

NATIONAL REPORT: REPUBLIC OF IRELAND

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Republic of Ireland
August 2008

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A. GENERAL

1. Are there special rules concerning the property relationship between spouses (explaining what is meant by spouses)?

If so, briefly indicate the current sources of these rules.

As such, there are no special rules concerning the property relationship between spouses. However, each spouse can hold property separately. There is no Community Property Regime.

The institution of marriage enjoys a privileged position in the Irish constitutional order. In Article 41.3.1 of the Constitution of Ireland 1937 the State "pledges itself to guard with special care the institution of marriage, on which the Family is founded, and to protect it against attack". The term "spouses" is confined to a man and woman who have married each other.

a. upon marriage

b. during marriage

The Irish Family Home Protection Act 1976,¹ which came into force on the 12th of July 1976, provides the non-owning spouse with a power of veto over the sale of the family home. This protection which was afforded to spouses of either sex is contained in S. 3(1) of the 1976 Act and states that without the prior consent in writing of the non-owning spouse, a conveyance shall be void. The protection afforded by the 1976 Act is very wide due to the definition of conveyance in S. 1 of the Act. This includes "a mortgage, lease, assent, transfer, disclaimer, release and any other disposition of property otherwise than by a will or a *donatio mortis causa* and also includes an enforceable agreement, whether conditional or unconditional". Thus, the definition of conveyance includes virtually all inter vivos transactions of any interest² in the family home. In addition to the requirement that the consent be prior consent and in writing, the courts have held that the consent must be informed.³ S. 4 of the 1976 Act provides that the Court where a non-owning spouse omits or refuses to consent may if it considers it unreasonable to withhold consent dispense with such consent.⁴ Such consent cannot be dispensed with retrospectively and thus the court order must be sought before the conveyance is entered into.

It should be noted that a conveyance in favour of a bona fide (i.e. without notice of the fact that it is a family home) purchaser for full value is not void.⁵ Moreover, proceedings to have a conveyance declared void by reason of the absence of consent may not be instituted after 6 years of the date of the conveyance and such a conveyance shall be deemed not to be and never to have been void.⁶

¹ No. 27 of 1976.

² S. 1(1) of the 1976 Act defines interest as "any estate, right, title or other interests, legal or equitable".

³ See *Bank of Ireland v Smyth* [1996] 1 IR 241 and *Allied Irish Bank plc v Finnegan* [1996] 1 ILRM 401.

⁴ See *Hamilton v Hamilton* [1982] IR 466.

⁵ S. 3(3)(a) of the 1976 Act.

⁶ S. 3(8) of the 1976 Act.

c. upon separation

No special rules apply where the parties separate although they are free to enter into a separation agreement setting out their property arrangements which is governed by the rules of contract law. The Irish Family Home Protection Act 1976 provides that each conveyance requires the prior consent of the non-owning spouse. While there was nothing in the 1976 Act to prevent one consent being given for a number of transactions or indeed for all dispositions of the family home the question arose as to whether such general consents could be informed if the non-owning spouses was not aware of the nature of the particular transaction. This issue was resolved by S. 3(9) of the 1976 Act, as inserted by S. 54(1)(b) of the Irish Family Law Act 1995, which allows spouses to give a general consent to sale. The general consent will usually form part of a separation agreement or a separate deed of waiver thus allowing the spouse taking over the family home to deal with the family home at his or her discretion.

A wide discretionary power is vested in the Court pursuant to S. 9 of the Irish Family Law Act 1995 to “adjust” the property rights of spouses on the grant of a judicial separation by reference to a requirement for fairness. This discretion is exercisable having regard to the following statutory criteria:

1. income and financial resources;
2. financial needs;
3. standard of living;
4. age of spouses and length of cohabitation;
5. physical or mental disability;
6. past and future contributions;
7. marital responsibilities;
8. statutory income and benefits;
9. conduct;
10. accommodation needs;
11. loss of future benefits; and
12. rights of other parties.

Various orders are available to the court pursuant to S. 9 (property adjustment orders), S. 10 (special orders in relation to the family home), S. 15 (orders for the sale of property) and S. 18 (variation, discharge orders) of the 1995 Act.

S. 9 of the 1995 Act allows the court on granting a decree of judicial separation or at any time during the lifetime of the respondent spouse to make a property adjustment order. In particular, S. 9(1) grants the court the power to make one or more of the following property adjustment orders:

- (a) the court can order the transfer of property from one spouse to the other spouse, or to any dependent member of the family, or to a third party for the benefit of such a member;
- (b) the court can order the settlement of any property for the benefit of one or both spouses or for any dependent member;
- (c) the court can make an order varying a previously agreed settlement of any property;
- (d) the court can make an order extinguishing or reducing any interest held by either spouse under any such settlement.

Significantly, S. 9(3) of the 1995 Act provides that if either spouse remarries, the court can no longer make an order under S. 9.

S. 10 of the 1995 Act deals with miscellaneous ancillary orders relating to the family home. It allows the court to make an order for the sale of the family home subject to any appropriate conditions. This section also empowers the court to make an order to determine any issue of ownership of property between the spouses.

An order for the sale of property can be made under S. 15 of the 1995 Act. The final aspect of the 1995 Act which relates to the family home is contained in S. 18, which deals with the variation of orders. In relation to the family home, the orders which are open to variation under S. 18 are a property adjustment order or an order relating to the sale of the family home or conferring an exclusive right of residence on one spouse. S. 18 allows the court on application by either spouse, or in the case of the death of either spouse and on application by a person deemed by the court to have a sufficient interest as the court considers proper⁷, having regard to any change of circumstances and any new evidence, to make an order to vary, discharge, temporarily suspend or revive an order to which this section applies. Thus, in changed circumstances, an order granting a spouse sole occupation rights in the family home could be replaced by an order for the sale of the home or the granting to the spouse originally excluded of sole occupation rights in the home. In circumstances where the sale of the family home results in an unexpected substantial increase in net proceeds (because of an original undervaluation), the court may, upon application being made to it, see fit to vary under S. 18 the sum to be received by each spouse. Clearly, no order relating to the family home, except perhaps an order for sale which has already been complied with, can be viewed as being unquestionably final. Even in the case where the family home has already been sold to a third party, the court can use its powers under S. 18 to vary an order in relation to the proceeds of sale.

If the parties have entered into a separation agreement this is a bar to subsequent proceedings for a judicial separation and, more importantly, the ancillary orders available pursuant to the 1995 Act. Keane J, delivering the judgment of the Irish Supreme Court in December 1997, stated that a separation agreement amounts in Irish law to a binding contract and as such is a bar to subsequent proceedings for a judicial separation under the Irish Judicial Separation and Family Law Reform Act 1989.⁸ Citing the dicta of Blayney J. in *F v F*,⁹ Keane J justified the bar not only because the parties to a binding agreement should not be permitted to go behind it, but also because the parties, by agreeing to live separate and apart, had rendered superfluous the granting of a decree of judicial separation.¹⁰

It should be stated that a separation agreement does not act as a bar to divorce proceedings under the Irish Divorce Act since S. 20(3) of that Act merely requires the court in determining what provision should be made for spouses and dependent children in divorce proceedings to have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force.

d. upon death

See Question 6.

e. upon divorce

S. 14 of the Irish Divorce Act allows the court on granting a decree of divorce or at any time during the lifetime of the respondent spouse to make a property adjustment order. S. 14(1)

⁷ Normally a dependent child.

⁸ No. 6 of 1989.

⁹ [1995] 2 IR 354.

¹⁰ See *K v K*, unreported, High Court, O'Neill J, 24.01.2003 ; *WA v MA* [2005] 1 IR 1; and *SMcM v MMcM*, unreported, High Court, Abbott J, 26.11.2006.

restricts the time in which an application can be made under this section to during the lifetime of the respondent spouse. This section grants the court the power to make one or more of the following property adjustment orders:

- (i) the court can order the transfer of property from one spouse to the other spouse, or to any dependent member of the family, or to a specified person for the benefit of such a member;
- (ii) the court can order the settlement of any property for the benefit of one or both of the spouses or for any dependent member;
- (iii) the court can make an order varying any previously agreed settlement of property;
- (iv) the court can make an order extinguishing or reducing any interest held by either spouse under any such settlement.

S. 14 of the Irish Divorce Act permits the court, upon application to it, to make an order, not only at the time of the granting of the decree of divorce but also at any time thereafter. Both spouses retain a right to apply at any time into the future, during the lifetime of the other spouse. S. 14(3) of the Irish Divorce Act, however, provides that if either spouse remarries, the court can no longer make an order under S. 14 in favour of the remarried spouse. Significantly, S. 14(7) prevents the court from applying the provisions of this section to a family home in which, following the decree of divorce either of the spouses concerned, having remarried, ordinarily resides with his or her spouse.

S. 15 of the Irish Divorce Act deals with miscellaneous ancillary orders including orders relating to the family home. S. 15(1)(a)(i) permits the court to make an order conferring on one spouse for life or other period of time the right to occupy the family home to the exclusion of the other spouse. S. 15(1)(a)(ii) allows the court to make an order for the sale of the family home subject to any conditions it considers proper. S. 15(1)(b) introduces a power to the court in relation to the family home, allowing the court to make an order under S. 36 of the Irish Family Law Act 1995 which relates to the determination of any issue of ownership of any property between spouses. S. 15 allows any order to be made by the court on the granting of a decree of divorce or at any time during the lifetime of the other spouse.

