGuinness J stated:

> There is clearly no prospect of a reconciliation; the husband lived in a permanent second relationship since 1978. [At. p. 2].

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[16] See Question 3 for a more detailed analysis of this issue.
[17] unreported, High Court, 22.11.1998.
[18] unreported, High Court, 15.01.1999.

As with the issue of 'living apart', it is likely that each case will turn on its own facts, and the degree of acrimony or agreement in each case will assist the court in deciding the issue. In the case of *Moorehead v Tiilikainen*,[19] one of the issues to be determined was whether a reconciliation had been effected between the parties, although this was in the context of an earlier separation agreement. It was held that the intention of the parties was significant in determining whether a reconciliation had taken place. The relevant word in section 5(1)(b) is 'reasonable', and the court is not charged with the task of ensuring that every remnant of civility between the parties has been abandoned.

By virtue of section 5(1)(c) of the Family Law (Divorce) Act 1996, the court must be satisfied that such provision as the court considers proper, having regard to the circumstances exists, or will be made for the spouses and any dependent members of the family. Section 2(1) of the Family Law (Divorce) Act 1996 defines a 'dependent member' as any child under the age of 18 years (or 23 if in full-time education). It is significant that whereas section 5(1)(c) alludes to 'dependent members of the family', Article 41.3.2º of the Irish Constitution refers to 'any children of either or both' of the spouses. In the case of *R.C. v C.C.*,[20] Barron J. confirms that there is little doubt that the latter interpretation will prevail:

> Since the jurisdiction invoked is that contained in the Constitution and not that amplified by the Act, it is necessary for the court to consider the position of the children. While I do not purport to determine that non-dependent children should necessarily have provision made for them, I am satisfied that in the particular circumstances of the present case it is proper that certainly the two daughters of the marriage should have provision made for them in the interests of the family as a whole.

The reference to 'any children' in Article 41.3.2º of the Constitution is clearly capable of a much wider interpretation than that of 'any dependent members of the family' as set out in the Family Law

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[19] unreported, High Court, 17.06.1999.
[20] [1997] 1 ILRM 401.

(Divorce) Act 1996, where the term is defined as any person under the age of 18 years, or if over 18 but below 23, is in full-time education. There are no such limitations on the interpretation of 'child' in the provision contained in the Constitution. It is therefore possible for a divorcing parent to be ordered to continue maintenance payments in respect of an adult child where he/she no longer wishes to do so, in order that the court might be satisfied that proper provision exists or will be made for the 'children' of the marriage. The foregoing assumes added importance given that the requirement of proper provision must be in place to the satisfaction of the court, prior to the granting of the divorce decree. The case of *McA. v McA.*[21] is instructive in terms of the ancillary reliefs ordered by the court to form 'proper provision'. In summary, the implications of section 5(1)(c) of the Family Law (Divorce) Act 1996 are significant. The Irish court has the power to refuse to grant a decree of divorce in circumstances where it is not satisfied that proper financial arrangements have been put in place to ensure that the spouses and dependent family members have been catered for and, in this regard, the court may refuse to direct that a settlement agreement entered into by the parties be made a rule of court.

5. *Provide the most recent statistics on the different bases for which divorce was granted.*

Since divorce was introduced in Ireland on 27 February 1997, 13,300 people have sought decrees of divorce.[22] These figures may appear conservative given that at the time of the introduction of divorce it was estimated that there were up to 80,000 people in Ireland whose marriages had broken down. The flood of applications that was anticipated at the time of the Irish divorce referendum has therefore never materialised.

The legal year ended July 1997 shows 417 divorce applications were made with 95 decrees granted, in circumstances where the Family Law (Divorce) Act 1996 had only come into operation on 27 February of that year. In the year ended July 1998, the numbers had risen to 2,761

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21 [2000] 2 ILRM 48.
22 This figure reflects the position up to 31.12.2001.

divorce applications and 1,421 decrees granted, and in 1999 there were 3,316 divorce applications made with 2,333 decrees granted. In the year to the end of July 2000, there were 3,346 divorce applications while 2,596 decrees were granted. The figures for the legal year 2000-2001 show a further modest increase in divorce decrees granted, in a year when 3,339 applications for divorce were received. It is interesting to note from the available statistical data that female divorce applications outnumber male applications by two to one. For example, of the Circuit Family Court divorce applications granted in 2001, 1,069 were male applicants and 1,748 female.

Year	**Divorce applications**	
	Received	**Granted**
Year ending July 2001	3,490	2,837
Year ending July 2000	3,346	2,596
Year ending July 1999	3,316	2,333
Year ending July 1998	2,761	1,421
Year ending July 1997	417	95

6. How frequently are divorce applications refused?

Of the 3,459 divorce applications dealt with in the Circuit Family Court in 2001, one was refused and 47 were withdrawn. That said, the strict application of the *in camera* rule in Irish family law proceedings makes it difficult to assess not only how frequently divorce applications are refused generally but also people's motives for applying for a divorce, and the application of the provisions of the divorce legislation by the various Circuit Court judges throughout Ireland. Ad hoc reporting of family law cases, even with the use of the parties' initials, has led to only anecdotal evidence being available as to the approaches of the Irish courts. Consequently, it is difficult to discern whether existing arrangements are being replaced, to the satisfaction of one or both parties. It is also not possible to garner a clear picture of what kinds of ancillary orders are being made, given that much of the information circulating, outside of reported cases, concerns cases where high awards have been made or extraordinary circumstances outlined.

7. Is divorce obtained through a judicial process, or is there also an administrative procedure?

Divorce is obtained in Ireland through a judicial process. Both the Circuit Court and the High Court have jurisdiction concurrently with each other to hear and determine applications for divorce decrees pursuant to section 38(1) of the Family Law (Divorce) Act 1996. Section 38(2) of the Family Law (Divorce) Act 1996 facilitates the transfer of divorce proceedings to the High Court where the rateable valuation of the land the subject of the proceedings exceeds £200. At present, most applications for divorce in Ireland are made to the Circuit Court rather than to the High Court, the obvious advantages of the Circuit Court being lower costs and easier access to court lists. In addition, the provisions of the Civil Legal Aid Act 1995[23] dictate that proceedings be instituted in the court having the first level of jurisdiction to hear the matter and, in divorce applications, this is the Circuit Court.

8. Does a specific competent authority have jurisdiction over divorce proceedings?

See Question 7.

9. How are divorce proceedings initiated? (e.g. Is a special form required? Do you need a lawyer? Can the individual go to the competent authority personally?)

The rules for making application to the Circuit Family Court for a divorce are contained in Order 59 of the Consolidated Circuit Court Rules 2001.[24] Rule 4.2 deals with the issue of venue, and states that proceedings may be instituted in the Irish county where any party to the proceedings ordinarily resides or carries on any ‘profession, business or occupation’. Theoretically, therefore, an applicant could have a number of venues available to him/her, and possibly a number of circuit court areas, depending on his or her geographical location.

[23] No. 32 of 1995.
[24] S.I. No. 519 of 2001.

Divorce proceedings in the Circuit Family Court are commenced by the issuing of a Family Law Civil Bill at the county registrar's office for the appropriate county. You do not need a lawyer to initiate divorce proceedings. That said, a lawyer is generally retained due to the complexities inherent in such cases (e.g. pensions and taxation). The Family Law Civil Bill is the grounding document on foot of which every application for divorce will be set out. Every Family Law Civil Bill must set out in numbered paragraphs the relief being sought and the grounds relied upon in support of the divorce application.[25] It should contain the following information:
the date and place of marriage of the parties;

- the length of time the parties have lived apart, including the date on which they commenced living apart and the addresses of both of the parties during that time, where known;[26]
- details of any previous matrimonial relief sought and/or obtained and details of any previous separation agreement entered into between the parties (with any relevant court orders or agreements annexed to the Family Law Civil Bill);
- the names and dates of birth of any dependent children of the marriage;
- details of the family home(s) and/or other residences, of the parties, including all details of any former family home/residence to include details of the manner of occupation or ownership thereof;
- where reference is made in the Family Law Civil Bill to any immovable property, whether it is registered or unregistered land and a description of the land/premises so referred to;
- the basis of jurisdiction under the Family Law (Divorce) Act 1996;

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25 Rule 4.4.

26 Where the applicant and respondent have lived apart from each other, whilst under the same roof, all relevant information to ground such a claim should be in the Family Law Civil Bill. Details should be furnished, for example, as to how the house is being divided up and the arrangements for using kitchen and bathroom facilities.

- the occupation and ages of each party;
- the grounds relied upon for the relief sought (e.g. that the parties have been living apart for at least four of the last five years, that there is no reasonable hope of reconciliation, that proper provision for the spouse and any dependent members of the family has been made and other relevant grounds); and
- each section of the Family Law (Divorce) Act 1996 under which relief is sought.

Once the Family Law Civil Bill claiming a decree of divorce has been prepared and signed by the applicant or his or her solicitor, the original is filed at the appropriate Circuit Court office along with a section 6 or section 7 certificate,[27] an affidavit of means (Rule 17) and an affidavit of welfare (Rule 19).

The rules governing an application for divorce in the High Court are contained in the Rules of the Superior Courts (No. 3) of 1997, and are construed together with the Rules of the Superior Courts 1986. Proceedings for divorce are commenced by a special summons, which must be a family law summons and which must contain a 'Special Endorsement of Claim' specifying all the necessary particulars, the relief sought and the section of the Family Law (Divorce) Act 1996 on which such reliefs are grounded. An accompanying affidavit verifying the proceedings must be filed (pursuant to Rule 4), and should contain the following information:

- the date and place of the marriage of the parties;
- the length of time the parties have lived apart and their addresses during that time, where known;
- full particulars of the children, whether any of them are dependent, and what provision has been made for them;
- whether any possibility of reconciliation exists and of the basis on which this might take place;

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[27] Sections 6 and 7 of the Family Law (Divorce) Act 1996 set out the obligations and responsibilities on solicitors (who represent either an applicant or repsondent) in a divorce case to discuss with the applicant or respondent the issue of a possible reconciliation, the possibility of mediation, the possibility of separation by means of a deed of separation and the possibility of judicial separation.

- details of any separation agreement or previous matrimonial relief sought or obtained, and copies of all relevant documentation should be exhibited in a separate affidavit;
- the domicile of each party at the date of commencing the proceedings, or where each party has been ordinarily resident for the year prior to the commencement of the proceedings;
- details of the family home and any other residences of the parties, together with details of their ownership and occupation;
- details of whether the property is registered or unregistered land and any other details.

Order 70A, Rule 6 deals with the issue of the affidavit of means, which must be filed with the verifying affidavit. The affidavit of means need only be filed where financial relief is being sought. Order 70A, Rule 7 deals with the affidavit of welfare.

