



Break-up of Marriage

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Divorce was introduced in Ireland 13 years ago, and in the 2006 Census it was characterised as the “fastest growing marital status” in Ireland. By that year the number of divorced persons in Ireland had increased from a baseline of 9,800 in 1996 to 59,500. Family Law Acts give the courts wide powers to redistribute assets held by both spouses, to order the payment of maintenance for a dependent spouse and children and also to make long-term orders such as pension adjustment orders or orders directing provision for an ex-spouse from a deceased person’s estate.

The introduction of divorce in Ireland added a further option to the remedies available to married couples, and they can currently opt for a State annulment, an informal separation, a separation agreement, a court-ordered separation or a court-ordered divorce. Each of these marital states is considered briefly below.

Various Marital States **Annulment**

A marriage may be annulled by the State, in which case it will be deemed never to have

existed. It follows that the “married” couple were never legally “spouses” and therefore never entitled to any of the various legal rights that accrue to spouses such as the right to maintenance. If the couple were never married, they were never entitled to be taxed as spouses. In practice Revenue will generally treat the couple as married up to, and single from, the date of the annulment. A Catholic marriage may also be annulled by the Church, leaving the couple free to enter into another religious marriage, but a Church annulment has no legal

effect, so the spouses will remain legally married and will be taxed as spouses.

Separation agreements and orders

Persons who have been married may separate voluntarily and negotiate a separation agreement. This is a legally binding contract and normally deals with maintenance, the division of property and succession rights. It should be noted that separation has no impact on the validity of the marriage, and the couple are still legally spouses and will be treated as such for taxation purposes. They will technically cease to be eligible for income tax and CGT spouse relief as both taxes have a requirement that the spouses be co-habiting, but spouses can elect to be taxed together for income tax purposes. A couple can apply to the court for an order of judicial separation, in which case the court may include provisions in the orders in relation to maintenance, property and succession rights, and pension adjustment orders. Again, a separation order will not affect the validity of the marriage.

Divorce

Since the Family Law (Divorce) Act 1996, spouses who have lived apart for four out of the previous five years can obtain a divorce in Ireland, bringing the marriage to an end from the date of the divorce. After that date the couple are no longer spouses and will no longer be eligible for the various taxation reliefs available to spouses. Again, various orders can be made to deal with maintenance, property and succession rights, and pensions.

Common law spouses

One term often heard to describe a couple living together long term is “common law spouses”. This is not a legal status, so there are currently no legal rights attaching to a couple simply by virtue of the fact that they have co-habited for a long time. It should be noted that some provision is made for the recognition of long co-habitation in Part 15 of the draft Civil Partnership Bill. However, this legislation will not take effect until it is enacted, and in the meantime Revenue follows the legal position in relation to common law spouses, in that it does not recognise any special status for such couples.

It is worth noting that there is one small concession made for inheritances by common law spouses. Revenue indicates in the CAT manual that the hardship provisions (s59 CATCA 2003) may apply where the financial position of a surviving common law spouse is particularly difficult, e.g. where the principal asset was the family home and it is at risk due to a substantial CAT liability on the death of one of the common law spouses.

Foreign Divorce not Recognised in the State

Foreign divorces will be valid in Ireland only if they would be recognised here under the Domicile and Recognition of Foreign Divorces Act 1986. In general a foreign divorce requires some element of domicile or at the very least long residence in the jurisdiction where the divorce was obtained. There were 9,800 divorced persons in Ireland in 1996, the year that divorce was introduced, all of whom must have obtained foreign divorces. Not all of those divorces would have met the criteria for recognition in Ireland, and if the divorce was not valid in Ireland the couple has remained legally married. The subsequent introduction of Irish divorce in no way validates divorces obtained before 1996 that were not valid.

As the “former” spouses remain legal spouses under Irish law, the transfer of property between them does not give rise to tax. However, if either or both enter into a further “marriage” with other partners, the transfer of property between the new partners may have tax implications (CAT, stamp duty and CGT), as the partners are not legal spouses and would be treated as legal strangers (class (c) threshold for CAT).

“Marriage” — But Not As We Know It?

The publication of the Civil Partnership Bill 2009 marks a distinct change in the Irish legal treatment of non-marital couples, as it provides for a scheme of contractual protection for same-

sex partnerships and co-habitants that parallels in many ways the protection offered to married spouses. It has wide-ranging provisions dealing with issues such as succession rights, protection from domestic violence and property adjustment orders, and will bring Irish law into line with much of the rest of the EU.¹

Civil partnerships

The Bill includes a scheme of civil registration of same-sex partnerships (to be known as civil partnerships) with a range of rights and duties, including (in Part 8 of the Bill) the

same succession rights as married couples, i.e. a legal right share and rights as next of kin.