S. 19 of the Irish Divorce Act confers jurisdiction on the court upon making a maintenance or property adjustment order to make an order directing the sale of property owned by either or both spouses and sets down the ancillary powers of the court where an order for the sale of property has been made. Essentially, an order for the sale of property can contain whatever provisions the court considers appropriate.

The final aspect of the Irish Divorce Act which relates to the family home is contained in S. 22 of the Irish Divorce Act which deals with the variation of orders made under the Irish Divorce Act. In relation to the family home the orders which are open to variation under S. 22 are a property adjustment order under S. 14, an order under S. 15(1)(a) relating to the sale of the family home and an order under S. 15(1)(a)(i) conferring an exclusive right of residence on one spouse. In summary, no order relating to the family home, except perhaps an order for sale which has already been complied with, can be viewed as being unquestionably final. Even in the case where the family home has already been sold to a third party, the court can use its power under S. 22 to make an order in relation to the proceeds of the sale.

f. upon annulment?

The effects of nullity flow logically from the fact that a marriage that is null and void is deemed in law never to have existed. The "spouses" lose all marital property rights that they might otherwise have enjoyed. They may no longer apply, for example, for the property

ancillary orders described in (e) above. Interestingly, when first published, the Family Law Bill 1994¹¹ proposed that the property ancillary orders now available in proceedings for divorce would also be available where a declaration of nullity is granted. At a late stage in its progress through the Houses of the Oireachtas, however, these proposals were dropped from the Bill. A party to an annulled marriage may, however, be able to establish an equitable interest pursuant to a purchase money resulting trust (discussed below) if he or she has contributed to the purchase price of property which is owned by the other party.

2. Give a brief history of the main developments and most recent reforms of the rules regarding the property relationship between spouses.

It was not until the enactment of the Irish Judicial Separation and Family Law Reform Act 1989¹² that property adjustment orders became available to spouses on marriage breakdown. Prior to that, the only remedies available to mitigate the harshness of the separate property system were equitable ones – the doctrine of proprietary estoppel and the purchase money resulting trust. The purchase money resulting trust proved more popular and the courts resorted to it pursuant to S. 12 of the Irish Married Women’s Status Act 1957¹³ which permitted it to determine ownership disputes arising between spouses. Where the spouse made a recognised contribution to the purchase price of property in the other spouse’s name it would generate an equitable interest in that property proportionate to the amount of the contribution. The remedy, which continues to be the main remedy available to unmarried cohabiting couples, was recognised as being unsuitable to resolve ownership disputes between spouses. For example, it failed to recognise contributions in the form of work in the home¹⁴ or improvements to the property¹⁵. The court when making property adjustment orders on the grant of a judicial separation or a divorce is now directed to take into account the contribution which each spouse has made or is likely to make in the future to the welfare of the family, including contributions to the earning capacity and property of the other spouse and contributions made by looking after the home or caring for the family.

There have been few recent developments in the law governing the property relationship between spouses. In matters of property, the family in Ireland is granted a strong degree of autonomy. In *The Matter of Article 26 and the Matrimonial Home Bill 1993*,¹⁶ the Irish Supreme Court declared unconstitutional a proposed statute purporting to vest the equitable interest in the family home of a couple in both spouses jointly and equally. The remit of the proposed legislation, it should be noted, was confined to the dwelling that the parties shared (together with such land as was attached to and used therewith). “Matrimonial Home” was defined in S. 2 of the proposed legislation as “a dwelling in which a couple ordinarily resided or reside on or at any time after the 25th of June, 1993 as their sole and principal residence”.

The Irish Supreme Court ruled, nonetheless, that this Bill infringed the concept of marital autonomy by imposing on the parties, perhaps contrary to their express wishes, a property arrangement not of their making. In particular, the court argued that certain pre-existing spousal agreements involving the distribution of family property could, if the legislation were put into effect, effectively be undone, thus denying the parties their right to make joint decisions on issues of property ownership. The authority of the family in such cases might be undermined and thus the proposed legislation amounted to a failure to protect and vindicate the rights of the marital family. While the Supreme Court recognised the social advantages of joint ownership, it felt that “the potentially indiscriminate alteration of what must be many

¹¹ This eventually became the Irish Family Law Act 1995 (No. 26 of 1995).

¹² No. 6 of 1989.

¹³ No. 5 of 1957.

¹⁴ *L v L* [1992] 2 IR 77 (HC), (SC).

¹⁵ *NAD v TD* [1985] 5 ILRM 153 (HC).

¹⁶ [1994] 1 IR 305.

joint decisions validly made within the authority of the family”¹⁷ could not be justified by such social advantages.

3. Are there any recent proposals (e.g. parliament, reform bodies, academic community) for reform in this area?

In 2006, a Governmental Study Group (hereinafter referred to as the “Group”) was established to analyse the law in respect of pre-nuptial agreements.¹⁸ The Group concluded that:

“[P]re-nuptial agreements are enforceable and capable of variation under existing Irish statute law. The weight to be attached to an agreement would be determined by the courts in light of the requirement for proper provision and the relevant statutory criteria.”¹⁹

The Group recommended that provision be made for pre-nuptial agreements in the Irish Divorce Act. Specifically it was recommended that a new S. 20(3)(A) be inserted into the Irish Divorce Act. The rationale for this approach was that pre-nuptial agreements ought to be treated in a manner akin to pre-existing separation agreements, but cognisance should be had to the differences between pre-nuptial agreements and separation agreements.²⁰ Importantly, the Group also recommended that a number of procedural safeguards be set down and followed in order for such agreements to be legally recognisable:

1. The agreement should be in written form, signed by both parties and witnessed (although not necessarily by a solicitor);
2. The parties should each have received separate legal advice as to the effect and meaning of the agreement;
3. Each of the parties should have made disclosure of all relevant financial information; and
4. The agreement should be executed not less than 28 days before the marriage.²¹

There has also been much academic commentary in Ireland which criticises the absence of guiding principles for the court in granting ancillary relief and some commentators have called for the introduction of a clean break principle.²² Buckley has called for the introduction of something akin to the German deferred community of property system.²³

4. Briefly explain whether or not the rules regarding the property relationship between spouses also apply to registered or civil partnerships?

No, though this will change when the Civil Partnership Bill 2008 is enacted. On 24 June 2008, the general scheme of a Civil Partnership Bill was published by the Irish Government with the intent of establishing a new form of registered civil partnership for same-sex couples and

¹⁷ [1994] 1 IR 305 at 326-327.

¹⁸ Department of Justice, Equality and Law Reform, *Report of the Study Group on Pre-nuptial Agreements*, April 2007. Available at <http://www.justice.ie/en/JELR/PrenupRpt.pdf/Files/PrenupRpt.pdf>.

¹⁹ Department of Justice, Equality and Law Reform, *Report of the Study Group on Pre-nuptial Agreements*, April 2007. Available at <http://www.justice.ie/en/JELR/PrenupRpt.pdf/Files/PrenupRpt.pdf>.

²⁰ Department of Justice, Equality and Law Reform, *Report of the Study Group on Pre-nuptial Agreements*, April 2007. Available at <http://www.justice.ie/en/JELR/PrenupRpt.pdf/Files/PrenupRpt.pdf>.

²¹ Department of Justice, Equality and Law Reform, *Report of the Study Group on Pre-nuptial Agreements*, April 2007. Available at <http://www.justice.ie/en/JELR/PrenupRpt.pdf/Files/PrenupRpt.pdf>.

²² See Geoffrey Shannon, *The Irish Divorce Act in Practice*, (Thomson Round Hall, 2008).

²³ See Lucy Anne Buckley, “Matrimonial Property and Irish Law: a Case for Community?”, (2002) 1 *Northern Ireland Legal Quarterly* 1.

a redress scheme for long-term cohabiting opposite or same-sex couples. Head 35 of the 2008 Scheme mirrors in general terms S. 3(1) of the Irish Family Home Protection Act 1976. It states that in the absence of an enforceable agreement made before the registration as civil partners of the civil partners, a conveyance shall be void without the prior consent in writing of the non-owning civil partner. Head 36 is in similar terms to S. 4 of the Irish Family Home Protection Act 1976. It provides that where a civil partner whose consent is required omits or refuses to consent, the court may if it considers it unreasonable to withhold consent dispense with such consent. Head 36 states that a court shall not dispense with the consent of a civil partner unless the court considers it unreasonable for the civil partner to withhold consent. In considering whether it is unreasonable for the civil partner to withhold consent, a court will have regard to all the circumstances, including-

- a) the respective needs and resources of the civil partners, and
- b) in a case where a civil partner whose consent is required is offered alternative accommodation, the suitability of that accommodation taking into account the respective degrees of security of tenure in the shared home and in alternative accommodation.

Heads 64, 65, 69 and 72 deal with property adjustment orders and grant the court the power to make an order for the sale of the family home or to allow one spouse to reside in the family home for a period of time.