10. When does the divorce finally dissolve the marriage?

In Ireland, the divorce dissolves the marriage on the granting of a decree of divorce pursuant to Article 41.3.2º of the Irish Constitution and section 5 of the Family Law (Divorce) Act 1996. The most obvious effect or result of the granting of a decree of divorce is set out in section 10 of the Family Law (Divorce) Act 1996, which is that the parties are free to remarry.

One of the reasons widely cited by those in Ireland seeking a divorce is a desire for a complete cessation of all ties between the parties; in other words, a clean break. It is often said that on divorce, the status of the marriage is irrevocably altered in that the parties are no longer the spouses of one another: the latter part of this sentence is not, however, entirely accurate in the Irish context as a number of ambiguities arise around the word 'spouse', which is referred to in section 2(2)(c) of the Family Law (Divorce) Act 1996 in the following terms:

> 'a reference to a spouse includes a reference to a person who is a party to a marriage that has been dissolved under this Act.'

The foregoing definition is limited to use in the context of the Family Law (Divorce) Act 1996, and is the first indication in the legislation that the word spouse can continue to be used as a description of a person whose marriage has been dissolved pursuant to a decree under section 5 of the Family Law (Divorce) Act 1996. Parties continue to be 'spouses' for the purposes of the rights and remedies available to them under the Family Law (Divorce) Act 1996, but not under other statues. For example, a party who is the beneficiary of a pension adjustment order under section 17 of the Family Law (Divorce) Act 1996 remains a spouse for that purpose. Indeed, most of the ancillary reliefs available under Part III of the Family Law (Divorce) Act 1996 are available to former spouses.

If under your system the sole ground for divorce is the irretrievable breakdown of marriage answer part II only. If not, answer part III only.

II. Divorce on the sole ground of irretrievable breakdown of the marriage

11. How is irretrievable breakdown established? Are there presumptions of irretrievable breakdown?

Section 5 of the Family Law (Divorce) Act 1996 sets out the legal requirements necessary to establish irretrievable breakdown for the purposes of obtaining a decree of divorce:

> **5.** (1) Subject to the provisions of this Act, where, on application to it in that behalf by either of the spouses concerned, the court is satisfied that:
>
> (a) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
>
> (b) there is no reasonable prospect of a reconciliation between the spouses, and
>
> (c) such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family,

> the court may, in exercise of the jurisdiction conferred by Article 41.3.2º of the Constitution grant a decree of divorce in respect of the marriage concerned.

Presumptions of irretrievable breakdown do not exist under Irish divorce law. Before a court can grant a decree of divorce, the applicant spouse must prove that he or she has lived apart from the other spouse for the relevant period 'at the date of the institution of the proceedings'.[28] The four-year period, therefore, must have expired prior to the issuing and serving of a grounding summons. As mentioned in the answers to pervious questions, the Irish courts, when deciding whether or not the parties have been 'living apart' for a period of four years, will take into account all relevant evidence when making a decision. Therefore, Irish practitioners, when drawing up deeds of separation and other matrimonial agreements, clearly state the date on which the couple commenced living apart. It is possible for spouses to live physically apart from each other and still not be in a position to obtain a decree of divorce.[29] Each case will depend on its own facts. It can be seen from the case of *McA. v McA.*,[30] discussed in Question 55 (Boek II, XYZ), that the intention of the parties is of great importance. It is difficult to establish the 'intention' of the parties to a divorce application. This intention can only be ascertained from a detailed consideration of the facts of each particular case.

Before granting a decree of divorce, the Irish court must also be satisfied that there is no reasonable prospect of a reconciliation between the spouses.[31] It is therefore possible for a court to refuse to grant a decree of divorce because in its own view, the couple may be in a position to effect a reconciliation. The court must finally be satisfied that proper provision exists or will be made for the spouses and any dependent members of the family.[32]

[28] Section 5(1)(a) of the Family Law (Divorce) Act 1996.
[29] For example, where one spouse is hospitalised for a lengthy period of time.
[30] [2000] 2 ILRM 48.
[31] Section 5(1)(b) of the Family Law (Divorce) Act 1996.
[32] Section 5(1)(c) of the Family Law (Divorce) Act 1996.

12. Can one truly speak of a non-fault-based divorce or is the idea of fault still of some relevance?

It is interesting to compare the grounds for the granting of a decree of judicial separation in Ireland with the grounds for the granting of a decree of divorce. The element of fault is still relevant insofar as the granting of a decree of judicial separation under the Irish Judicial Separation and Family Law Reform Act 1989 is concerned whilst, in relation to divorce, it is of little relevance. Section 5 of the Family Law (Divorce) Act 1996 provides that a court designated by law may grant a divorce decree where, on application to it by either spouse, it is satisfied that:

(a) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
(b) there is no reasonable prospect of a reconciliation between the spouses, and
(c) such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family.

It can be seen from the foregoing that no element of fault needs to be ascribed to either party in order to qualify for a divorce under this section. The parties need only satisfy the requirements of section 5 for a decree to be granted, none of which make any reference to fault or blame. That said, the issue of conduct arises in the context of matters to which the court shall have regard in deciding whether to make an order for ancillary relief.[33] Issues relating to conduct may be set out in detail in the endorsement of claim of the Family Law Civil Bill, but no matter how extenuating the circumstances, they will not prevent the granting of the divorce if the terms of section 5 are adhered to. The question of fault is therefore entirely irrelevant insofar as the granting of the divorce decree itself is concerned. It may be relevant, however,

[33] Section 20(2)(i) of the Family Law (Divorce) Act 1996 requires the court before deciding to make any order of ancillary relief to take account of: the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it.

when a court is making ancillary relief orders and is one of the factors to be taken into account under section 20 of the Family Law (Divorce) Act 1996 by a court when making such orders. A relevant and instructive case is *T. v T.*,[34] where it would appear that a significant factor in the reordering of the pension was the conduct of the parties, and in particular the conduct of the applicant husband. Lavan J. stated:

> One outstanding matter that has given me much difficulty is the specific provision of Section 20(2)(i) of the Family Law (Divorce) Act 1996. It seems to me on the evidence that I am obliged, in exercise of the discretion which undoubtedly arises, to take it into account…. In respect of the pension provisions as set out in the Delaney Bacon and Woodrow Report dated the 10th of July 2001, I would have been disposed to divide this to the Applicant as to 49% and the Respondent as to 51%. However, having regard to the view I have expressed as to the taking into account of Section 20(2)(i) of the aforesaid Act of 1996 I will in deference to my findings thereunder allow a finding of 45% to the Applicant and 55% to the Respondent. [At pp. 22-23].

13. To obtain the divorce, is it necessary that the marriage was of a certain duration?

Before an Irish Court can grant a decree of divorce, the applicant spouse must prove that he or she has lived apart from the other spouse for at least four years during the previous five years. Section 5(1)(a) of the Family Law (Divorce) Act 1996 provides:

> at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years.

Therefore, to obtain a divorce in Ireland, it is necessary that the parties be married for in excess of five years.

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[34] unreported, High Court, 28.11.2001.

14. Is a period of separation generally required before filing the divorce papers? If not, go to question 16. If so, will this period be shorter if the respondent consents than if he/she does not? Are there other exceptions?

Before filing divorce papers in Ireland, the period of separation must amount to at least four years during the previous five years.[35] The four-year period must have expired prior to the actual issuing and serving of a grounding summons. There are no exceptions to this requirement and the period will not be shortened if the respondent consents.

15. Does this separation suffice as evidence of the irretrievable breakdown?

Yes.

16. In so far as separation is relied upon to prove irretrievable breakdown:

(a) Which circumstances suspend the term of separation?

The commencement of cohabitation will suspend the term of separation. That said, the Family Law (Divorce) Act 1996 provides that where the reconciliation of the spouses is possible, the court may at any time adjourn the proceedings to allow the spouses, if they both so wish, to consider reconciliation.[36] During such a period, should the parties resume living with one another for the purposes of effecting a reconciliation, this period of cohabitation shall not prejudice the parties position for the purpose of section 5(1)(a) of the Family Law (Divorce) Act 1996.[37]

(b) Does the separation need to be intentional?

No.

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35 Section 5(1)(a) of the Family Law (Divorce) Act 1996. See Questions 3 and 14.

36 Sections 6(2)(a) and 7(2)(a) of the Family Law (Divorce) Act 1996.

37 'At the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years'.

(c) Is the use of a separate matrimonial home required?

The absence of a definition of 'living apart' in the Irish Family Law (Divorce) Act 1996 has caused particular difficulty in determining whether the separation need be intentional and whether the use of a separate matrimonial home is required. Indeed, the concept of 'living apart' caused some controversy during the divorce referendum, with anti-divorce campaigners claiming that it could be used unilaterally by a spouse to claim a divorce while continuing to live with the respondent. 'Living apart' was first introduced into Irish law in the Irish Judicial Separation and Family Law Reform Act 1989 as a ground for judicial separation. The Irish Judicial Separation and Family Law Reform Act 1989 contained an explanation of 'living apart' in section 2(3) such that:

> spouses shall be treated as living apart from each other unless they are living with each other in the same household, and references to spouses living with each other shall be construed as references to their living with each other in the same household.

During the second stage of the Divorce Bill, the then Minister for Law Reform, Mervyn Taylor TD, stated:

> The term 'living apart' is used in the Judicial Separation and Law Reform Act, 1989 and it is also a familiar term in many other jurisdictions where it has been held that this phrase will clearly cover whether the spouses have physically separated and are living in different places. The case law also states that where domestic life is not shared it is possible for there to be two households under the one roof.

The first judicial guidance on 'living apart' in Irish divorce proceedings came in the case of *McA. v McA.*[38] McCracken J. considered the law on living apart. He noted that the Family Law

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38 [2000] 2 ILRM 48.

(Divorce) Act 1996 did not provide any definition guidance and sought assistance from the judgments given in the English cases of *Mouncer v Mouncer*[39] and *Santos v Santos*.[40] The learned judge distinguished the *Mouncer* case where the spouses were deemed to have lived as a single household 'from the wholly admirable motive of caring properly for their children'. The *Santos* case was accepted by McCracken J. as a case which clearly expressed 'the view that the intention of the parties is a very relevant matter in determining issues of whether they live apart or whether there has been desertion' [at p. 7]. He referred to the judgment of Sachs J. in *Santos* wherein the latter stated:

> [L]iving apart…is a state of affairs to establish which it is in the vast generality of cases…necessary to prove something more than that the husband and wife are physically separated. For the purposes of that vast generality, it is sufficient to say that the relevant state of affairs does not exist whilst both parties recognise the marriage as subsisting. That involves considering attitudes of mind and naturally the difficulty of judicially determining that attitude in a particular case may on occasion be great…identification of an attitude of mind is required. [At p. 255].