Part 12 of the Bill deals with the dissolution of a civil partnership after the breakdown of the relationship, once the civil partners have lived apart for periods amounting to at least two years

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during the previous three years. This parallels the divorce of a married couple (except that the requirement for a divorce is that the couple should have lived apart for four out of five years). The Bill also provides for ancillary orders similar to those available in divorce, including property adjustment orders, financial compensation orders, pension adjustment orders and orders for provision out of an estate.

Co-habitants

Part 15 of the Bill makes provision for co-habitants, i.e. “one of 2 adults (whether of the same sex or the opposite sex) who live together as a couple in an intimate and committed relationship” for at least three years, or two years if there are children, “and who are not related to each other within the prohibited degrees of relationship, or married to each other or civil partners of each other”. As a couple become co-habitants over time, without formally contracting into the relationship, the status of the couple is a little more nebulous than that of married couples or registered civil partners. The Bill

1. See Audrey Byrne’s article in this issue, ‘The Civil Partnership Bill — a New Dawn for Co-habiting Couples (Part 1)’, pp 43 – 47

envisages that, rather than automatically having rights, a surviving co-habitant will be able to apply to court for provision from the estate of the deceased co-habitant. The Bill goes on to provide for the possible breakdown of the co-habitants' relationship and allows a court to order ancillary reliefs (such as property and pension adjustment orders) after such a breakdown.

The legislation as it currently stands does not contain any provision for taxation relief for transfers and/or payments between civil partners or co-habitants, and it is intended that tax issues will be dealt with by way of a Finance Bill and a Social Welfare Bill that will be introduced once the civil partnership registration scheme comes into effect. The Department of Finance has indicated that civil partnerships will generally be treated in the same way as married couples for taxation purposes. It has not provided as clear an indication on how co-habitants will be treated for tax purposes, and under current legislation co-habitants will be unmarried (no spouse reliefs) and strangers for CAT purposes. This lack of provision may be due to the less precise nature of the relationship. Unlike married couples or civil partners, there is no precise point in time (such as the signing of a register) when the relationship legally comes into existence.

Tax and Spouse Reliefs

Table: Legislation for spouse reliefs

CAT	CATCA 2003 s70 (gifts), s71 (inheritances) and s88 (dissolution of marriage)
CGT	TCA 1997 s1028 (spouses), s1030 (separated spouses) and s1031 (divorced persons)
Income tax	TCA 1997 s1017–1019 (joint assessment), s1025 (maintenance for separated spouses), s1026 (separation and divorce) and s1027 (payments under court order)
Stamp duty	SDCA 1999 s96 (spouses) and s97 (dissolution of marriage)

There are CAT, CGT and stamp duty reliefs for spouses and special income tax rules that

allow for some pooling of spouses' incomes and allowances. In summary, no CAT or stamp duty will arise in relation to a transfer from one spouse to another, and no CGT will arise on the transfer provided that the couple are married and living together and the receiving spouse would be within the charge to Irish CGT on a disposal of the asset. Married couples can opt to be jointly assessed to income tax (again, assuming that they are living together) and can avail of some tax benefits such as the sharing of tax allowances and standard rate bands and the sharing of Case I and II losses and excess Case V capital allowances.

There may be tax implications under several tax heads, i.e. CAT, CGT, stamp duty and income tax, when a marriage breaks up.

Tax Following Separation CAT and stamp duty

Separated spouses remain spouses, so reliefs available to spouses, such as stamp duty relief and CAT relief, are freely available after separation, regardless of whether the separation is voluntary, by formal agreement or by court order.

CGT

Few separated spouses co-habit to any extent, so reliefs available to spouses who are living together (such as CGT relief) will not be available after separation, although s1030 TCA 1997 provides some CGT relief for transfers between separated spouses. In the year of separation the general Revenue practice is to treat couples as married for CGT purposes, but in following years relief will be available only if the transfer occurs under the family law provisions specified in s1030. In a practice note on "Separation & Divorce", Revenue provides as follows:

"Any assets, including an interest in the family home, transferred from one spouse to the other spouse in the year of separation will be treated as a no gain/no loss for capital gains tax purposes. As a result no capital gains tax liability will arise in the year of separation. Any losses may be transferred between spouses in the year of separation."

Income tax

A separated couple can opt to be treated as a married couple for income tax purposes if they are both resident in the State and maintenance payments are made under a legally enforceable arrangement. The couple must submit a joint election in writing, signed by both, before the end of the tax year. If such an election is made, any maintenance payments are ignored and, if both spouses have income, separate assessment will apply.