5. Are the rules concerning the matrimonial property relationship between spouses exclusive or are there other mechanisms of property law, such as joint ownership, which also play a role in relation between spouses?

Where the family home is held as joint tenants it passes by survivorship to the surviving spouse whereas property which is held as tenants in common passes into the deceased spouse's estate. The rules governing the purchase money resulting trust may also apply where property is held by joint tenants and no express declaration is made in relation to the beneficial ownership. Where the joint tenants make unequal contributions to the purchase price a beneficial tenancy in common may be presumed to reflect the unequal shares. However, where the joint tenants are married this presumption will be rebutted by the presumption of advancement if the larger contribution was made by the husband, giving rise to a beneficial joint tenancy in the absence of evidence to rebut the presumption that a gift of the extra contribution was intended. Where the larger contribution was made by the wife, the presumption of advancement does not apply and the husband will have to prove that she intended to make a gift in order to rebut the presumed resulting trust.²⁴ These rules will generally only be of significance in the event of bankruptcy, the registration of a judgment mortgage against the interest of one spouse in the property, annulment or where the spouses decide to separate without resort to the ancillary orders available on the grant of a judicial separation or a divorce. The courts may make a property adjustment order in relation to co-owned property on the grant of a judicial separation or divorce.

6. What is the relationship, if any, between the law regarding the property relationship between spouses and the law of succession?

The relationship of husband and wife is given special priority by the legislature in the Irish Succession Act 1965 ("the 1965 Act"). This Act was described by the Irish Supreme Court in *O'B v S*²⁵ as "a most important part of family law". Prior to the coming into force of the Succession Act a testator had complete freedom of disposition and could distribute his estate amongst strangers whilst ignoring entirely the needs of his family. The law of succession generally now takes precedence over the law regarding the property relationship between spouses. That said, property held jointly between the spouses passes by means of

²⁴ See *caselaw* in 12(1) CPLJ 18: Article: Property Disputes Between Co-owning Cohabitees – A Conveyancer's Perspective: Una Woods.

²⁵ [1984] IR 316 at 335.

survivorship. Under Irish law, a Will²⁶ is revoked by marriage but not by a divorce. A widow/widower by virtue of his or her status as a spouse, is granted an automatic share in the estate of his or her deceased spouse. The spouse has a right to a fixed share in the deceased spouse's estate. It should be stated that the right is only "automatic" if the surviving spouse was left nothing in the will²⁷.

S. 111 of the Irish Succession Act 1965 provides:

"If the testator leaves a spouse and no children, the spouse shall have a right to one half of the estate. If the testator leaves a spouse and children, the spouse shall have a right to one third of the estate".

Therefore, if a testator dies leaving a spouse and no children, the spouse is legally entitled to one-half of the estate. S. 111(2) states if a testator dies leaving a spouse and children, the spouse has a legal right to one-third of the estate. Thus, the introduction of S. 111, ensures that a testator's wife will be provided for out of the estate of her deceased spouse, irrespective of the contents of his will.

This section would appear to impose a restriction on the right of the testator to leave his property in accordance with his own wishes. If the surviving spouse is left a devise or bequest in the will she must elect to take her legal right share, otherwise she is deemed to take under the will. She may also elect to take such a bequest in partial satisfaction of her legal right share.

Under S. 56 of the Irish Succession Act 1965, where the estate of a deceased person comprises a dwelling in which at the time of the deceased's death the surviving spouse is living, the surviving spouse, subject to certain restrictions, can require the family home and chattels to be appropriated in her favour. The deceased spouse's personal representative must inform the surviving spouse of her right to elect to take the legal right share or her right of appropriation pursuant to S. 56 and a time limit is imposed on her right to exercise such rights. The legal right of a spouse may, however, be renounced in writing by an ante-nuptial contract. S. 113 of the Irish Succession Act 1965 states:

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

S. 14 of the Irish Family Law Act 1995 allows the court to make an order extinguishing the succession rights of either spouse on the grant of a judicial separation or at any time thereafter. Such a spouse may still apply for provision out of the estate pursuant to S. 15A of the 1995 Act unless a blocking order is made.

The legislature in drafting the Irish Divorce Act did not have to concern itself with granting the court with power to extinguish the aforementioned spousal succession rights because once the decree of divorce is granted the parties are no longer spouses. What was provided for, however, was the right of the court under S. 18(10) of the Irish Divorce Act, to bar any application by either party on the death of the other for a share in the estate of the deceased spouse.

The court, under S. 18(1) of the Irish Divorce Act, can, on the death of one spouse, make such provision for the surviving spouse as it considers appropriate having regard to the rights of

²⁶ In Ireland, if you want to distribute your property in a certain manner on your death, this can only occur by preparing a testamentary document known as a will.

²⁷ See *In the matter of the Estate of Thomas Cummins deceased; John O'Dwyer v Keegan* [1997] 2 ILRM 401.

any other person having an interest in the matter. In so doing, the Irish court must be satisfied that proper provision in the circumstances was not made for the applicant during the lifetime of the deceased spouse. If an order is made by the court under S. 18(1), S. 18(4) prohibits the court from making an award to the applicant which exceeds the share in the estate which the applicant would have been entitled to under the 1965 Act, if the marriage had not been dissolved. As stated above, S. 18(10) empowers the court, following the granting of a decree of divorce, upon application by either spouse, during the lifetime of the other spouse, to make an order if it considers it just to do so, barring either or both spouses on the death of either of them from making an application under S. 18(1) of the Irish Divorce Act.

7. Are there distinct rules concerning general rights and duties of the spouses (as referred to in section B) that are independent of the specific property relationship of the spouses (matrimonial property regimes as referred to in section C)?

Yes.

B. GENERAL RIGHTS AND DUTIES OF SPOUSES CONCERNING HOUSEHOLD EXPENSES, TRANSACTIONS IN RESPECT TO THE MATRIMONIAL HOME AND OTHER MATTERS IRRESPECTIVE OF THE SINGLE MATRIMONIAL PROPERTY REGIME

8. What, if any, are the obligations of spouses to contribute to the costs and expenses of the family household? In answering this question, briefly explain what your system understands by “costs and expenses of the family household”.

There are no statutory obligations on spouses to contribute to the costs and expenses of the family household. However, a statutory liability of spouses to maintain one another exists during the marriage relationship and beyond pursuant to the Family Law (Maintenance of Spouses and Children) Act 1976.²⁸ In fact, on the granting of a decree of judicial separation²⁹ or divorce³⁰, or at any time thereafter during the lifetime of the spouse, the court may make a periodical payments order or a lump sum order. S. 13(2)(a) of the Irish Divorce Act, for example, empowers the court to make a lump sum order in respect of any liabilities or expenses reasonably incurred by the applicant spouse before the making of a maintenance application. S. 13(2)(b) allows the court to order a spouse to pay a lump sum to a specified person to meet any liabilities or expenses reasonably incurred prior to the making of a maintenance application.

9. Is one spouse liable for the household debts incurred by the other? And if so, to what extent?

No, unless a judgment mortgage is registered against the property. That said, although the spouse is not liable for the other spouse's debt, where the family home or other property is jointly owned and a judgment mortgage is registered against the debtor's interest in the property, the creditor may be able to force a sale of the co-owned property pursuant to the Partition Acts 1868 - 1876 to realise his debt from the debtor's share of the proceeds if the property is not registered in the Land Registry. Where the property is registered in the Land Registry the creditor may have difficulty realising his security in such circumstances.³¹ S. 114 of the Land and Conveyancing Law Reform Bill 2006, if enacted, will permit the court to make an order for sale or such other order as the court thinks appropriate for the enforcement of a judgment mortgage registered against the interest of a judgment debtor in the Registry of Deeds or Land Registry.

²⁸ No. 11 of 1976.

²⁹ S. 8 of the Irish Family Law Act 1995.

³⁰ S. 13 of the Family Law (Divorce) Act 1996.

³¹ See *Farrelly v Donnelly* [1913] 1 IR 50 at pp 56-57.

In *Containercare (Irl) Limited v Wycherley*³² and *Murray v Diamond*³³, the Irish High Court held that a judgment mortgage did not constitute a conveyance within the meaning of S. 1 of the Irish Family Home Protection Act 1976. In the *Containercare* case, Carroll J held that a spouse's prior consent was not required to effect a judgment mortgage even where the family home was held in joint names. The learned judge stated:

"[A] judgment mortgage, if registered against a family home, is not a disposition by a spouse purporting to convey an interest in the family home. It is a unilateral act by a judgment creditor...".

In *Murray v Diamond*, Barrington J adopted a similar approach stating:

"I do not think that the mere fact that a man has irresponsibly allowed himself to get into debt, or allowed a judgment to be obtained against him and thereby allowed a situation to develop in which his creditor registers a judgment against his interest in the family home, would justify a court in saying that he has conveyed or purported to convey his interest in the family home to the judgment mortgagee".

10. To what extent, if at all, are there specific rules governing acquisition and/or transactions in respect of the matrimonial/family home irrespective of the matrimonial property regime? In answering this question, briefly explain what your system understands by "matrimonial/family home".