McCracken J. accepted this approach in *McA.* in recognising that just as 'there is a mental element to' living apart other than mere physical separation, there is more to living together than being physically in the same house. In the *McA.* case, the respondent husband's return to the family home in 1991 was not activated by a desire to restart the marriage, but to develop his relationship with his children. Accordingly, he had no intellectual attachment to the marriage, although he did live in the same house as the wife. They ate and holidayed together, though that was in the interests of the children. McCracken J. stated in relation to the test for 'living apart':

> I do not think one can look solely at where the parties physically reside, or at their mental or intellectual attitude to

39 [1972] 1 WLR 321.
40 [1972] 2 All ER 246.

> the marriage. Both of these elements must be considered, and in conjunction with each other. [At p. 8].

In essence, the Irish test on 'living apart' is a mixed test: one that encompasses an objective element, though it is primarily subjective in any case where the parties have physically separated. If one cannot look solely at physical separation, then the real determinant becomes mental attitude, which must be subjective. Indeed, the real strength of the subjective approach in the *McA.* case prevented objective factors such as dining together and going on holidays from ousting 'living apart' as a state of mind.

In summary, following the *McA.* judgment, it appears that 'living apart' under the Irish Family Law (Divorce) Act 1996 means something more than mere physical separation; the mental attitude of the parties is of considerable relevance. Therefore, divorce in Ireland, post *McA.*, is not concerned with whether the parties live in a separate matrimonial home, as an individual can be living apart from his or her spouse whilst still residing under the same roof. It now appears that the Irish court will look to both where the parties reside and their mental attitude to the marriage.

17. Are attempts at conciliation, information meetings or mediation attempts required?

Sections 6, 7 and 8 of the Family Law (Divorce) Act 1996 deal with issues of reconciliation and mediation. The solicitor must, before the institution of proceedings, furnish the client with a list of persons qualified to assist in the reconciliation process.[41] The possibility of engaging the services of a mediator to help bring about divorce on agreed terms should also be discussed with the client, who must be provided with a list of suitably qualified mediators for that purpose.[42] During the course of the Dáil and Seanad debates on this part of the Family Law (Divorce) Act 1996, much was made of obliging the parties to attend for counselling before permitting them to obtain a decree of divorce. Deputy Woods, at the second stage of the Bill, stated:

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[41] Sections 6(2)(a) and 7(2)(a) of the Family Law (Divorce) Act 1996.

[42] Sections 6(2)(b) and 7(2)(b) of the Family Law (Divorce) Act 1996.

> The Bill should contain a provision placing an obligation on the spouse initiating a separation or divorce process to participate in counselling, proof of which could take the form of a certificate from the counselling service, or other similar documents. [467 Dáil Debates Col. 1778].

These proposals, while laudable were rejected. Indeed, it is difficult to see how applicants for divorce could have been forced to attend counselling sessions, after a period of four years' separation during which time people would presumably have moved on to develop their own lives. In addition to the practical difficulties, there might also have been constitutional difficulties with compelling a person to attend for counselling.

Solicitors for both the applicant and respondent must file a certificate with the originating proceedings confirming that they have fulfilled their duties under sections 6 and 7 of the Family Law (Divorce) Act 1996.[43] It would be unwise for an Irish solicitor to adopt a cavalier attitude to compliance with sections 6 and 7 as it is clearly open to the court to make detailed enquiries in this regard. However, the exact manner in which the information is imparted in relation to these matters is at the discretion of the solicitor.

The Family Law (Divorce) Act 1996 is silent as to how lay litigants are to be made aware of the alternatives to divorce. It is possible that under section 8 of the Family Law (Divorce) Act 1996, the court may adjourn the proceedings to allow a person explore the alternatives, but this would clearly not extend to an obligation on the court to dispense advice in relation to these matters.

18. Is a period for reflection and consideration required?

No. See Question 17.

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[43] A copy of the relevant certificate must accompany the Family Law Civil Bill when filed in court. Also, a similar certificate must be filed at the same time as the entry of the Appearance.

19. Do the spouses need to reach an agreement or to make a proposal on certain subjects? If so, when should this agreement be reached? If not, may the competent authority determine the consequences of the divorce?

No. The spouses need not reach an agreement nor do they have to make proposals on certain subjects. That said, Rule 10.G of the Circuit Court Rules 2001[44] provides a simple and speedy procedure where both parties are agreed in respect of the ancillary reliefs being sought. This is known as a 'fast track divorce' and can also be availed of where no ancillary relief is being claimed.

20. To what extent must the competent authority scrutinize the reached agreement?

This is not applicable, except in respect of the 'fast track divorce'. In a 'fast track divorce', even where the parties have reached an agreement on all of the issues, the court must be satisfied that such provision as it considers proper, having regards to the circumstances, exists, or will be made for the spouses and any dependent members of the family.[45] The reference to 'all the circumstances' means that a subjective view will be taken of each family's situation and there are no standards or guidelines in place as to what constitutes proper provision in general. The case of *McA. v McA.*[46] is instructive in terms of the ancillary reliefs ordered by the court to form 'proper provision'. The court in that case referred to the provisions of section 20 of the Family Law (Divorce) Act 1996. It directed a lump sum payment of £300,000 and periodic payments of £4,500 per month. Issues concerning property had been agreed between the parties prior to the hearing.

21. Can the divorce application be rejected or postponed due to the fact that the dissolution of the marriage would result in grave financial or moral hardship to one spouse or the children? If so, can the competent authority invoke this on its own motion?

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44 S.I. No. 510 of 2001.
45 Section 5(1)(c) of the Family Law (Divorce) Act 1996.
46 [2000] 2 ILRM 48.

(a) By virtue of section 5(1)(c) of the Family Law (Divorce) Act 1996, the Irish court is mandated to ensure that proper provision exists, or will be made for the spouses and any dependent members of the family. It should be remembered that the requirement of proper provision must be in place to the satisfaction of the court, prior to the granting of the divorce decree. The court cannot decide to grant the decree first and then examine the issue of ancillary financial reliefs, but the court need not ensure that the provision exists at the time of the making of the decree, if it is satisfied that it will be in place in the future. The reference to 'all the circumstances' in section 5(1)(c) means that a subjective view will be taken of each family's situation and there are no standards or guidelines in place as to what constitutes proper provision in general.

If proper provision does not exist at the time of the application for the divorce decree, it is probable that it will be brought about by the court by way of orders for ancillary relief. If a court is not satisfied as to proper provision, it may re-examine and amend previous agreements or orders, regardless of whether these were operating to the satisfaction of the parties or not. This is one of the most controversial aspects of the Family Law (Divorce) Act 1996. The power of the court to refuse to grant a decree of divorce unless satisfied with the terms of the orders agreed, or being proposed, has led to practical difficulties, with some judges adopting an interventionist approach despite agreement of the parties to future financial arrangements. Difficulties also arise in that regard for practitioners who may have participated in settlement negotiations on behalf of their clients and considered the resulting heads of agreement to be worthy of recommendation to their client. Confidence in hard-fought terms of agreement may then be eroded by the refusal of the judge to make the order. It would appear in such circumstances that there is little option but to renegotiate the terms, not always a welcome proposal for at least one of the parties.

Whether proper financial provision has or has not been made in a particular case will be determined by reference to the provisions of section 20 of the Family Law (Divorce) Act 1996. This section sets out in detail the matters to which the court shall have regard in deciding whether to make orders for ancillary reliefs. Doubtless, the same matters will be considered by the court in deciding on the issue of

'proper provision'. The status of a subsisting separation agreement and court orders will be of relevance in deciding the status of the existing 'proper provision', and these can be revisited and reviewed to obtain the desired result.

In summary, by virtue of section 5(1)(c) of the Family Law (Divorce) Act 1996, the Irish court has the power to refuse to grant a decree of divorce in circumstances where it is not satisfied that proper financial arrangements have been put in place to ensure that the spouses and dependent family members have been catered for. This can have very practical consequences for parties who have arrived at an agreement, insofar as the court has the jurisdiction vested in it by section 5(1)(c) to interfere with a hard-fought settlement.

(b) The divorce application will not be rejected or postponed even if the respondent can show that he/she lives in a community in which social and religious attitudes and conventions are such that granting the decree of divorce would make him/her an outcast, so long as the three requirements set out in section 5(1) of the Family Law (Divorce) Act 1996 have been made out.

III. Multiple grounds for divorce

A number of questions in Part III have some relevance to the Irish divorce regime. Answers will therefore be furnished in respect of these questions, notwithstanding the furnished instructions.

1. Divorce by consent

22. Does divorce by consent exist as an autonomous ground for divorce, or is it based on the ground of irretrievable breakdown?

Divorce by consent under Rule 10.G of the Circuit Court Rules 2001[47] is based on the ground of irretrievable breakdown.

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[47] S.I. No. 510 of 2001.

23. Do both spouses need to apply for a divorce together, and if not, how do the divorce proceedings vary according to whether one or both spouses apply for a divorce?

See Question 28.

24. Is a period of separation required before filing the divorce papers?

See Question 14.

25. Is it necessary that the marriage was of a certain duration?

See Question 13.

26. Is a minimum age of the spouses required?

No. That said, section 2(2)(c) of the Family Law (Divorce) Act 1996 provides that a 'spouse includes a reference to a person who is a party to a marriage that has been dissolved under [the Divorce] Act'. With effect from August 1, 1996, the parties to an Irish marriage must be at least eighteen years old.[48] This minimum age applies firstly, to all marriages celebrated within Ireland and in addition, to all marriages wherever celebrated where both parties are, or either party, at the time of the marriage, is ordinarily resident in Ireland. Subject to section 33 of the Family Law Act 1995, a marriage contracted in contravention of the minimum age requirement will be null and void from the date of its apparent inception.[49] It is not possible to obtain a divorce decree in respect of a void marriage.

27. Are attempts at conciliation, information meetings or mediation attempts required?

See Question 17.

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[48] Section 31 of the Family Law Act 1995.
[49] Section 31(1)(a)(i) and 31(1)(c).

28. What (formal) procedure is required? (e.g. How many times do the spouses need to appear before the competent authority?)

In the Circuit Family Court there is a specific 'fast track' divorce by consent procedure where the parties are either in agreement as to the ancillary financial relief being sought on divorce, or where no ancillary financial relief is claimed. The case may be brought before the County Registrar[50] by either:

- a motion for Judgement by Consent, attaching a 'Consent Defence' filed by the other spouse or his or her solicitor and seeking that the case be listed for trial as a 'consent matter'; or
- a motion for Judgement in Default of Appearance; or
- a motion for Judgement in Default of Defence.