Joint/separate assessment requires a certain level of co-operation between the spouses, and in general separated/divorced spouses choose to be taxed singly and the focus of income tax advice is the taxation treatment of maintenance payments.

Maintenance payments

Maintenance payments for a spouse are generally treated as income of the receiving spouse (payment from pre-tax income; income tax and income levy deduction for paying spouse; and subject to income tax and income levy in the hands of the receiving spouse). It should be noted that, if the maintenance payment is voluntary (i.e. not legally enforceable), there will be no entitlement to a tax deduction for the paying spouse (who will also be responsible for paying income levy on the voluntary maintenance). If the voluntary payment is wholly or mainly supporting the spouse (i.e. it represents over 50% of the dependent spouse's income), then the spouse paying the voluntary maintenance can claim a married allowance but not the married standard rate band. Maintenance payments for a child are treated as income of the paying parent (payment from after-tax income; no tax deduction for paying parent; and no tax for the child).

Tax Following Divorce

Divorced "spouses" are no longer legally spouses, so they are no longer eligible for any of the tax reliefs available to spouses. However, provision is made in the legislation for spouse reliefs to apply to orders made on the dissolution of marriage, and a divorced couple has the same income tax option as a separated couple, i.e. they may elect to be treated as a married couple

for income tax purposes if they are both resident in the State and neither spouse has remarried.

It is important, when advising on the tax consequences of the transfer of an asset in the context of a broken marriage, to establish the basis for the transfer. All of the “dissolution of marriage” reliefs refer to specific legislation, and if the transfer does not occur under one of the listed provisions then spouse relief will not apply. For example, originally there was no CAT exemption for benefits taken by divorced spouses under a foreign court order in respect of a foreign divorce settlement, even if the divorce itself was recognised in Ireland. The issue was that the property orders were not made under the Irish legislation listed in s88 CATCA 2003. However, s149 FA 2000 filled this gap by providing that the s88 CAT spouse exemption will apply to a foreign ancillary order after 10 February 2000, provided that it is analogous to the orders that an Irish court could make, that it was made in consequence of the dissolution of a marriage, and that the dissolution is valid in Ireland.

In Form CA25 (“Guide to Completion of the Inland Revenue Affidavit”) Revenue notes that, if a couple divorce and the court makes an order regarding property under the divorce settlement, the transfer of the property taken by a divorced spouse is exempt from CAT, even if the actual transfer of the property does not take place until sometime after the divorce is final and the couple are no longer husband and wife. In addition, a divorced spouse may make a claim against a former spouse’s estate, and the court may make an order appropriating part of the estate to him or her. The transfer will be exempt from CAT if the order is made under the Divorce Act, notwithstanding the fact that the parties are no longer married at the date that the order is made.

Any settlements of property or other settlements made without a court order between the parties after the divorce are not exempt and, as they are deemed to be passing to and from strangers in blood, they attract a class (c) threshold.

Table: Tax points re spouse reliefs

CGT	Relief is not available under s1028 if the spouse receiving the asset is not within the charge to CGT (e.g. a spouse resident outside Ireland)
CGT	In the year of separation a couple can transfer at no gain/no loss and can transfer losses
Stamp duty	s96 does not give relief if another party (apart from the two spouses) appears in the deed; also spouse relief is not available in the context of a sub-sale

Property Adjustment Orders

Under Irish separation and divorce legislation² (and under the draft Civil Partnership Bill) the Irish courts are given very wide powers to redistribute property following the breakdown of a relationship. In addition to the actual separation/divorce order, the courts have power to make ancillary orders including orders to provide for the maintenance of spouses and children, property adjustment orders redistributing assets held by the spouses, pension adjustment orders allocating pension rights between spouses, and orders for provision from estates.

The power to make property adjustment orders is very broad and a court can order:

- › the transfer of property from one spouse to the other or to a dependent child,
- › the settlement of specified property for the benefit of the family,
- › the variation of any pre-marriage or post-marriage settlement made on the couple (including any settlement in a will), for the benefit of the family, or
- › the extinguishment or reduction of the interest of either spouse in a pre-marriage or post-marriage settlement.

Clients who are considering the transfer of assets to children who do not have stable marriages may have a well-founded fear that, if the marriage fails, “family” assets may pass outside the family into the control of the ex-daughter-/son-in-law. Once the Civil Partnership Bill becomes law, this concern will extend to children living with “unsatisfactory” partners. As the court can vary marriage settlements, attempts to “lock” assets away from the child’s legal control by using a trust may not prevent the asset being vulnerable to a claim by an ex-spouse. In addition, even if a court does not order the variation of a discretionary trust set up by one spouse’s family, the judge may take the view that the spouse who is a potential beneficiary of the family trust needs less provision from the assets of the marriage.