As previously stated, the Irish Family Home Protection Act 1976 provides the non-owning spouse with a power of veto over the sale of the family home. This protection which was afforded to spouses of either sex is contained in S. 3(1) of the 1976 Act and states that without the prior consent in writing of the non-owning spouse, a conveyance shall be void. In addition to the requirement that the consent be prior consent and in writing, the courts have held that the consent must be informed.

The term "family home" is defined in S. 2(1) of the 1976 Act as:

"... primarily a dwelling in which a married couple ordinarily reside. The expression comprises, in addition, a dwelling in which a spouse whose protection is in issue ordinarily resides, or if that spouse has left the other spouse, ordinarily resided before so leaving".

S. 2(2) of the 1976 Act, as inserted by S. 54(1)(a) of the Irish Family Law Act 1995, defines a "dwelling" as:

"any building or part of a building occupied as a separate dwelling and includes any garden or other land usually occupied with the dwelling, being land that is subsidiary and ancillary to it, is required for amenity or convenience and is not being used or developed primarily for commercial purposes, and includes a structure that is not permanently attached to the ground and a vehicle, or vessel, whether mobile or not, occupied as a separate dwelling".

The Irish Supreme Court in *National Irish Bank v Graham*³⁴ stated that the definition of "family home" could not be extended by the judiciary beyond the words of the Family Home Protection Act. In that case, Finlay CJ clearly stated that the definition should not be given liberal or alternative interpretation beyond the words used in S. 2.

³² [1982] IR 143.

³³ [1982] ILRM 113.

³⁴ [1995] 2 IR 244.

S. 37 of the Irish Family Law (Divorce) Act 1996 should also be noted in that it sets out the powers which the court has, in relation to transactions carried out by a party to the proceedings, which are intended to prevent or to defeat an application by the other party for financial relief.³⁵ In particular, S. 37(2) provides that, in circumstances where proceedings have been instituted for the grant of relief, but not been determined, and where the court is satisfied that the other spouse, or any other person, proposes to make any disposition or transfer out of the jurisdiction or otherwise deal with any property, with a view to preventing that relief, then the court may make an order restraining the other spouse from so doing. Significantly, the Irish Divorce Act provides that if a disposition is made within three years of the application for a divorce, and where the court is satisfied that the consequence of such disposition would be the prevention or restriction of relief which could be granted, or that has already been the consequence, then the intention of the respondent to so prevent or defeat relief will be presumed. The effect of this provision is to place the burden of proving that a party had no intention to defeat relief on the respondent as opposed to the applicant.

11. To what extent, if at all, are there specific rules governing acquisition and/or transactions in respect of household goods irrespective of the matrimonial property regime? In answering this question, briefly explain what your system understands by "household assets".

S. 9 of the Irish Family Home Protection Act 1976 allows the court to place a restriction on the disposal of any household chattels. Household chattels are defined in S. 9(7) of the 1976 Act as meaning "furniture, bedding, linen, china, earthenware, glass, books and other chattels of ordinary household use or ornament and also consumable stores, garden effects and domestic animals, but does not include any chattels used by either spouse for business or professional purposes or money or security for money". S. 9(1) of the 1976 Act provides:

"Where it appears to the court, on the application of a spouse, that there are reasonable grounds for believing that the other spouse intends to sell, lease, pledge, charge or otherwise dispose of or to remove such a number or proportion of the household chattels in a family home as would be likely to make it difficult for the applicant spouse or a dependent child of the family to reside in the family home without undue hardship, the court may by order prohibit on such terms as it may see fit, the other spouse from making such intended disposition or removal".

12. To what extent, if at all, are there other rules governing transactions entered into by one spouse irrespective of the matrimonial property regime (e.g. entering into guarantees, incurring debts...)?

The Family Home Protection Act 1976 applies to mortgages. Therefore, if the owning spouse wishes to raise a mortgage on the family home, the prior consent in writing of the non-owning spouse is required. The term "mortgage" is defined in S. 1 of the 1976 Act as including "an equitable mortgage, a charge on registered land and a chattel mortgage". In *Bank of Ireland v Smyth*³⁶ and *Allied Irish Banks plc v Finnegan*³⁷ the Irish Supreme Court stressed that the failure to obtain prior consent of the non-owning spouse has the effect that the lender obtains no mortgage or charge over the family home.

13. To what extent, if at all, are there specific rules concerning one spouse acting as agent for the other?

None, save where a power of attorney has been effected.

³⁵ See also the corresponding provision in the context of a judicial separation, namely s 35 of the 1995 Act.

³⁶ [1996] 1 ILRM 241.

³⁷ [1996] ICLC 36.

14. What restrictions or limitations, if any, are there concerning transactions between spouses irrespective of the matrimonial property regime (e.g. gifts...).

None, save that transactions to defraud creditors will be set aside under Irish Bankruptcy legislation.

S. 14 of the Irish Family Home Protection Act 1976 should be noted in this context in that it provides that no stamp duty, land registry fee, registry of deeds fee or court fee is payable on any transaction creating a joint tenancy between spouses in respect of a family home where the home was immediately prior to such transaction owned by either spouse or both spouses otherwise than as joint tenants.

C. MATRIMONIAL PROPERTY REGIMES

C.1. General issues

15. Are spouses entitled to make a contract regarding their matrimonial property regime?

There is nothing precluding future spouses from entering into a pre-nuptial agreement regulating their property relationship. The difficulty is that the Irish courts are not obliged to enforce such an agreement should the spouses separate or divorce.

Where the spouses separate by agreement they are free to enter into a separation agreement setting out their property arrangements which is governed by the rules of contract law. If the parties have entered into a separation agreement this is a bar to subsequent proceedings for a judicial separation and, more importantly, the ancillary orders available pursuant to the 1995 Act. It should be stated that a separation agreement does not act as a bar to divorce proceedings under the Irish Divorce Act. The importance of a separation agreement existing between the parties prior to their application for a decree of divorce is highlighted in S. 20(3) of the Irish Divorce Act which requires the court, in deciding whether to make an order for ancillary relief on divorce, to have regard to the terms of a separation agreement (which is still in force).

16. What regime is applicable, using the list below,³⁸ if spouses have not made a contract (default regime) or are not allowed to make a contract or are not allowed to make a contract with binding effect?

I.	Community of property	Communauté des biens	Gütergemeinschaft
II.	Community of accrued gains/Participation in acquisitions	Participation aux acquêts	Zugewinnngemeinschaft/ Errungenschaftsbeteiligung
III.	Deferred community of property	Communauté différée des biens	Aufgeschobene Gütergemeinschaft
IV.	Separation of property	Séparation de biens	Gütertrennung
V.	Separation of property with distribution by the competent authority	Séparation de biens avec une distribution des biens par l'autorité compétente	Gütertrennung mit behördlicher Vermögensverteilung

Separation of property with distribution by the competent authority.

³⁸ For an explanation of this list, see the document: CLASSIFICATION OF MATRIMONIAL PROPERTY REGIMES PROPOSED BY THE CEFL.

17. Using the list above, are there other alternative matrimonial property regimes regulated by statute for which spouses can opt besides the default regime (where applicable)?

No.

18. Briefly describe the regimes indicated in the answers to:

- a. Question 16.
- b. Question 17.

A wide discretionary power is vested in the Irish courts to “adjust” the property rights of spouses on the grant of a judicial separation or divorce by reference to a requirement for fairness. This discretion is exercisable having regard to the following statutory criteria:

1. income and financial resources;
2. financial needs;
3. standard of living;
4. age of spouses and length of cohabitation;
5. physical or mental disability;
6. past and future contributions;
7. marital responsibilities;
8. statutory income and benefits;
9. conduct;
10. accommodation needs;
11. loss of future benefits;
12. rights of other parties; and
13. the terms of any separation agreement which is still in force.

There is no hierarchy in the above long list of criteria to which the Court must have regard.

19. Indicate the frequency of the use made of the regimes (where possible by reference to statistical data) referred to in Questions 16 and 17.

No statistical data is available.

C.2. Specific regimes

I. Community of property

Not relevant.

II. Community of accrued gains/Participation in acquisitions

Not relevant.

III. Deferred Community

Not relevant.

IV. Separation of property

Not relevant.

IV. Separation of property with distribution by the competent authority

V.1. Assets

161. Describe the system. Indicate the different categories of assets involved.

The Irish courts are granted unfettered discretion in the Irish Family Law (Divorce) Act 1996 to deal with the property and economically valuable assets of the parties to a marriage. This discretion is exercisable within a framework of criteria as well as the constitutional and statutory requirement that proper provision be made for the spouses and dependent children of the marriage. S. 20 of the Irish Divorce Act sets out those individual factors which must be taken into account before deciding to make any property order/order by way of ancillary relief. These factors are:

1. income and financial resources;
2. financial needs;
3. standard of living;
4. age of spouses and length of cohabitation;
5. physical or mental disability
6. past and future contributions;
7. marital responsibilities;
8. statutory income and benefits;
9. conduct;
10. accommodation needs;
11. loss of future benefits;
12. rights of other parties; and
13. the terms of any separation agreement which is still in force.