The latter situations were designed to facilitate an application to compel the other party to file appropriate court papers such as an appearance, defence, affidavit of means or an affidavit of welfare. They can also be used, however, where the respondent is either unrepresented or does not wish to go to the expense of filing a Consent Defence. In practice, a letter from the respondent indicating that he/she is happy for the matter to proceed to trial as an uncontested issue, in terms of the ancillary reliefs sought, is normally required by the County Registrar.

The High Court rules do not provide a specific procedure for the ruling of a divorce where the parties have agreed the ancillary financial issues.[51] It is possible, however, to either:

- close the pleadings, and apply to the Master of the High Court to transfer the case into a list of cases ready for trial on the basis that it is a short matter where the ancillary financial reliefs are not at issue, or
- bring a motion pursuant to Rule 12, seeking that the matter be listed for trial on the basis that the ancillary financial reliefs are not at issue.

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[50] The County Registrar is an administrative court official with authority to deal with pre-trial issues and directions, such as service issues and discovery issues.

[51] Rules of the Superior Courts (No. 3) of 1997, Order 70A, Rule 19.

It would be most unusual to commence a divorce application in the High Court where no ancillary financial relief is claimed in the context of the divorce.[52]

29. Do the spouses need to reach an agreement or to make a proposal, or may the competent authority determine the consequences of the divorce?

Even where the parties reach an agreement on all of the issues, the Irish court has a duty to ensure that proper provision exists, or will be put in place for the divorcing parties and any dependent members of the family. [53] See also Question 19.

30. If they need to reach an agreement, does it need to be exhaustive or is a partial agreement sufficient? On what subjects should it be, and when should this agreement be reached?

Divorce by consent under Rule 10.G of the Circuit Court Rules 2001[54] may only be availed of where all ancillary relief issues are agreed. See Question 28.

31. To what extent must the competent authority scrutinize the reached agreement?

See Question 20.

32. Is it possible to convert divorce proceedings, initiated on another ground, to proceedings on the ground of mutual consent, or must new proceedings be commenced? Or, vice versa, is it possible to convert divorce proceedings on the ground of mutual consent, to proceedings based on other grounds?

This is not directly applicable. That said, contested divorce proceedings in Ireland can be compromised and put into a consent day for ruling in either the Circuit Family Court or the High Court and vice versa.

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[52] See further the answer to question 10.
[53] Section 5(1)(c) of the Family Law (Divorce) Act 1996.
[54] S.I. No. 510 of 2001.

C. SPOUSAL MAINTENANCE AFTER DIVORCE

I. General

55. What is the current source of private law for maintenance of spouses after divorce?

The common law duty of spouses to maintain one another is preserved in every family law statute in Ireland and survives throughout, and after the termination of, the marital relationship. This duty can be enforced whether or not the spouses are residing together or have separated, and it also survives the execution by the parties of a separation agreement, or the granting by a court of an order for judicial separation or divorce. The duty also extends beyond the re-marriage of the maintenance debtor, regardless of any new duties or responsibilities that he/she may acquire. Liability to maintain a former spouse only terminates when the maintenance debtor dies or the claimant spouse re-marries, and even in the case of death, a secured maintenance order, made pursuant to section 13(1)(b) of the Family Law (Divorce) Act 1996, will ensure that the liability continues.

Any order made in respect of maintenance on divorce may be varied pursuant to the provisions of section 22 of the Family Law (Divorce) Act 1996, with the exception of a lump sum payment which is not being paid in installments. The class of person who may make an application under section 22 includes, in the case of the re-marriage of either of the spouses, the new spouse. Before varying any order under section 22, the court must have regard to any change of circumstances which may have occurred, or any new evidence which there may be. In addition to varying or discharging any maintenance order previously made, the court may suspend the operation of an existing maintenance order for a period of time.

56. Give a brief history of the main developments of your private law regarding maintenance of spouses after divorce.

The absence of a 'clean break' in Irish divorce law is evident in the case law that has followed the introduction of divorce in Ireland. In the Circuit Court case of *S.(R.) v S.(R.)*[55] McGuinness J. stated that orders in respect of maintenance are always open to variation, even aside from the provisions contained in the Family Law Acts. Similar sentiments were expressed by Barr J. in *G.H. v E.H.*[56] in refusing an application for a downward variation in maintenance as the respondent's circumstances had not changed since the original order. In *J.D. v D.D.*,[57] McGuinness J. explored in detail the issue of financial provision on marriage breakdown, and considered whether or not a clean break could be provided post judicial separation and divorce. The case involved a 30-year marriage where there were considerable financial resources. McGuinness J. held that no 'clean break' provision could be made when financially re-ordering a broken marriage. The learned judge noted that the Oireachtas had legislated to permit repeated applications to court concerning ancillary relief so that finality could not be achieved:

> [I]t appears to me that by the subsequent enactment of the Family Law Act 1995 and the Family Law (Divorce) Act 1996, the Oireachtas has made it clear that a 'clean break' situation is not to be sought and that, if anything, financial finality is virtually to be prevented … the court, in making virtually any order in regard to finance and property on the breakdown of a marriage, is faced with the situation where finality is not and never can be achieved. [At p. 89].

Following a consideration of the approach of the English courts in cases involving substantial assets and allowing for the fact that consideration of a 'clean break' is not permissible criterion in this jurisdiction, the learned judge stated:

> From the English case law, I would deduce the principle that in the case where there are considerable family assets the court is not limited to providing for the dependent spouses actual

55 (1996) 3 Fam. LJ 92.
56 unreported, High Court, 09.02.1998.
57 [1997] 3 IR 64.

> immediate needs through a periodic maintenance order, but may endeavour, through the making of a lump sum order, to ensure that the applicant will continue into the future to enjoy the lifestyle to which she was accustomed. [At p. 93].

McGuinness J. proceeded to order a lump sum payment of £200,000 to be paid by the husband to the wife. A relevant and instructive recent case is *W v W*,[58] where McKechnie J. awarded the wife a lump sum payment of £4.7million.

57. Have there been proposals to reform your current private law regarding maintenance of spouses after divorce?

No. This is very much to be regretted. The introduction of divorce in Ireland should have involved a reassessment of the basis on which maintenance is paid to former spouses. Consequently, there is a lack of rationale for post-divorce maintenance payments. The manner in which maintenance is awarded on divorce is virtually identical to that contained in the Family Law Act 1995. No new theoretical basis for awarding maintenance was provided.

58. Upon divorce, does the law grant maintenance to the former spouse?

Yes. On the granting of a decree of divorce, or at any time during the lifetime of the former spouse, the Irish court may make one or more orders under section 13 of the Family Law (Divorce) Act 1996. Section 13(1)(a) governs the making of a periodical payments order to the former spouse. Section 13(1)(b) provides similarly for the making of a periodical payments order to a former spouse, but in this case the order made is secured. Section 13(1)(c)(i) empowers the court to make a lump sum order in favour of the former spouse. An order made in respect of maintenance under the Family Law (Divorce) Act 1996 may be varied pursuant to the provisions of section 22 of the Family Law (Divorce) Act 1996, with the exception of a lump sum payment which is not being paid in installments. Before varying any order under section 22, the court must have regard to any change of circumstances which may have occurred, or any new evidence which may have

[58] *Ex tempore* judgment of McKechnie J., delivered on 17.12.2001.

emerged.[59] The criteria set out in section 20 of the Family Law (Divorce) Act 1996 and the principles derived from judicial consideration of them are applied by the court in assessing maintenance upon divorce. The provisions of section 20 act as a guide to the court in ensuring that proper provision is made for the former spouse.

59. Are the rules relating to maintenance upon divorce connected with the rules relating to other post-marital financial consequences, especially to the rules of matrimonial property law? To what extent do the rules of (matrimonial) property law fulfil a function of support?

The calculation of how much maintenance is to be paid in any particular case is ultimately a matter for the court to decide, and each case will stand on its own facts. There is no set formula, either in legislation or case law, as there is in other jurisdictions for determining the amount of maintenance to be paid. The court in each case will attempt to strike a balance in all the circumstances and will also take into account all matters it considers proper. The court is guided in this regard by the provisions of section 20 of the Family Law (Divorce) Act 1996.[60] This section also dictates the court's approach in deciding whether or not to make orders for ancillary reliefs in respect of pensions, property, financial compensation, succession rights, or variations of any of these orders.

The interaction between property and support can be seen in circumstances where a periodical payments order is secured.[61] The court has a wide discretion in deciding whether to order that periodical payments be secured. If it does so, a fund of capital is set aside which can be resorted to if payments are not made as they fall due. This generally comprises stocks and shares vested in trustees but can also comprise property even if it is the liable spouse's sole asset. A secured order has the important advantage of remaining enforceable

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59 For example, the case of *G.H. v E.H.* unreported, High Court, Barr J., 09.02.1998, involved an application for a downward variation in maintenance, which was refused as the respondent's circumstances had not changed since the original order.

60 See section 20(2) (a) to (l).

61 Section 13(1)(b) of the Family Law (Divorce) Act 1996.

even if a spouse disappears or ceases to earn. An unsecured order ceases on the death of the maintenance debtor while a secured order for an indefinite duration will continue for the applicant's lifetime unless varied before the death of the maintenance debtor.

60. Do provisions on the distribution of property or pension rights (including social security expectancies where relevant) have an influence on maintenance after divorce?

As stated in the answer to the previous question, maintenance will be assessed having regard to the total financial resources of the spouses. The actual and likely future income and assets of the parties will be the starting point but the court will also look at potential income including the existence of realisable capital assets. In several Irish cases, maintenance has been set at a level that could only be met by a re-arrangement of capital assets.[62]

In *J.D v D.D.*,[63] McGuinness J., in making proper provision for the applicant, favoured the making of a lump sum order and a periodical payments order, rather than making a property adjustment order.

The factors which a court must have regard to in deciding whether to make a pension adjustment order under section 17 of the Family Law (Divorce) Act 1996 are, as stated previously, set out in section 20 of the same Act. Section 17(23)(b) is of particular importance in addressing the present question in that it requires the court to examine in the first instance the possibility of making proper provision for the applicant spouse on foot of applications for maintenance, property adjustment and financial compensation orders, before considering whether a pension adjustment order should be made.

61. Can compensation (damages) for the divorced spouse be claimed in addition to or instead of maintenance payments? Does maintenance also have the function of compensation?

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[62] See, for example, *B.(S.) v B. (R.)* [1996] 1 FLR 220.

[63] [1997] 3 IR 64.

Compensation for the divorced spouse cannot be claimed in Ireland, either in addition to or instead of maintenance payments. Post divorce maintenance in Ireland does not have the function of compensation. The basis and criteria for awards of maintenance on divorce is need. The maintenance awarded relates to the needs of the applicant spouse and dependent members of the family and the resources of the respondent spouse. As previously stated, the Family Law (Divorce) Act 1996 provides a host of factors at section 20, which must be taken into account by the court when making certain financial relief. Conduct, for example, is one of the factors and must be so serious that it would be unjust to disregard it.[64] In general, the court when fixing the level of maintenance will take into account the financial resources and needs as well as the standard of living, responsibilities and obligations of both parties.