Pre-Nuptial Agreements – Any Protection?

If parents have a concern about the impact of the break-up of a child’s impending/future marriage, they may wish to consider whether any protection can be secured by a pre-nuptial agreement. The Constitution reserves special protection for the institution of marriage, and for many years there has been substantial uncertainty about whether pre-nuptial agreements would automatically be void and unenforceable as a breach of public policy. A Study Group on Pre-nuptial Agreements was established, and its report in 2007³ concluded that pre-nuptial agreements do not offend against the constitutional protection of marriage and the right to marry, and they may be enforceable under existing Irish law. However, there is a constitutional requirement that proper provision should be made for a family, so pre-nuptial agreements would not be automatically enforceable.

The Group recommended that some recognition should be afforded to pre-nuptial agreements but envisaged that, if challenged, they would be treated in the same way as separation agreements, i.e. they would be considered by the courts rather than being automatically enforced.

2. Section 9 Family Law Act 1995 and s14 Family Law (Divorce) Act 1996.

3. www.justice.ie/en/JELR/PrenupRpt.pdf/Files/PrenupRpt.pdf.

It was also suggested that pre-nuptial agreements should be reviewable on death and that legal criteria would be established to determine if an agreement was valid. The suggestion is that, to be enforceable, an agreement would have to be made:

- › in writing, signed and witnessed,
- › after each party has obtained independent legal advice,
- › with full disclosure of financial information and
- › not less than 28 days before the intended marriage.

The Minister for Justice, Dermot Ahern, has acknowledged that in drafting the Civil Partnership Bill a distinction was deliberately maintained between marriage and civil partnership:

“The Bill provides very significant rights to civil partners which raises complex legal issues in the context of the special protection which the Constitution guarantees to marriage and in relation to the equality rights protected by Article 40.1 of the Constitution. The Bill has been carefully framed to balance any potential conflict between these two constitutionally guaranteed rights. This balance is achieved by maintaining material distinctions between civil partnership and marriage, in particular between the rights attaching to both, while at the same time reflecting the equality rights protected by the Constitution.”⁴

Provision is made in the Civil Partnership Bill for the enforceability of agreements between co-habitants in regard to the regulation of their joint property and financial affairs, and the court is given the power to carve out provisions of the agreement if the enforcement of such provisions would result in an injustice. There is no parallel provision for civil partners, but there would be no constitutional issue if a pre-partnership agreement is drawn up. In the absence of specific legislation, normal contract law provisions should apply.

Recession — Good for Ailing Marriages?

There do not appear to be statistics available on the current rate of Irish divorce and the impact, if any, of the recession, but in the UK the Office of National Statistics has published a report that indicates that the number of UK divorces has fallen recently, and the speculation is that this is driven by the downturn in the economy.

In general when a couple splits up, one moves out of the family home, establishing a second household, and it is, of course, more expensive to run two households than to run one. Often, following a break-up, one spouse will buy the other out of the family home or, if the family home is a substantial property and the bulk of the couple’s wealth is tied up in it, the family home will be sold and the net proceeds of sale will be divided. This is hard to achieve in the current environment, when bank loans and purchasers are not easily found, so it may be easier and cheaper to defer a separation or divorce.

There have been a number of family law cases recently dealing with the impact of the downturn in the economy on marital breakdown proceedings, particularly those where the court has made an order for sale or transfer of property based on a historical value that is no longer achievable on sale. The court will generally, if the couple’s position has changed substantially, consider varying an order already made.

In *NF v EF (No. 2)*, a 2008 High Court case, the wife divorced her husband; as part of the divorce

provisions, the court ordered the sale of a house owned by the husband (valued at €600,000

in 2007, when the case was heard) and directed that the net proceeds (estimated at €400,000 after payment of costs and the mortgage) should be lodged and used for the wife’s benefit during her life. By the time that the property came up for sale, it was worth only €300,000 and neither party was happy with the original court order. The judge amended the original order to direct that the property was to be sold for not less than €300,000 and to deal with the possibility that the property could not be sold (in which case it was to be transferred to the wife, who would take over the mortgage).

It would seem likely that a number of cases will be brought back to the courts for variation of provisions that do not reflect the current economic climate.

Future Developments

Tax provisions have been introduced, and where necessary adjusted, to deal with the impact of marital

breakdown, separation and divorce. As further legislation is introduced to deal with the breakdown of the relationships, tax law and practice are likely to change again, and existing reliefs are likely to be extended.

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4. Department of Justice press release, 26 June 2009.