There is no hierarchy in the above long list of criteria to which the Court must have regard. As noted by Murphy J in the leading *T v T*³⁹ case:

“[I]t may be little consolation to litigants or their advisors but in the final analysis, one can but recognise that our current legislation requires that proper provision be made for each spouse (whether male or female) and that in reaching that objective, the court is bound to have regard to the factors set out in S. 20 of [the 1996 Act]”.

That said, the comments of McGuinness J in the Supreme Court case of *MK v JPK*⁴⁰ are worth noting:

“The provisions of the 1996 Act leave a considerable area of discretion to the Court in making proper financial provision 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 S. 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”.

Under Irish law on separation and divorce the court has the right to adjust the property owned by either spouse to achieve an outcome which is reasonable in the subjective circumstances of the case. Irish law is concerned with proper provision rather than division of the assets/property. Denham J of the Irish Supreme Court in the aforementioned *T v T* case stated the position as follows:

“The scheme established under the Act of 1996 is not a division of property. The scheme established under the Act of 1996 provides for proper provision, not division. It is not a question of dividing the assets at the trial on a percentage or equal basis.

³⁹ [2002] IESC 68.

⁴⁰ [2003] 1 IR 326.

However, all the circumstances of the family, including the particular factors referred to in S. 20(2) of the Act of 1996, are relevant in assessing the matter of provision from the assets”.

Property is not defined in the Irish Divorce Act. It is therefore broad enough to include anything which can be owned. In Ireland, on separation/divorce, the matrimonial assets of the couple include all assets held individually or jointly (i.e. family home, second property, cars, caravans, yachts etc.). Liquid assets are also included such as personal bank accounts of each spouse, those held jointly, any life assurance savings plans, unit trusts, shares, share options and the pension retirement benefits of each spouse.

162. What assets comprise the separate property of the spouses?

As previously stated, all assets held individually or jointly are available for re-distribution on separation/divorce.

163. Can spouses acquire assets jointly? If so, what rules apply?

Yes. [See Question 5 (i.e. distinction between joint tenancy and tenancy in common).] Where the vendors are joint owners of property, they must join in the contract and deed. Where one joint owner dies, it passes to the surviving owner by survivorship.

164. What is the position of pension rights and claims and insurance rights?

a. Pension Rights and Claims

In many instances in Ireland, pensions are the most valuable matrimonial asset in a divorce after the family home. Following the breakdown of a marriage, the pension provisions of the Irish Divorce Act provide the courts with substantial powers to deal with the pension(s) held by one or both spouses. All benefits payable under a pension scheme can be the subject of a pension adjustment order. The factors which a court must have regard to in deciding whether to make a pension adjustment order under S. 17 of the Irish Divorce Act are set out in S. 20 of the Act. This is not an exhaustive list, but contains several highly important and influential factors, including the property and income of the spouses, the duration of the marriage and the conduct of the spouses. S. 17(23)(b) 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.

b. Insurance Rights

S. 16 of the Irish Divorce Act enables the court to make orders in respect of life assurances for dependent spouses and children. On the granting of a decree of divorce or at any time thereafter, the court may make a financial compensation order requiring either or both of the spouses to do one or more of the following:

- (a) effect a life insurance policy for the benefit of the applicant, or any other dependent family member specified in the order;
- (b) assign such a policy in whole or in part to the other spouse or dependent family member;
- (c) continue to discharge the premiums due on a particular policy.

The court is directed by S. 16(2)(a) of the Irish Divorce Act to consider whether adequate and reasonable provision can be made for the other spouse or dependent family members by

maintenance, property adjustment or pension adjustment orders under sS. 13, 14, 15 or 17 of the Irish Divorce Act.

165. Can a third party make a disposition (e.g. a gift or a bequest) so as to avoid the competent authority's power over the spouses' assets?

S. 37 of the Irish Divorce Act, as previously stated, sets out the powers which the court has in relation to transactions carried out by a party to the proceedings which are intended to prevent or to defeat an application by the other party for financial relief. S. 37(2) provides that, in circumstances where divorce proceedings have been instituted for the grant of relief, but not been determined, and where the court is satisfied that the other spouse, or any third party, proposes to make any disposition or transfer out of the jurisdiction or otherwise deal with any property, with a view to preventing that relief, then the court may make an order restraining the other spouse from so doing. The purpose of this section in the Irish divorce legislation is to prevent the reduction of assets by either of the spouses with a view to reducing the amount of assets available for the making of an order for ancillary relief following the granting of a divorce decree.

S. 37(4) of the Irish Divorce Act provides that if the disposition was made within 3 years of the application for a divorce, or in relation to a disposition yet to take place, and where the court is satisfied that the consequence of such disposition would be the prevention or restriction of relief which could be granted, or that has already been the consequence, then the intention of the respondent to prevent or defeat relief will be presumed. The effect of this provision is to place the burden of proving that a party had no intention to defeat relief on the defendant as opposed to the applicant.

166. How is the ownership of the assets proved as between the spouses? Are there rebuttable presumptions?

Any dispute between the spouses as to the ownership or possession of the asset can be determined by the court under S. 36 of the Irish Family Law Act 1995. In any such application, the court may direct such inquiries, and give such other directions, in relation to the application as it considers proper. In determining a dispute as to ownership of the assets, the court may hear oral evidence or examine receipts furnished. The court may make a declaration in relation to the beneficial ownership which differs from the legal ownership. A voluntary transfer or a contribution to the purchase price of property may give rise to a presumption of a resulting trust or a presumption of advancement which may be rebutted by evidence of a contrary intention. [See discussion in question 2 and 5.]

167. How is the ownership of the assets proved as against third parties? Are there rebuttable presumptions?

There are two systems of registration currently in operation in Ireland, the Registry of Deeds and the Land Registry. The two systems are mutually exclusive and enable ownership of the assets to be proved as against third parties. The crucial and essential difference between the two systems is that in the Registry of Deeds system all that is registered is the document and registration confers priority over earlier unregistered transactions but does not guarantee the effectiveness of the transaction, whereas in the Land Registry it is the title itself that is registered and a state guarantee of that title is provided to purchasers who rely on the register. Regardless of where the property is registered a purchaser or mortgagee will insist on being furnished with a family home declaration as proof that S. 3 of the 1976 Act does not apply. It is important for the purchaser/mortgagee to ensure that he is a bona fide purchaser as otherwise the conveyance will be void.⁴¹ In fact, notice that a person is married to a person having an interest in the particular property can be registered in either registry although this

⁴¹ See *Somers v Weir* [1979] IR 94.

opportunity is seldom availed of. S. 3(8) of the 1976 Act, inserted by S. 54(1)(b)(ii) of the Irish Family Law Act 1995, has resolved the conveyancing difficulties which arose where consents in previous transactions were never obtained. The spouse must bring an action to have the conveyance declared void within 6 years of the disposition unless the spouse was in occupation of the property immediately before the expiry of the 6 years. If not, the conveyance is deemed to have always been valid.

A purchaser must also ensure that there is no-one in occupation who has a beneficial interest in the property under a purchase money resulting trust as it will bind him under the doctrine of constructive notice in the case of unregistered land or as an overriding interest in the case of land registered in the Land Registry. This may change with the enactment of the 2006 Bill as S. 21 provides that beneficial interests will be overreached on a conveyance unless they are previously registered in the Registry of Deeds or the Land Registry as appropriate.

Where property other than the family home is sold, the vendor is asked to confirm that it is or was not a family home.

168. Which debts are personal debts?

All debts are personal debts.

169. Which debts are joint debts?

None, unless incurred jointly.

170. On which assets can the creditor recover personal debts?

All assets belonging to the debtor.

171. On which assets can the creditor recover joint debts?

All.

V.2. Administration of assets

172. How are assets administered?

I am presuming that this question refers to the management of property before marital breakdown. It is more relevant to community property regimes. In Ireland assets are generally owned separately by spouses and administered by the individual owner. Assets which are owned jointly are administered jointly e.g. a conveyance of a house in joint names must be executed by both spouses.

Assets are administered so as to ensure proper provision as between the spouses and any dependent members of the family. S. 2(1) of the Irish Divorce Act defines a "dependent member" as any child under the age of 18 years [or 23 years if in full-time education] of both spouses, or adopted by both spouses or in relation to whom both spouses are *in loco parentis*, so long as the other spouse is aware that he or she is not the parent of the child and has treated the child as a member of the family.

173. Can one spouse mandate the other to administer the assets?

Yes.

174. Are there important acts concerning assets (e.g. significant gifts, disposal of the matrimonial/family home or other immovable property) that require the consent of the other spouse?

Yes. The Irish Family Home Protection Act 1976 prevents the spouse in whose name the title to the family home is vested from dealing with his or her interest in the family home without the prior written consent of the other spouse. S. 3(1) of the Irish Family Home Protection Act 1976, as amended by S. 54(1)(b)(i) of the Irish Family Law Act 1995, states:

“Where a spouse, without the prior written consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2), (3) and (8) and S. 4, the purported conveyance shall be void”.

The consequences for the owning spouse conveying an interest in the family home to another party without the prior consent of the non-owning spouse are extremely serious in that the section declares void any conveyance where the prior consent of the non-owning spouse has not been obtained.