62. Is there only one type of maintenance claim after divorce or are there, according to the type of divorce (e.g. fault, breakdown), several claims of a different nature? If there are different claims explain their bases and extent.

There is only one type of maintenance claim after divorce. See also Questions 58 and 59.

63. Are the divorced spouses obliged to provide information to each other spouse and/or to the competent authority on their income and assets? Is this right to information enforceable? What are the consequences of a spouse's refusal to provide such information?

Rule 17 of the Circuit Court Rules 2001[65] provides that in all divorce cases where there is a claim for financial relief, the parties must file an affidavit of means setting out specified information. An affidavit of means should be based on full and frank discovery of all of the assets, income, benefits-in-kind and emoluments of the persons swearing the

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[64] Section 20(2)(i) provides that the court shall, in deciding whether to make an order under section 13, have regard to: the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it,…

[65] S.I. No 510 of 2001.

affidavit, and should also comprehensively disclose all liabilities, outgoings and pension information.[66]

Where there is a refusal to provide the financial information sought, an application may be made to the court by any person having an interest in the matter, and the court may direct compliance or order discovery, with the likelihood of the defaulting party being penalised in costs.

Parties are required to disclose only such particulars of their property and income as may reasonably be required for the purpose of the proceedings. While it is incumbent on the parties to provide the court with a full and accurate financial picture, an over-zealous quest for information may not be warranted in terms of the delays and costs involved. The potential for spiralling costs and delay involved in repeated applications to court for further information has been the subject of judicial comment in *E.P. v C.P.*[67]

II. Conditions under which maintenance is paid

64. Do general conditions such as a lack of means and ability to pay suffice for a general maintenance grant or do you need specific conditions such as age, illness, duration of the marriage and the rising of children? Please explain.

Need or proper provision is the basis for post-divorce payments in Ireland. The calculation of what constitutes appropriate maintenance in each case is ultimately left to the court to decide. In attempting to strike the proper balance, a court will take into account all the circumstances it considers proper. Section 20(2)(a) to (l) of the Family Law (Divorce) Act 1996 provides a non-exhaustive list of criteria to be taken into account by the court when deciding whether to make a maintenance order. Such factors include:

- actual and potential financial resources;
- financial needs, obligations and responsibilities;

[66] See *L.(J.) v L.(J.)* [1996] 1 Fam. LJ 1, *F. v F.* unreported, High Court, 02.12.1999, *A.K. v P.K.* unreported, High Court, 13.03.2000 and *P.O'D. v J.O'D.* unreported, High Court, 31.03.2000.

[67] unreported, High Court, McGuinness J., 27.11.1998.

- standard of living;
- age of spouses and the length of the marriage;
- disability;
- spousal contributions;
- earning capacity;
- statutory entitlements;
- conduct;
- accommodation needs;
- future loses; and
- third party rights.

Ultimately, whatever maintenance order is made by the court, section 20(1) of the Family Law (Divorce) Act 1996 requires the court to endeavour to ensure that such provision is made for each spouse concerned and for any dependent member of the family as is proper, having regard to all of the circumstances of the case. There is no ceiling on what constitutes proper maintenance in cases where more than the minimum reasonable requirements of the dependents can be met by the liable spouse. For example, in *McA. v McA.*,[68] McCracken J. ordered periodic payments in the amount of £4,500 per month together with a lump sum payment of £300,000.

Despite the extensive factors contained in section 20 of the Family Law (Divorce) Act 1996, no practical formula exists to provide a basis on which post-divorce maintenance can be paid. The failure of the Irish legislature to provide any system for the calculation of maintenance allows absolute judicial discretion to be applied in every situation, and not merely divorce cases. In the Report of the Joint Oireachtas Committee on Marriage Breakdown, the Committee expressed concern at evidence of 'judicial inconsistency in administering the law in the area of maintenance'. Furthermore, the Committee emphasised the importance of 'uniform judicial interpretation' as to the level of such awards. However, despite this criticism, no means of attaining judicial consistency by way of agreed formula was proposed.

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[68] [2000] 2 ILRM 48.

An order for periodical payments made pursuant to the Family Law (Divorce) Act 1996 means, that although the union of the parties is no longer recognised, the ongoing obligation to maintain a spouse results in an undeniable link remaining between the parties. The obligation to maintain a spouse after the granting of a decree of divorce is governed by legislation that effectively mirrors the pre-existing provisions governing maintenance granted with a judicial separation. Thus, although the marriage is deemed to be no longer in existence, no corresponding alteration has been made to the law governing the ancillary relief of maintenance. The failure of the legislature, upon the introduction of divorce, to reassess the basis on which maintenance is paid to former spouses shows a lack of rationale for post-divorce payments in Ireland.

65. To what extent does maintenance depend on reproachable behaviour or fault on the part of the debtor during the marriage?

The court has a wide discretion in determining what is 'proper' maintenance in a divorce case. In deciding whether to make a maintenance order and, if so, the amount to be paid, the court is required to have regard to the factors set out in section 20(2) of the Family Law (Divorce) Act 1996. Section 20(2)(i) requires the court to take account of:

> the conduct of each of the spouses if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it.

Therefore, what is deemed to be proper maintenance in the circumstances may be affected by the conduct of the parties. However, the court in assessing maintenance is not, *prima facie*, concerned with matrimonial misdemeanors and will consider conduct relevant only if it is of such a nature that it would be repugnant to justice to ignore it. In the case of *E.M. v W.M.*,[69] McGuinness J. considered that the respondent husband's behaviour was relevant to her decision. A relevant and instructive recent case is *T. v T.*,[70] where it would appear

[69] [1994] 3 Fam. LJ 93.
[70] unreported, High Court, 28.11.2001.

that a significant factor in the reordering of the pension was the conduct of the parties.

Considerations of conduct are rarely relevant in practice. In most divorce cases it is recognised that neither party is entirely blameless so that conduct will only be relevant as a determining factor where there is some imbalance in the conduct between the spouses.

66. Is it relevant whether the lack of means has been caused by the marriage (e.g. if one of the spouses has give up his or her work during the marriage)?

The long-term financial consequences of marriage and childcare responsibilities on earning capacity by way of career interruptions, part-time working, loss of promotion opportunities and fringe benefits, especially pension entitlements, are compensatable under the criteria set down in section 20(2) of the Family Law (Divorce) Act 1996 in the context of marital asset distribution upon divorce. Section 20(2)(f) of the Family Law (Divorce) Act 1996 requires the court to have regard to:

> the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family.

The foregoing provision, which gives credit to a non-earning spouse, is a relatively new concept in Ireland, with its origin in the Irish Judicial Separation and Family Law Reform Act 1989. The High Court case of *J.D. v D.D.*[71] is an excellent example of a scenario where the applicant wife remained in the family home to rear the children and provide for the respondent husband while he worked outside the home. McGuinness J. ordered '…a reasonably equal division of the accumulated assets…' as the application followed a 30-year marriage.

71 [1997] 3 IR 64.

The learned judge noted the husband's long-term acceptance of their respective traditional roles as financial provider and homemaker.

Section 20(2)(g) of the Family Law (Divorce) Act 1996 requires the court to take account of:

> the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family.

This provision clearly authorises the court, in making ancillary orders, to take cognisance of, and to compensate accordingly, a spouse's past and future earnings lost due to his or her assumption of marital and domestic responsibilities.

67. Must the claimant's lack of means exist at the moment of divorce or at another specific time?

No. In Ireland, the statutory liability of spouses to maintain one another exists during the marriage relationship and beyond. The liability persists irrespective of whether the parties cease to be spouses following a divorce. Indeed, the liability to a claimant spouse will continue even if the maintenance debtor remarries and is liable for the support of a new spouse and dependent children. A maintenance debtor will only cease to be liable for the support of the claimant spouse when he/she dies or the claimant spouse remarries. The liability may even survive the death of the maintenance debtor by means of a secured maintenance order where the order is made pursuant to section 13(1)(b) of the Family Law (Divorce) Act 1996. In summary, the statutory provisions for maintenance in Ireland are totally opposed to the concept of a 'clean break'.[72]

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[72] See *J.D. v D.D.* [1997] 3 IR 64.

III. Content and extent of the maintenance claim

68. Can maintenance be claimed for a limited time-period only or may the claim exist over a long period of time, maybe even lifelong?

The only circumstances in which maintenance obligations between the spouses will terminate with no possibility of resurrection is on the death of either spouse or on the re-marriage of the claimant spouse. Indeed, a former spouse is not precluded under the Family Law (Divorce) Act 1996 from seeking a lump sum order on his or her remarriage. That said, such an order would only be granted in exceptional circumstances, with the court taking all the circumstances into account. This situation whereby a former re-married spouse can virtually always seek the payment of a lump sum presents significant difficulties for lottery winners or persons who have made significant gains in the stock or property markets, and is a striking example of how a 'clean break' situation is difficult to achieve in Ireland.

The issue of whether or not a clean break, in respect of maintenance, is facilitated by Irish divorce legislation was addressed by McGuinness J. in *J.D. v D.D.*[73] The learned judge noted that no clean break provision could be made when financially re-ordering a broken marriage. She noted that the Oireachtas had legislated to permit repeated applications to court concerning ancillary relief so that finality could not be achieved. Specific reference to this case was made by White J. in *B.S. v J.S.*[74] The decision of *J.D. v D.D.* was followed, with the court reiterating the comments of McGuinness J. that the Irish statutory policy was totally opposed to the concept of a 'clean break' between spouses upon separation or divorce. Recently in *K. v K.*,[75] McGuinness J. stated:

> 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. [At p. 16].

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[73] [1997] 3 IR 64.
[74] unreported, Circuit Court (Western Circuit), 05.02.1999.
[75] unreported, Supreme Court, 06.11.2001.

See also Question 67.

69. Is the amount of the maintenance granted determined according to the standard of living during the marriage or according to, e.g. essential needs?

The maintenance granted is determined according to the standard of living during the marriage and not according to essential needs. Section 20(2)(c) of the Family Law (Divorce) Act 1996 refers to:

> the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be.