S. 4 of the Irish Family Home Protection Act 1976 provides that the Court (where a non-owning spouse omits or refuses to consent) may if it considers it unreasonable to withhold consent dispense with such consent. Consent cannot be dispensed with retrospectively and thus the Court order must be sought before the conveyance is entered into. S. 4(2) states:

“The court shall not dispense with the consent of a spouse unless the court considers that it is unreasonable for the spouse to withhold consent taking into account all the circumstances, including-

- (a) the respective needs and resources of the spouses and of the dependent children (if any) of the family, and
- (b) in a case where the spouse whose consent is required is offered alternative accommodation, the suitability of that accommodation having regard to the respective degrees of security of tenure in the family home and in the alternative accommodation”.

175. Are there special rules for the administration of professional assets?

No.

176. Is there a duty for one spouse to provide information to the other about the administration of the assets?

Where property is owned separately by an individual spouse there is no obligation to provide information about its management unless judicial separation or divorce proceedings have been initiated in which case you have discovery. This is a pre-trial procedure which is designed to make available to both the applicant and the respondent all documents which exist and which may impact on the administration of the assets. Discovery is an area which, in the context of any matrimonial proceedings can be fraught with difficulty, but particularly in divorce cases, where the expectation of at least one of the spouses is generally that the financial relationship between them will be severed on the granting of the divorce decree.

If property is co-owned by spouses, there is a duty to account for rent and profits but this applies to all co-ownership relationships.

177. How are disputes between the spouses concerning the administration of assets resolved?

Disputes between spouses concerning the administration of assets are resolved by the Court.

178. What are the possible consequences when a spouse violates the rules governing the administration of assets? What are the possible consequences in other cases of maladministration of the assets?

Disputes concerning the administration of assets or maladministration of the assets are dealt with by the Court. Costs may be awarded against the spouse who violates the rules governing the administration of the assets. Similarly, in respect of other cases involving the maladministration of the assets.

179. What are the possible consequences if a spouse is incapable of administering the assets?

The wardship jurisdiction can be invoked unless an enduring power of attorney has been effected.

V.3. Distribution of assets upon dissolution

180. When do the competent authority's powers of redistribution arise, e.g. on separation, death of a spouse or divorce?

The competent authority's powers of redistribution arise following the granting of a judicial separation or divorce decree. The Irish court, under S. 18(1) of the Irish Divorce Act, can, on the death of one spouse, make such provision for the surviving spouse as it considers appropriate having regard to the rights of any other person having an interest in the matter.⁴² In doing so, the court must be satisfied that proper provision in the circumstances was not made for the applicant during the lifetime of the deceased spouse. If an order is made under S. 18(1), S. 18(4) prohibits the court from making an award to the applicant which exceeds the share in the estate which the applicant would have been legally entitled to under the 1965 Succession Act, if the marriage had not been dissolved. It should be noted, however, that S. 18(10) empowers the court, following the granting of a decree of divorce, upon application by either spouse, during the lifetime of the other spouse, to make an order if it considers it just to do so, barring either or both spouses on the death of either of them from making an application under S. 18(1) of the Irish Divorce Act.

181. What powers does the competent authority have to redistribute the spouses' assets?

On the introduction of divorce in Ireland the 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 requirement that proper provision be made for the spouses and dependent children of the marriage. S. 20(2) of the Irish Divorce Act sets out those individual factors which must be taken into account by the court before deciding to make any order of ancillary relief.⁴³ These factors are:

1. income and financial resources;
2. financial needs;
3. standard of living;
4. age of spouses and length of cohabitation;
5. physical or mental disability
6. past and future contributions;
7. marital responsibilities;
8. statutory income and benefits;
9. conduct;
10. accommodation needs;
11. loss of future benefits;
12. rights of other parties; and
13. the terms of any separation agreement which is still in force.

There is no hierarchy in the long list of criteria to which the Court must have regard.

In *K v K*,⁴⁴ the Irish Supreme Court stated:

“The provisions of the [Divorce] Act leaves a considerable area of discretion to the court in making proper financial provision for spouses in divorce cases. This discretion, however, is not to be exercised at large. The statute lays down mandatory guidelines.

⁴² See also the corresponding provision in the context of a judicial separation, namely s 15A of the 1995 Act.

⁴³ See also the corresponding provision in the context of a judicial separation, namely s 16(2) of the 1995 Act.

⁴⁴ [2003] 1 IR 326, at pp 383-384.

The court must have regard to all the factors set out in S. 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”.

182. What assets are taken into account? Are e.g. premarital assets and debts, assets acquired by gift, will or inheritance and debts related those assets, the increase in value of the spouses’ property and debts related to that property, pension rights and claims and insurance rights taken into account? How are they valued?

All assets are taken into account, although the fact that the asset was inherited and brought into the marriage can be taken into account.⁴⁵ Moreover, the Irish Court may depart from the benchmark of fairness to ensure the survival of an income-generating asset. Denham J in the leading Irish Supreme Court case of *T v T*⁴⁶ stated the position in the following terms:

“It [the check on fairness] may not be relevant to a family of adequate means if, for example, [it] could only be achieved by a sale of assets which would destroy a business, or the future income of a party of parties...”

In *BD v JD*,⁴⁷ McKechnie J stated:

“I wish to assert as a matter of principle, that this Court has jurisdiction over all the assets of both the applicant and respondent, including those held by the latter through the medium of a limited company, and can make use of them in the most appropriate manner feasible so as to make proper provision for the parties to this marriage ... I could not under any circumstances accept that this Court could be disabled from performing its constitutional and statutory duties simply by the creation and existence of a private company where its entire affairs are within the exclusive control of one party to the marriage. If there was no other way of achieving proper provision I would not be dissuaded from exercising this jurisdiction and if that involved a company restructure or even a sale then so be it.”

The Irish courts have made orders in relation to post nuptial settlements where such orders are required to make proper provision for the parties.⁴⁸

The value to be taken into account is the net value. It is clear from the leading Irish Supreme Court case of *T v T*⁴⁹ that the Irish Divorce Act positively requires realisation costs to be taken into account. Fennelly J states the position in the following terms:

“... The parties accept also that, in order to make provision in the form of a lump sum for the wife in accordance with the law, assets will have to be realised. This, in turn, necessarily entails the incurring of realisation costs and expenses in the form of legal and other professional expenses and tax liability, in particular capital taxes.”

⁴⁵ *C v C* [2005] IEHC 276.

⁴⁶ [2002] 3 IR 334 at 415.

⁴⁷ [2005] IEHC 15.

⁴⁸ Unreported, High Court, McKechnie J, 22.06.2004; Abbott J, 13.03.2006.

⁴⁹ [2002] 3 IR 334 at 415.

183. What are the relevant dates for the determination and valuation of assets? E.g. is the fact that the spouses are living apart before the dissolution of the marriage relevant?

The value of assets is assessed at the time of the hearing.⁵⁰ The High Court in *RG v CG*⁵¹ stated the position as follows:

“The time for the assessment of the assets of the husband and the wife ... is the date of the divorce hearing ... This also appears to be the date at which the Court must be satisfied that proper provision exists or will be made for the spouses and children”.

The fact that the spouses are living apart before the dissolution of the marriage is not relevant.⁵²

184. What happens if one spouse’s assets are used for investments in the other spouse’s assets? Is there any right to compensation? If so is this a nominal compensation or is it based on the accrual in value?

S. 16(2)(f) of the Irish Family Law Act 1995 and S. 20(2)(f) of the Family Law (Divorce) Act 1996 permit the court to take into account the contributions which a spouse made to the income, earning capacity, property and financial resources of the other spouse when making ancillary orders. It has full discretion to decide on the type and extent of the order to be made.

S. 36 of the 1995 Act and S. 15(1)(b) of the Irish Divorce Act enable an Irish court to determine any dispute between the parties as to the ownership or possession of any property.⁵³

185. What happens if one spouse’s assets have been used for payment of a debt of the other spouse? Is there a rule of compensation? And if so, how is compensation calculated?

See Question 184. All assets are joint assets.

186. Do the spouses have preferential rights over the matrimonial/family home and/or the household’s assets?

Spouses have limited preferential rights over the family home and household’s assets. The Irish Family Home Protection Act 1976 provides the non-owning spouse with a power of veto over the sale of the family home.⁵⁴ S. 9 of the 1976 Act allows an Irish court to place a restriction on the disposal of any household chattels “where there are reasonable grounds for believing that the other spouse intends to sell, lease, pledge, charge or otherwise dispose of or to remove such a number or proportion of the household chattels in a family home as would be likely to make it difficult for the applicant or spouse or a dependent child of the family to reside in the family home without undue hardship”.

187. Do the spouses have preferential rights over other assets?

No.

⁵⁰ *T v T* [2002] 3 IR 334.

⁵¹ Unreported, High Court, Finlay-Geoghegan J, 08.02.2005.

⁵² See *SMcM v MMcM*, unreported, High Court, Abbott J, 26.11.2006, *N v O’D*, unreported, High Court, Abbott J, 29.11.2006, *NF v EF*, unreported, High Court, Abbott J, 4.07.2007 and *MB v VB*, unreported, High Court, Birmingham J, 19.10.2007.

⁵³ See *SMcM v MMcM*, unreported, High Court, Abbott J., 26.11.2006.

⁵⁴ S. 3(1) of the Irish Family Home Protection Act 1976.

188. To what extent, if at all, does the distribution of the assets affect the attribution of maintenance?

The Irish Supreme Court in the *T v T* case held that the distribution of the assets of a marriage is to be decided on the individual facts and circumstances of each case. The Court stated it was interested in proper provision not division. It was not, therefore, a question of reordering the assets on a percentage or equal basis. On the granting of a decree of divorce or anytime thereafter, the Irish Court may, on application by either spouse, grant a maintenance order. S. 13(1)(a) of the Irish Divorce Act governs the making of a periodical payments order while S. 13(1)(b) provides for a secured periodical payments order. S. 13(1)(c) of the Act 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. The Supreme Court in the aforementioned *T v T*⁵⁵ case held that the absence of a “clean break” principle in Irish divorce law did not prevent the payment of a lump sum maintenance order as part of the proper provision for a spouse, even where no order for periodic payments by way of maintenance has been made. Denham J stated the position in the following terms:

“There is nothing in the Constitution or legislation which prohibits a lump sum as part of a financial ancillary order ... The fact that ... a lump sum order may exclude or greatly limit any further order by a court does not make the provision improper or the order unfair. The underlying principle of the Act of 1996 is fairness. As S. 20(5) [of the Irish Divorce Act] provides:

“The court shall not make an order under a provision referred to in subsection (1) unless it would be in the interests of justice to do so”.

Keane CJ, as he then was, held that he did not believe that the Oireachtas intended that the courts should exclude the possibility of achieving certainty and finality when financially reordering the assets upon divorce, or of avoiding further litigation between ex-spouses. He expressed approval for the approach adopted by Denham J in *F v F*,⁵⁶ wherein she stated that the principles of certainty apply to family law as to other areas of the law.

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. S. 20(2)(a) to (m) of the Irish Divorce Act provides a non-exhaustive list of criteria to be taken into account by the court when deciding whether to make an order under S. 13 of the Irish Divorce Act. Ultimately, whatever maintenance order is made by the court, S. 20(1) 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 the circumstances of the case.

189. To what extent, if at all, can the competent authority transfer or modify the pension rights and claims of one or both spouses?

S. 17 of the Irish Divorce Act is the primary provision governing the making of a pension adjustment order by the court when a decree of divorce is granted.⁵⁷ It is an extensive provision comprising of some 26 subsections. Following the breakdown of a marriage, the pension provisions of the Irish Divorce Act provide the Courts with substantial powers to deal with the pensions held by one or both spouses. All benefits payable under a pension scheme can be the subject of a pension adjustment order.

⁵⁵ [2002] 3 IR 335.

⁵⁶ [1995] 2 IR 354.

⁵⁷ See also the corresponding provision in the context of a judicial separation, namely S. 12 of the 1995 Act.

For the purposes of the Irish Divorce Act benefits are broken down into two categories: retirement benefit and contingent benefit. A contingent benefit is a benefit payable to a specified person or persons upon the occurrence of the stated contingency. Retirement benefit, in referring to all other benefits payable under a pension scheme, would, therefore, cover the pension paid to a person who retires or a pension payable to the widow or widower and any dependent member of the family on the death of a member after retirement. An application for a pension adjustment order in respect of a retirement benefit and a contingent benefit can be made under S. 17(2) or S. 17(3) of the Irish Divorce Act respectively, by either spouse or by a person on behalf of a dependent member of the family. An order made in respect of a retirement benefit can only be made under S. 17(2) in favour of the other spouse or for the benefit of a dependent member of the family, whereas an order made under S. 17(3) in respect of a contingent benefit can be made in favour of both. Neither order, however, can be made in favour of the applicant if he/she has remarried.⁵⁸ Although an application for a pension adjustment order in respect of a retirement benefit can be made at the time of the granting of the decree of divorce, or at any time thereafter during the lifetime of the member spouse, an application in respect of a contingent benefit must be made not more than one year after the granting of the decree of divorce.⁵⁹

The pension provisions of the Irish Divorce Act permit a court by way of a pension adjustment order to attempt to secure the position of a spouse and/or any dependent member(s) of the family. There are two basic concepts which are central to the operation of a pension adjustment order under S. 17 of the Irish Divorce Act, namely "earmarking" and "pension splitting". Earmarking means that a percentage of the whole or part of a benefit should be paid directly to the other spouse or alternatively to another person for the benefit of a dependent member of the family. Pension splitting on the other hand means that a percentage of a "retirement benefit" which has been earmarked for the other spouse is valued and is used to provide a separate pension for that spouse.

The factors which a court must have regard to in deciding whether to make a pension adjustment order under S. 17 of the Irish Divorce Act are set out in S. 20 of the Act. This is not an exhaustive list, but contains several highly important and influential factors, including the property and income of the spouses, the duration of the marriage and the conduct of the spouses.

S. 17(23)(b) of the Irish Divorce Act 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. Finally, S. 17(26) should be noted in that it allows the Irish court to make an order restricting to a specific extent or excluding completely any application for variation made in respect of a pension adjustment order.

190. Are there, besides the rules of succession, specific rules governing the competent authority's power to redistribute the assets upon the death of one spouse?

No, save that S. 18(10) of the Irish Divorce Act empowers an Irish court, following the granting of a decree of divorce, upon application by either spouse, during the lifetime of the other spouse, to make an order if it considers it just to do so, barring either or both spouses on the death of either of them from making an application under S. 18(1) of the Irish Divorce Act.⁶⁰ The court, under S. 18(1) of the Irish Divorce Act, can, on the death of one spouse, make

⁵⁸ S. 17(23)(a).

⁵⁹ S. 17(3).

⁶⁰ See also the corresponding provision in the context of a judicial separation, namely s 15A(10) of the 1995 Act.

such provision for the surviving spouse as it considers appropriate having regard to the rights of any other person having an interest in the matter.

D. MARITAL AGREEMENTS

191. Are future spouses permitted to make a pre-nuptial agreement regulating their property relationship? If so, is it binding? Or if it is not binding, does it have any effect?

There is nothing precluding future spouses from entering into a pre-nuptial agreement regulating their property relationship. The difficulty is that the Irish courts are not obliged to enforce such an agreement should the spouses separate or divorce. S. 113 of the Irish Succession Act 1965 provides for a limited form of pre-nuptial agreement. It states:

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

In summary, the legal right of a spouse may be renounced in a pre-nuptial agreement in writing between the spouses to an intended marriage, which agreement will be binding after the marriage is solemnised.

In Ireland, traditionally pre-nuptial agreements entered into were objected to on the following grounds:

- (i) the broad ground of public policy at common law that the marital union was for life and an agreement that envisaged a breakdown or the dissolution of that contract was inconsistent with the sanctity of marriage and was therefore contrary to the common good;
- (ii) the narrow and distinctively Irish theocratic constitutional ground that Article 41 of the Irish Constitution expressly provided that any agreement which envisaged a dissolution of marriage and the State’s interest in preserving marriage was contrary to the Irish Constitution; and
- (iii) the legislature had enacted legislation permitting the judiciary to consider and, if necessary, vary the terms of agreements whereas pre-nuptial agreements purport to exclude the jurisdiction of the courts.

The removal of the Constitutional prohibition on divorce with the coming into force of the Irish Family Law (Divorce) Act 1996 on February 27, 1997 weakens but does not negate the arguments outlined above. By virtue of Article 41.3.2 of the Constitution and the Irish 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. It must therefore be noted that the constitutional imperative on the part of the courts to ensure “proper provision” has been made before granting a decree of divorce will, no doubt, make pre-nuptial agreements concluded several years prior to the divorce, at best, no more than a factor in the overall consideration of a case.

The provisions of the Irish Family Law Act 1995, and the Family Law (Divorce) Act 1996 do not appear to support the enforceability of pre-nuptial agreements. It is clear from both statutes that the Irish Parliament (known as the Oireachtas) legislated to facilitate repeated applications to court for ancillary relief rendering the statutes opposed to the concept of spousal autonomy. Moreover, if it was intended to give binding effect to pre-nuptial agreements, it is reasonable to assume that they would have been specifically mentioned in the 1995 and 1996 Acts. That said, a pre-nuptial agreement could be considered as part of “the

circumstances of the case” by a court when determining what ancillary orders to make under S. 16 of the 1995 Act and S. 20 of the 1996 Act. The effect, if any, of a pre-nuptial agreement has yet to be considered by either the Irish High Court or Supreme Court.