This subsection allows the court to ensure that the dependent spouse of a wealthy person will not necessarily lose his or her financial status and can, despite the departure of the affluent spouse, be adequately provided for and continue to enjoy an affluent lifestyle. In *J.D. v D.D.*[76] McGuinness J stated:

> [T]he court is not limited to providing for the dependant spouses actual immediate needs through a periodic maintenance order, but may endeavour, through the making of a lump sum order, to ensure that the applicant will continue into the future to enjoy the lifestyle to which she was accustomed…I will therefore order the payment of a lump sum by way of maintenance of £200,000 by the husband to the wife…

The lump sum order granted was in addition to a periodical maintenance order of £20,000 per annum. This award of maintenance was made in the context of judicial separation proceedings but in her analysis of the principles applicable the learned judge referred to the breakdown of marriage and made no distinction between maintenance payable under the Family Law Act 1995 or the Family Law (Divorce) Act 1996. In a further case, *G.H. v E.H.*,[77] Barr J. confirmed the

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76 [1997] 3 IR 64.
77 unreported, High Court, 09.02.1998.

applicant's 'right to a reasonable lifestyle commensurate with that available to the respondent'.[78]

70. How is maintenance calculated? Are there rules relating to percentages or fractional shares according to which the ex-spouses' income is divided? Is there a model prescribed by law or competent authority practice?

The court, in calculating maintenance, is required to have regard to the factors outlined in section 20(2)(a) to (l) of the Family Law (Divorce) Act 1996. These factors apply to the needs and circumstances of the claimant and respondent spouse. In addition, section 20(4)(a) to (g) provides a non-exhaustive list of factors to be considered by the court when deciding to order a maintenance award in favour of any dependent members of the family. Whatever maintenance award is directed by the court, section 20(1) requires consideration to be given to proper provision in the light of the factors set down in section 20 of the Family Law (Divorce) Act 1996. Despite the extensive factors in the Family Law (Divorce) Act 1996, no set of rules or formulae exist exclusively for the calculation of maintenance. The failure of the Irish legislature to provide any system for the calculation of maintenance allows absolute discretion to be applied in determining the maintenance to be awarded in every situation. The recent introduction of divorce in Ireland should have involved a reassessment of the basis on which maintenance is paid to former spouses. See also Question 65.

71. What costs other than the normal costs of life may be demanded by the claimant? (e.g. Necessary further professional qualifications? Costs of health insurance? Costs of insurance for age or disability?)

The financial needs, obligations and responsibilities of each of the spouses are issues that the court will take into account in applying section 20 of the Family Law (Divorce) Act 1996. If the dependent ex-spouse has a debt in respect of further professional qualifications, this debt could be discharged. Health insurance would be acknowledged as reasonable outlay, as well as other forms of insurance. The ability of

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[78] See also *McA. v McA.* [2000] 2 ILRM 48, where the High Court, in granting a divorce, directed maintenance in the sum of £4,500 per month and a further lump sum of £300,000.

the paying spouse to pay is very relevant in assessing whether the foregoing costs will be awarded. For example, the court must take the paying spouse's needs and obligations into account. Indeed, the Irish courts have commented that one of the practical realities of divorce, in particular where the parties are of limited or average means, is that both parties will inevitably face a reduction in living standards following the grant of the decree.

72. Is there a maximum limit to the maintenance that can be ordered?

No.

73. Does the law provide for a reduction in the level of maintenance after a certain time?

No.

74. In which way is the maintenance to be paid (periodical payments? payment in kind? lump sum?)?

Section 13 of the Family Law (Divorce) Act 1996 allows for the making of periodical payments orders, secured periodical payments orders and lump sum orders. The orders may be made either at the time the decree is granted, or at any subsequent time. The application for relief may be made by either of the spouses, or by someone on behalf of a dependent member of the family. An order may be made for either a periodical payment, or lump sum, or both. A secured periodical payments order (and these are relatively rare in Ireland) provides that the payments may be secured, for example, to a particular bank account, or to rental income from property.

Section 13(2) of the Family Law (Divorce) Act 1996 directs that a lump sum order may be ordered to reimburse a spouse or dependent family member who has incurred expenses prior to the making of the application, for example, for expenses incurred while maintenance was not being paid. Section 13(3) directs that a lump sum may be paid by way of instalments, secured or otherwise.

Periodical payments orders will cease on the death of the payee.[79] They will also cease on the re-marriage of the payee. No maintenance order under the Family Law (Divorce) Act 1996 will be made in respect of a spouse who has re-married.[80] Section 13 also makes provision for attachment of earnings orders, and for variation of those orders under section 22 of the Family Law (Divorce) Act 1996 if necessary.

75. Is the lump sum prescribed by law, can it be imposed by a court order or may the claimant or the debtor opt for such a payment?

The lump sum is not prescribed by law nor can the claimant or the debtor opt for it. Section 13(1)(c) of the Family Law (Divorce) Act 1996 empowers the court to order either spouse to make a lump sum payment to the other spouse under the terms as specified in the order for the benefit of the recipient spouse, or a dependent member of the family, allowing the court flexibility to deal with a variety of situations. It takes into account the practical difficulties of raising a large sum immediately and allows the court to order the lump sum payment to be made at various times and in varying amounts. In addition, the court can also require such instalment payments to be secured. Where a lump sum is paid by way of instalments, tax benefits arise for the paying spouse, because stage payments are tax deductible. The type of lump sum order made by the court is dependent on the particular circumstances of the case. A lump sum may be ordered to finance future purchases such as a home, to discharge outstanding debts and liabilities or to reimburse a spouse for specific expenditure. In addition, section 13(2)(a) empowers the court to make a lump sum order in respect of expenses already reasonably incurred prior to the making of an application under section 13. For example, in *J.C. v C.C.,*[81] Barr J. ordered the husband to pay a lump sum of £15,500 to his wife in respect of money unfairly withheld during the marriage. The lump sum related, *inter alia*, to money already spent by the wife on the maintenance and improvement of the family home and on health care for a dependent son subsequent to the

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79 S.13(4) of the Family Law (Divorce) Act 1996.

80 S.13(5) of the Family Law (Divorce) Act 1996.

81 [1994] 1 Fam. LJ.

breakdown of the marriage. In *E.P. v C.P.,*[82] McGuinness J. demonstrated the court's power to make a lump sum order. In so doing, the learned judge acknowledged that although a lump sum of maintenance was desirable for the children, sufficient funds were not available to allow for this. In the circumstances, McGuinness J. ordered the payment of arrears in the sum of £10,000 together with the sum of £30,000 to cover maintenance for the children for a period of four years and thereafter the applicant could apply for further maintenance. This order was made by the court in light of the history of non-payment of maintenance by the respondent husband. Clearly, in such circumstances, McGuinness J. considered the likelihood of the respondent falling into arrears if a periodical payments order was made. In *P.P. v A.P.,*[83] McCracken J. in determining the amount of the lump sum to be paid to the wife took into account the fact that the maintenance payments would be cut back within a few years because of the husband's intention to cut back on his work due to his health problems.

76. Is there an (automatic) indexation of maintenance?

No. On consent the parties may opt for consumer price indexation by reference to the annual change in the index which is produced by the Central Statistics Office of the Government of the Republic of Ireland annually. Thus, routine upward adjustment of maintenance can be linked to this, or alternatively, the parties may, in addition, review the maintenance by reference to the level of increase in the salary of the paying ex-spouse. Either party may apply to the court to adjust the maintenance upwards or downwards. It is not possible for the parties to remit the issue of spousal maintenance to the local District Court, as the legislation applicable there only relates to 'spouses'. In any event, maintenance fixed in the District Family Court has a fixed monetary ceiling.

77. How can the amount of maintenance be adjusted to changed circumstances?

[82] unreported, High Court, 27.11.1998.
[83] unreported, High Court, 14.12.1999.

Any order made in respect of maintenance may be varied pursuant to the provisions of section 22 of the Family Law (Divorce) Act 1996, with the exception of a lump sum payment which is not being paid in instalments. Before varying any order under section 22, the Irish court must have regard to any change of circumstances which may have occurred, or any new evidence which there may be. In *G.H. v E.H.*,[84] for example, an application for a downward variation in maintenance was refused, as the respondent's circumstances had not changed since the original order. An application for a downward variation in maintenance may not succeed where the maintenance debtor is in financial difficulties but has capital assets to which recourse could be had to improve his finances. In *B. v B.*,[85] a variation application was refused on the basis that the applicant husband had failed to implement a sensible investment policy and had the means at his disposal to improve his financial position.

In addition to varying or discharging a maintenance order previously made, the amount of maintenance awarded can be adjusted to reflect changed circumstances by suspending the operation of the original maintenance order for a period of time. This might arise due to the existence of a new financial obligation, e.g. the liability to maintain the child of a new relationship.

IV. Details of calculating maintenance: Financial capacity of the debtor

78. Do special rules exist according to which the debtor may always retain a certain amount even if this means that he or she will not fully fulfill his maintenance obligations?

Yes, in that the most important consideration when determining a maintenance award in Ireland is the actual ability of the respondent to pay the maintenance. The Irish courts have said the object is not to make the respondent destitute (if for no other reason, that he or she may give up his or her job). Consequently, there is a minimum

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[84] unreported, High Court, 09.02.1998.
[85] unreported, High Court, 03.1989.

protected earnings level. Therefore, in respect of low-income families, the subsistence level approach has been adopted. This approach ensures that the effect of a maintenance order in favour of a dependent ex-spouse is not to depress the paying ex-spouse below subsistence levels. Under this approach, the Irish court calculates the net available income of the paying ex-spouse and considers the effect of the proposed maintenance order on his or her ability to meet his or her own living expenses. In so doing, the court compares the sum the paying spouse would receive if in receipt of supplementary benefit to ensure that he or she is not left below that figure.

79. To what extent, if at all, is an increase of the debtor's income a) since the divorce, b) since the divorce, taken into account when calculating the maintenance claim?

An increase in the debtor's income since the separation or divorce will be taken into account when considering variation of the maintenance claim. Section 20(3) of the Family Law (Divorce) Act 1996 requires the Irish courts to 'have regard to the terms of any separation agreement' when determining maintenance on divorce. In the Circuit Court case of *S.(R.) v S.(R.)*,[86] McGuinness J. stated that orders in respect of maintenance are always open to variation. Similar sentiments were expressed by Barr J. in the case of *G.H. v E.H.*[87] Variation will be considered having regard to any change of circumstances which may have occurred, or any new evidence which there may be.

80. How far do debts affect the debtor's liability to pay maintenance?

Legitimate debts will be taken into account, however, they will not necessarily rank in priority. The court has a large measure of discretion, and each situation is judged on its own facts and merits.

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[86] (1996) 3 Fam. LJ 92.
[87] unreported, High Court, 09.02.1998.

81. Can the debtor only rely on his or her other legal obligations or can he or she also rely on his or her moral obligations in respect of other persons, e.g. a de facto partner or a stepchild?

The Irish High Court considered this issue in *M.McG. v D.McG.*,[88] and held that the court should take into account the fact that the husband had set up home on a permanent basis with another partner. The High Court therefore acted 'on the basis of what is factual' and took into account the fact that 'the level of the husband's expenses after tax is less than it might otherwise be'. In *J.C.N. v R.T.N.*,[89] McGuinness J. took cognisance of the husband's commitments to his partner and the two dependent children of their relationship. In particular, the court noted that the husband had built up the pension scheme after separating from his wife 'with a view to a pension being paid to his present partner'.

82. Can the debtor be asked to use his or her capital assets in order to fulfil his or her maintenance obligations?

The capital assets of the debtor may be taken into account in assessing maintenance. In several Irish cases, maintenance has been set at a level that could only be met by a re-arrangement of capital assets. For example, in *B.(S.) v B.(R.)*,[90] McGuinness J. took into account the fact that the respondent could substantially reduce the mortgage repayments on his new home, and the fact that he had acquired an expensive car, in assessing what funds might be available to pay maintenance to his wife.

83. Can a 'fictional' income be taken into account where the debtor is refusing possible and reasonable gainful employment or where he or she has deliberately given up such employment?

Yes, earning capacity can be taken into account.

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88 unreported, High Court, 02.1985.
89 unreported, High Court, 15.01.1999.
90 [1996] 1 F.L.R. 220.

84. Does the debtor's social security benefits, which he or she receives or could receive, have to be used for the performance of his or her maintenance obligation? Which kinds of benefits have to be used for this purpose?

Yes, any income or benefits, which either of the spouses is entitled to by or under statute, is taken into account. That said, even where the parties have an order ruled on consent, the Department of Social and Family Affairs can pursue an ex-spouse as a 'liable relative' under the social welfare code seeking to recoup from that ex-spouse any financial support or benefit which it has had to pay to the dependent spouse. In 'consent cases' therefore where capitalised maintenance is agreed with very little periodical maintenance, or indeed, no periodical maintenance, a clause is normally inserted indemnifying the paying spouse from any such repercussions.

85. In respect of the debtor's ability to pay, does the income (means) of his or her new spouse, registered partner or de facto partner have to be taken into account?

Section 20(2)(c) of the Family Law (Divorce) Act 1996 requires the court to take account of 'the rights of any person other than the spouses but including a person to whom either spouse is remarried'. Consequently, any financial resources or assets that become available to the maintenance debtor upon re-marriage must be taken into account by the court when considering his ability to pay maintenance.

Other, non-marital, relationships are different. The better view is that such relationships are taken into account. The Irish High Court stated, in *O?K. v O?K.*,[91] that, in principle:

> Neither the fact that the husband is living in an adulterous association nor the fact that the third party is earning or not earning is a consideration which should be taken into account. The wife should not be entitled to any greater maintenance from her husband because he has the benefit of earnings of a third party with whom he is living, nor should the wife suffer

[91] unreported, High Court, 16.11.1982.

> because the third party with whom her husband is living is not earning and has to be supported by him.

However, in practice, the reality of the situation is that all means available to the parties are taken into account in assessing the maintenance payable. In the case cited above, Barron J., despite the statement of principle to the contrary, proceeded 'as a matter of practicality' to take into account the third party's contribution of £68 per week in assessing the maintenance debtor's overall resources. Interestingly, in *McG. v McG.,*[92] Barron J. stated that third party relationships ought to be considered, but when assessing the debtor's ability to pay, the learned judge seemed to disregard it.

V. Details of calculating maintenance: The claimant's lack of own means

86. In what way will the claimant's own income reduce his or her maintenance claim? Is it relevant whether the income is derived on the one hand, from employment which can be reasonably expected or, on the other hand, from employment which goes beyond what is reasonably expected?

All the financial circumstances of both parties are taken into account when the court decides whether or not to make an order for maintenance. Financial needs and obligations are also taken into account as are the other responsibilities undertaken by the spouses, for example, in relation to childcare. The court has a wide level of discretion, which is referable to section 20 of the Family Law (Divorce) Act 1996.

87. To what extent can the claimant be asked to seek gainful employment before he or she may claim maintenance from the divorced spouse?

A party may not be obliged to seek gainful employment as such. However, orders may be made or withheld which result in that course of action by necessity.

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[92] unreported, High Court, 08.02.1985.

Article 41.2 of the Irish Constitution should be noted in assessing the expectation that the claimant would seek employment. The Supreme Court has clearly stated in *B.L. v M.L.*,[93] that the court should:

> have regard to and exercise its duty under this sub-section of the Constitution in a case where the husband was capable of making proper provision for his wife within the home by refusing to have any regard to a capacity of the wife to earn herself, if she was a mother in addition to a wife and if the obligations so to earn could lead to the neglect of her duties in the home. In other words, maintenance…could and must be set by a court so as to avoid forcing by an economic necessity the wife and mother to labour out of the home to the neglect of her duties in it.

However, where a husband is not 'capable of making proper provision for his wife within the home' different considerations must apply. In *C.P. v D.P.*,[94] the court, while recognising that the earning capacity of a mother of two children aged ten and seven 'is obviously circumscribed by the obligations of looking after two children', nevertheless recognised that:

> there cannot be any long term prospect of this wife and children maintaining even their present moderate standard of living out of the earnings of the husband even if he were prepared to make very substantial sacrifices with regard to his personal expenditure.

The result was a compromise involving the husband in accepting 'a limited standard of living and economic accommodation in order to try and meet the long term financial obligation of maintaining his wife and children' and requiring the wife to make 'realistic, if less pleasant plans towards obtaining worthwhile employment bearing in mind the limitations which are imposed upon that.[95]

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93 [1992] 2 IR 77 at 109.
94 [1983] ILRM 380 at 386.
95 *ibid.* at 387.

In considering whether the claimant is in a position to seek gainful employment, the court will consider his or her skills, qualifications and training as well as details of job opportunities, potential income and related costs including home-help and childcare costs. Much depends on the circumstances of the case and how the judge deciding the case exercises his discretion. In *F.(B). v F.(V.),*[96] for example, Lynch J. was prepared to hold:

> that it is reasonable and proper for the wife at the present time not to seek work outside the home. She provides a home for the three children of the marriage…aged 17 years…15 and a half years and…13 years. That is a full time occupation in itself.

This was, however, a case in which the husband could clearly afford to maintain his family at a level higher than had been awarded in the lower court. A somewhat different approach was taken by Barr J. in *C. v C.,* where a wife's claim for extra maintenance, while recognised by the judge as modest and reasonable in the circumstances, was not fully acceded to as the learned judge took the view that she would not have too much difficulty making up at least a significant part of the desired increase by utilising her qualification as a Montessori teacher. In Barr J.'s view, such employment would be suited to her present circumstances and would not interfere with her duties as a mother.

88. Can the claimant be asked to use his or her capital assets, before he or she may claim maintenance from the divorced spouse?

Yes. Property at the disposal of the claimant may be taken into account as a potential source of income thereby reducing the amount of maintenance payable. In *L. v L.*,[97] for example, the house in which the claimant resided was too large for her needs, and maintenance was fixed at a level which took account of the capital likely to be raised by her selling that house and renting alternative accommodation.

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[96] [1995] Fam. LJ 3.
[97] unreported, High Court, 21.12.1979.

89. When calculating the claimant's income and assets, to what extent are the maintenance obligations of the claimant in relation to third persons (e.g. children from an earlier marriage) taken into account?

The liable relatives provision of the social welfare code[98] enables the state to pursue a 'liable relative' to re-imburse the state in respect of the social welfare benefit payable to the dependant ex-spouse in his own or her own behalf or on behalf of a dependent member of the family.

90. Are there social security benefits (e.g. income support, pensions) the claimant receives which exclude his or her need according to the legal rules and/or court practice? Where does the divorced spouse's duty to maintain rank in relation to the possibility for the claimant to seek social security benefits?

The Social Welfare Act 1996 provides a form of social welfare provision for one-parent families known as the one-parent family allowance. A person who would be a 'qualified parent' but for the fact that such person's marriage has been dissolved by a decree of divorce is regarded under the Act as a qualified parent. A divorced parent who is being fully maintained by his or her ex-spouse will not qualify for the one-parent family allowance. If the divorced spouse is in receipt of maintenance which falls below the rate of the one-parent family allowance, he/she is entitled to receive the allowance but at a reduced rate. Eligibility for the one-parent family allowance requires that the divorced spouse 'makes and continues to make appropriate efforts, in the particular circumstances, to obtain maintenance from the other spouse'. In practice, the Irish Department of Social and Family Affairs only requires court maintenance proceedings to be brought where the claimant divorced spouse should be able to obtain maintenance at a level equal to or greater than the one-parent family allowance.

One of the main advantages of entitlement to the one-parent family allowance is that the payment is guaranteed and the recipient is not left in the precarious position of trying to pursue a reluctant ex-spouse

[98] Section 285 of the Social Welfare Consolidation Act, 1993.

for maintenance. If the divorced spouse is being partially maintained pursuant to a court order made on the granting of the divorce, it is possible to sign the order over to the Department of Social and Family Affairs and claim the full amount of the one-parent family allowance. The allowance may also entitle the recipient to valuable extra benefits such as a medical card, family income supplement, rent and mortgage interest supplement, fuel allowance and butter vouchers.

Section 285 of the Social Welfare Act 1993 provides that a person shall be liable to maintain his spouse and children. This includes a divorced spouse, save in the very limited circumstances previously outlined. Where the Department of Social and Family Affairs or a health board makes a payment to support a claimant, it can recover a contribution from any liable relative of such amount as it deems appropriate. The Social Welfare Act 1993 enables an application to be made to the District Court if the liable relative fails or neglects to make the required contribution. That said, in practice District Court proceedings have never been instituted to compel a liable relative to re-imburse the relevant authority for money paid to a welfare recipient.

VI. Questions of priority of maintenance claims

91. How is the relationship between different maintenance claims determined? Are there rules on the priority of claims?

There are no rules on the priority of claims. Consequently, there is no formal ranking as between the first and second family. All obligations must be taken into account. The criteria set out in section 20 of the Family Law (Divorce) Act 1996 are applied by the court. The provisions in section 20 act as a guide to the court in ensuring that proper provision is made for all the parties. The application of the corresponding provision of the Family Law Act 1995 was considered by McGuinness J. in *J.D. v D.D.*[99] McGuinness J. stated that 'even given these guidelines…the court still has a wide area of discretion, particularly in cases where there are considerable financial assets'.

[99] [1997] 3 IR 64.

92. Does the divorced spouse's claim for maintenance rank ahead of the claim of a new spouse (or registered partner) of the debtor?

For the purposes of a maintenance claim after divorce, the divorced spouse continues to be regarded as a spouse, since there is no 'clean break' under Irish law. McGuinness J. stated the position as follows in *J.D. v D.D.*[100]:

> [I]t appears to me that by the subsequent enactment of the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996, the Oireachtas has made it clear that a 'clean break' situation is not to be sought and that, if anything, financial finality is virtually to be prevented…The court, in making virtually any order in regard to finance and property on the breakdown of a marriage, is faced with the situation where finality is not and never can be achieved…The statutory policy is, therefore, totally opposed to the concept of the 'clean break'.