In 2006, a Governmental Study Group (hereinafter referred to as the “Group”) was established to analyse the law in respect of pre-nuptial agreements.⁶¹ The Group concluded that:

“[P]re-nuptial agreements are enforceable and capable of variation under existing Irish statute law. The weight to be attached to an agreement would be determined by the courts in light of the requirement for proper provision and the relevant statutory criteria.”⁶²

The Group recommended that provision be made for pre-nuptial agreements in the Irish Divorce Act. Specifically it was recommended that a new S. 20(3)(A) be inserted into the Irish Divorce Act. The rationale for this approach was that pre-nuptial agreements ought to be treated in a manner akin to pre-existing separation agreements, but cognisance should be had to the differences between pre-nuptial agreements and separation agreements.⁶³ Importantly, the Group also recommended that a number of procedural safeguards be set down and followed in order for such agreements to be legally recognisable:

1. The agreement should be in written form, signed by both parties and witnessed (although not necessarily by a solicitor);
2. The parties should each have received separate legal advice as to the effect and meaning of the agreement;
3. Each of the parties should have made disclosure of all relevant financial information; and
4. The agreement should be executed not less than 28 days before the marriage.⁶⁴

192. Are spouses permitted to make a post-nuptial agreement regulating or changing their property relationship? If so, is it binding? Or if it is not binding, does it have any effect?

The position is the same as 191 above. A post-nuptial agreement should be distinguished from a separation agreement which is permissible under Irish law and is governed by contract law. In fact, an Irish divorce court is directed to have regard to a separation agreement on the granting of ancillary orders.⁶⁵

193. What formal requirements must the pre- and/or post-nuptial agreement fulfil to be valid as between the spouses?

In the absence of legislation and case law, there is considerable uncertainty surrounding the enforceability of pre-nuptial agreements in Ireland. That said, in any assessment of the validity, enforcement and the legal weight to be given to a pre-nuptial agreement, the Irish courts are likely to consider the agreement for substantive and procedural fairness. The

⁶¹ Department of Justice, Equality and Law Reform, *Report of the Study Group on Pre-nuptial Agreements*, April 2007. Available at: <http://www.justice.ie/en/JELR/PrenupRpt.pdf/Files/PrenupRpt.pdf>.

⁶² Department of Justice, Equality and Law Reform, *Report of the Study Group on Pre-nuptial Agreements*, April 2007. Available at: <http://www.justice.ie/en/JELR/PrenupRpt.pdf/Files/PrenupRpt.pdf>.

⁶³ Department of Justice, Equality and Law Reform, *Report of the Study Group on Pre-nuptial Agreements*, April 2007. Available at: <http://www.justice.ie/en/JELR/PrenupRpt.pdf/Files/PrenupRpt.pdf>.

⁶⁴ Department of Justice, Equality and Law Reform, *Report of the Study Group on Pre-nuptial Agreements*, April 2007. Available at: <http://www.justice.ie/en/JELR/PrenupRpt.pdf/Files/PrenupRpt.pdf>.

⁶⁵ S. 20(3) of the Irish Divorce Act.

following steps are generally taken where an Irish client wishes to effect a pre-nuptial agreement:

1. Disclosure requirements must be explained to the client.
2. Each party receives separate independent legal advice on his or her rights in the absence of the pre-nuptial agreement and the manner in which those rights may be altered or extinguished by the agreement. This often takes the form of a certificate acknowledging that each party has received independent "legal" advice before signing the agreement. This certificate is kept with the pre-nuptial agreement.
3. The recital portion of the agreement normally contains a provision to the effect that both parties acknowledge and consent to the agreement being legally binding, notwithstanding any statutory provisions that exist or will come into existence.
4. An Irish pre-nuptial agreement would cover such matters as duration of the contract, division of present property, division of future property, beneficial interest, financial provisions on death (i.e. legal right share under the Irish Succession Act 1965), maintenance, religion, pensions, a provision for the dissolution of the marriage, debts, matters not covered by the agreement, the governing law, the circumstances in which the agreement can be varied and costs.

In Ireland, pre-nuptial agreements are largely confined to financial matters and avoid personal aspects. Arrangements in relation to children are not therefore addressed. A pre-nuptial agreement cannot be binding if there are children involved as the Irish courts retain the right to deal with the welfare of children.

5. Irish pre-nuptial agreements invariably contain periodic reviews after a period of three or five years and/or after a major event, for example, the birth of a child or a significant change in the income of either party, with parties obtaining independent legal advice at each review.
6. It is common place for an Irish pre-nuptial agreement to contain a provision to the effect that if a Court finds any provision in the agreement illegal, invalid or otherwise unenforceable such provision is capable of being severed without affecting the other provisions in the agreement which will continue to be enforceable.

194. What formal requirements must the pre- and/or post-nuptial agreement fulfil to be valid in relation to a third party? Is there a system of registration of pre- and/or post-nuptial agreements? If so describe briefly the system and its effect.

There is no system of registration of pre-nuptial agreements.

195. Is full disclosure of the spouses' assets and debts necessary for the making of a pre- and/or post-nuptial agreement?

Full disclosure is necessary for the making of a pre and/or post-nuptial agreement. Abbott J in the case of *N v O'D*,⁶⁶ stated that the weight to be given to a prior settlement/agreement is to be determined by any error or mistake preceding it, such as the absence of full and proper disclosure.

196. If the agreement has to be made before an official (e.g. a notary), is that official obliged to inform the spouses about the content and the consequences of the pre-

⁶⁶ Unreported, High Court, Abbott J, 29.11.2006.

and/or post-marital agreement? If so, what happens if the official does not fulfil his or her obligation?

A pre and/or post-nuptial agreement does not have to be made before an official. It should be stated, however, that there is no court supervision or registration of prenuptial agreements in Ireland, with the responsibility for overseeing such agreements resting on Irish family law solicitors, as the providers of independent legal advice. For the Irish family law solicitor, therefore, the independent advice requirements are highly onerous and difficult to discharge, which in turn, raise issues about potential professional liability.

197. Provide statistical data, if available, regarding the making of pre- and/or post-nuptial agreements.

No statistical data is available regarding the making of pre-and/or post-nuptial agreements in Ireland. Irish family lawyers have, however, experienced an increase in the level of client enquiries about pre-nuptial agreements since the coming into force of the Irish Divorce Act on February 27, 1997. In particular, interest in pre-nuptial agreements has increased in relationships characterised by one or more of the following: people entering a second marriage seeking protection for properties they had before they married; a significant asset imbalance between the parties, a foreign national marrying an Irish person who wishes to protect properties owned in his or her home country should the marriage break down; and the presence of a family business that one spouse wishes to protect.

198. May spouses through pre- and/or post-nuptial agreements only choose, where applicable, a statutory matrimonial property regime and/or do they have the freedom to modify such a regime or even create their own regime?

No.

199. If spouses can modify through pre- and/or post-nuptial agreements a statutory regime or create their own regime, can those modifications be made to:

- a. categories of assets;
- b. administration of assets;
- c. distribution of assets;
- d. depend upon the ground of dissolution of the marriage?

Not relevant.

200. Are there typical contractual clauses used in practice to modify essential elements of the matrimonial property regime, where applicable, or to achieve a certain result, e.g. that certain rights are excluded only upon divorce but not on death of a spouse?

Yes. "Full and final settlement" clauses in separation agreements are designed to evade the discretion of the court which is the hallmark of the Irish regime.

The effect of a "full and final settlement" clause came before Abbott J in the Irish High Court in the recent case of *J.C. v. M.C.*⁶⁷. In this case the parties obtained a divorce in 2000 and the order contained a "full and final settlement" clause. Within two weeks of the order the husband's assets increased dramatically following the sale of a company, previously deemed to be an unrealisable asset. In what is now commonly termed as the "second bite of the cherry", the wife sought to have the orders for ancillary relief renewed as they no longer reflected the husband's means. As a preliminary issue, the Court was asked to determine whether it had jurisdiction to grant new orders following an order of divorce, and if so, what, if any, was the effect of a "full and final settlement" clause on such jurisdiction. The learned

⁶⁷ Unreported, High Court, Abbott J, 22.01.2007.

judge held that S. 12, 13, 14, 15, 17 and 18 of the Irish Divorce Act⁶⁸ provide for strategic relief in the quest to ensure “proper provision”, whereas, S. 22 allows for the fine tuning of such relief. Abbott J was satisfied that the Court has jurisdiction to grant strategic relief, *e.g.* lump sum order, following the grant of a divorce. However, this jurisdiction was tempered by the presence of a “full and final settlement” clause which precluded the Court from making another order in relation to ancillary relief which had already been executed and performed *e.g.* a lump sum already paid as opposed to a lump sum to be paid in continuing instalments. As a consequence the only ancillary relief to be renewed is that which can be varied and operates into the future *e.g.* periodic maintenance.

Central to the reasoning of Abbott J was the fact that those who enter a “full and final settlement” clause desire certainty and finality to both the emotional and financial aspects of marital breakdown. In order to achieve this, a party seeking to execute such a clause tends to sacrifice a bit more in the settlement agreement than they might normally be willing to do. This judgment would appear to rejuvenate confidence in the utility of such clauses, however, as noted by Abbott J the validity of such a clause is still subject to the constitutional imperative of “proper provision”.

201. Can the competent authority override, modify or set aside pre- and/or post-nuptial agreements on account of unfairness or any other ground?

Yes.⁶⁹

⁶⁸ These sections deal with pensions, succession rights, property and retrospective periodic payments.

⁶⁹ I am grateful to Una Woods for reviewing the answers furnished.