When fixing maintenance, the court in accordance with section 20(2)(l) of the Family Law (Divorce) Act 1996, can take into account 'the rights of any person other than the spouses but including a person to whom either spouse is remarried'. Consequently, if the maintenance debtor re-marries, and his or her second spouse seeks maintenance, the maintenance payable to the former spouse and children must be taken into account in assessing his or her income. In reality, on a contested application by a second spouse, his or her claim is reduced by existing obligations.

93. Does the claim of a child of the debtor, if that child has not yet come of age, rank ahead of the claim of a divorced spouse?

No. That said, the maintenance available to a divorced spouse may be reduced by her former spouse's financial obligations to a non-marital child and to the child's mother as care giver of the child. The statement of principle by Barron J. in *O'K. v O'K.*, to the effect that the wife should not suffer 'because the third party with whom her husband is living is not earning and has to be supported by him'[101] may require

[100] *ibid*. at 89.

[101] unreported, High Court, 16.11.1982 at 6.

modification in a situation where the third party is not earning due to childcare commitments to the former spouse's child. The decision of McGuinness J. in *E.P. v C.P.*,[102] highlights the importance attached by the court to the needs of the children of the marriage. There, the court ordered that the family home was to be transferred to the applicant wife, as the security and welfare of the children and their need for a secure home was the most important aspect of the case. Thus, the various needs of any dependent member of the family must be considered by the court prior to the making of any order for ancillary relief on application for a decree of divorce.

94. What is the position if that child has reached the age of majority?

By virtue of section 5(1)(c) of the Family Law (Divorce) Act 1996, before a divorce is granted, the court must be satisfied that 'such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family'. As previously mentioned, the definition of a 'dependent member of the family' includes children up to a maximum of 23 years (whilst still undergoing a full-time course of education). It would seem, however, that if an application is made for a decree of divorce pursuant to the provisions of the Constitution, the court will have to satisfy itself that the welfare of all of the children, regardless of age, is protected. The High Court in *R.C. v C.C.*,[103] stated that the court derived its jurisdiction to grant a divorce decree from the Constitution and not from the Family Law (Divorce) Act 1996. In the course of his judgment, Barron J. stated:

> While I do not purport to determine that non-dependent children should necessarily have provision made for them, I am satisfied in the particular circumstances of the present case it is proper that certainly the two daughters of the marriage should have provision made for them in the interests of the family as a whole.

[102] unreported, High Court, 27.11.1998.
[103] [1997] 1 ILRM 401.

In this case, both daughters were over the age of 23 and in employment. There was no evidence that either of the children had any special needs or any special requirements for their welfare. The court, however, felt that it had to satisfy itself that proper provision had been made for them in any event.

95. Does the divorced spouse's claim for maintenance rank ahead of the claims of other relatives of the debtor?

Yes.

96. What effect, if any, does the duty of relatives or other relations of the claimant to maintain him or her have on the ex-spouse's duty to maintain him or her?

Section 20(2)(h) of the Family Law (Divorce) Act 1996 requires the benefits arising from the duty of relatives or other relations of the claimant to maintain to be taken into account when fixing maintenance. This section refers to 'any income or benefits to which either of the spouses is entitled' and requires the court to take such payments into account.

In order to ensure the making of a fair and appropriate periodical payments or lump sum order, the court is obliged to take all income which is received by both parties into account. This includes all benefit payments. It is likely to be relevant in cases where the parties to the proceedings are of limited means.

VII. Limitations and end of the maintenance obligation

97. Is the maintenance claim extinguished upon the claimant's remarriage or entering into a registered partnership? If so: may the claim revive under certain conditions?

The only circumstance in which the Irish claimant's maintenance claim will terminate with no possibility of resurrection is on his or her re-marriage. That said, if a spouse in whose favour a maintenance order is made re-marries, then that order will only cease to have effect insofar as the remarried spouse is concerned, but not insofar as any

dependent family members are concerned. Ireland does not have a registered partnership system.

98. Are there rules according to which maintenance may be denied or reduced if the claimant enters into an informal long-term relationship with another person?

No. However, the fact that the claimant's partner in the informal long-term relationship has means, may be considered by the court in assessing the maintenance to be awarded to the claimant. The Irish courts have adopted different approaches on this issue. In *O'K. v O'K.,*[104] the High Court stated that the income of a claimant's partner should not be considered, but when fixing the amount of maintenance the court appeared to do just that. In *McG v McG,*[105] the High Court stated that such relationships should be considered, but when setting the amount of maintenance the court seemed to disregard it. In practice, the reality of the situation is that all the means available to the parties are taken into account by the court in assessing the maintenance payable.

99. Can the maintenance claim be denied because the marriage was of short duration?

No. However, section 20(2)(d) of the Family Law (Divorce) Act 1996 requires the court to consider the duration of the marriage. In *C.O'R. v M.O'R.,*[106] the High Court cited as a significant factor the fact that the marriage had only lasted three and a half years. The time during which the spouses cohabited, both prior to and during the marriage, is very relevant to a court when deciding what, if any, maintenance should be awarded. In respect of the duration of the marriage, it is likely that an applicant spouse will receive a more substantial payment if the marriage and prior cohabitation (if any) existed for a lengthy period of time.

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[104] unreported, High Court, 16.11.1982.
[105] unreported, High Court, 08.02.1985.
[106] unreported, High Court, 19.09.2000.

100.Can the maintenance claim be denied or reduced for other reasons such as the claimant's conduct during the marriage or the facts in relation to the ground for divorce?

The court, in deciding to make a maintenance order, and if it decides to do so, in determining the amount thereof, is required to take into account 'the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances'[107] be repugnant to justice to disregard it. Considerations of conduct are rarely relevant in practice. The Irish courts now place emphasis on financial circumstances with a view to removing the focus on fault. Courts tend to realise that neither party will be entirely without blame, and will usually only refer to behaviour or conduct if it has caused an imbalance in the relationship between the parties. Clearly, conduct will not be ignored where it would be 'unjust' to do so, as referred to in section 20(2)(i) of the Family Law (Divorce) Act 1996. The approach required by section 20 is that *prima facie* the conduct of the parties is not relevant. Conduct, which it would be repugnant to justice to ignore, is relevant. However, it is only one of the circumstances to be taken into account along with other relevant considerations set out in section 20 of the Family Law (Divorce) Act 1996. The onus is on the spouse who wishes to raise conduct as an issue to establish that it would be repugnant to justice to ignore it. Even if a spouse proves conduct which should be taken into account, it may not determine the issue of entitlement to maintenance since the other statutory criteria detailed in section 20 of the Family Law (Divorce) Act 1996 must be considered. Section 23 of the Family Law (Divorce) Act 1996 should be noted in this context in that it provides that where a maintenance order is being awarded or varied on behalf of a dependent family member, the issue of the claimant's conduct will not be relevant.

101.Does the maintenance claim end with the death of the debtor?

Liability to maintain a former spouse terminates when the maintenance debtor dies, though even in the case of death, a secured maintenance order, made pursuant to section 13(1)(b) of the Family

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[107] Section 20(2)(i) of the Family Law (Divorce) Act 1996.

Law (Divorce) Act 1996, will ensure that the liability continues for the former spouse's lifetime.

VIII. Maintenance agreements

102.May the spouses (before or after the divorce or during the divorce proceedings) enter into binding agreements on maintenance in the case of (an eventual) divorce?

The statutory liability of spouses to maintain one another exists irrespective of whether the parties enter into a separation agreement, obtain a court order for judicial separation or, in fact, cease to be spouses following a divorce. Section 20(3) of the Family Law (Divorce) Act 1996 only requires the court, in deciding whether to make an order for maintenance on divorce, to have regard to the terms of a maintenance agreement:

> 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.

If the court considers that proper provision for maintenance has been made in the agreement, it may decline further ancillary relief relating to maintenance. If the court is not satisfied with the level of maintenance provided, it will, in exercise of its statutory and constitutional duty, vary or set aside the maintenance agreement and achieve proper provision by way of ancillary relief orders.

103.May a spouse agree to renounce his or her future right to maintenance? If so, are there limits on that agreement's validity?

No, a spouse may not agree to renounce his future right to maintenance. On divorce, the Irish court has a constitutional and statutory duty to ensure that such provision as the court considers proper, having regard to the circumstances, exists or will be made for the spouses and any dependent children of the family. Indeed, the statutory provisions for maintenance in Ireland, with the facility for repeat applications to the court for relief after divorce, are totally

opposed to the concept of a 'clean break'.[108] On the contrary, the Supreme Court in *F. v F.*[109] stated that there could be no finality in relation to maintenance despite the disadvantages of such an approach for parties attempting to reach an agreed settlement and avoid costly court procedures:

> Some issues in family law are not capable of a final order by law, e.g. maintenance.

There can never, therefore, be a clean break in relation to maintenance entitlements or a final settling-up approach on divorce by the payment of a lump sum even if that is what the parties desire and agree to.[110]

104.Is there a prescribed form for such agreements?

No. The matter may be dealt with by a consent agreement, which is generally made a rule of court. There is no specific form for such agreements. That said, maintenance orders should specify the following:

- the total amount of maintenance payable;
- how the maintenance is divisible between the spouse and each dependent child;
- a commencement date for payment of the first payment and the date of payment for each subsequent payment; and
- a method of payment, e.g. directly into the account of the receiving spouse, into court for transmission to the receiving spouse or secured by attachment from the earnings of the paying spouse.

Maintenance consent orders or agreements generally contain the foregoing information for ease of enforcement. The rules of court provide the format for maintenance orders. It should be stated that maintenance agreements may be entered into which are not ruled in court but merely represent a legally binding agreement between the parties.

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108 See *J.D. v D.D.* [1997] 3 IR 64 at 89.
109 [1995] 2 IR 354.
110 *J.D. v D.D.* [1997] 3 IR 64 at 89.

105.Do such agreements need the approval of a competent authority?

No. That said, section 8 of the Family Law (Maintenance of Spouses and Children) Act 1976[111] provides a mechanism whereby a maintenance agreement can be made a rule of court, the primary reason being to facilitate the use of the enforcement mechanisms under that Act. If an agreement is made a rule of court, a contempt application is also available for breach and the defaulting spouse may be attached and committed to prison for contempt. A maintenance agreement that is made a rule of court under section 8 of the 1976 Act is only deemed to be a maintenance order for the purposes of enforcement and not for the purposes of variation. The test for making a maintenance agreement a rule of court is whether it is 'fair and reasonable'.

[111] No. 11 of 1976.