Family law in Ireland: overview

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JURISDICTION AND CONFLICT OF LAW

Regulatory framework

1. What are the primary sources of law in relation to marriage, marital breakdown and the welfare of children and give a brief overview of which courts will have jurisdiction to hear the dispute?

Sources of law

The Constitution of Ireland, specifically Articles 41 and 42, recognises the family as the most important social unit in the State and accords a special position to the "family" based on marriage. While the Constitution dates from 1937, accession to the EU and other international treaties facilitated the development of modern Irish family law, which is now primarily sourced within a statutory framework. The Judicial Separation and Family Law Reform Act 1989 first introduced the concept of judicial separation and extensive ancillary relief orders. That Act was subsequently amended and enhanced by the Family Law Act 1995, which remains in operation. Divorce was introduced by a narrow majority following a referendum on 24 November 1995, which resulted in new provisions at Article 41 and the enactment of the Family Law (Divorce) Act, 1996.

The Constitution continues to afford special protection to the family based on marriage, and that protection now extends to same sex marriage, following the Marriage Equality referendum held on 22 May 2015, which was passed by a 62% majority. The Children and Family Relationships Act 2015, passed by both houses of parliament (Oireachtas) includes a number of significant changes with regard to the position of children in Irish family law, such that there will be less differentiation between marital and non-marital children. The legislation also provides for children of civil partners, IVF and guardianship for non-marital fathers.

The main family law acts are the:

• Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (2010 Act) (insofar as it relates to civil partnership).
• Family Law (Maintenance of Spouses and Children) Act 1976.
• The Guardianship of Infants Act, 1964 as amended.

Court system

The Circuit Court and High Court each have full jurisdiction to deal with proceedings for divorce, separation, nullity and dissolution of civil partnerships. Both courts also have jurisdiction to deal with preliminary applications, interim applications and applications for ancillary (including financial) relief. "Ample resource" cases, international matters and/or more complex matters are generally instituted in the High Court whereas the Circuit Family Court deals with a higher volume of family law matters. The Court of Appeal and the Supreme Court (in certain cases) hear appeals from the High Court. The District Court, being the lowest court, deals with maintenance, guardianship, custody, access and domestic violence applications.

Jurisdiction

2. What are the main requirements for local courts to have jurisdiction in relation to divorce, property and children proceedings?

Domicile and/or ordinary residence in Ireland for a period of 12 months prior to the application forms the basis for jurisdiction over divorce, property and children proceedings under the main family law acts.

The Irish courts also have jurisdiction where the provisions of the revised Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II Regulation) apply. The Brussels II Regulation is now generally cited in Irish family law proceedings and has introduced a number of changes to the basis for jurisdiction in respect of divorce, separation, nullity and proceedings regarding children. Unfortunately, its provisions can result in a "race for the line" as each party attempts to acquire a preferred jurisdiction.

Domicile and habitual residence

3. How do the concepts of domicile and habitual residence apply in relation to divorce, financial arrangements, and children?

Domicile is generally understood as the country that a person treats as his permanent home and to which he has the closest legal attachment. The person cannot be without a domicile and cannot have two domiciles at once. At birth, an individual acquires a domicile of origin, which he retains until he acquires a domicile of choice in its place. A domicile of choice is acquired by making a home in a country with the intention that it should be a permanent base. It may be acquired at any time after a person becomes 16 and can be replaced at will by a new domicile of choice.

Habitual residence is interpreted in accordance with European case law, which has been endorsed by the Irish courts and applied in individual cases. The term has been interpreted as meaning the place or country in which a person has his home with an intention to reside there, coupled with a physical presence for a reasonable length of time. The court has held that habitual residence is not a term of art but a matter of fact to be decided on the evidence in each particular case. See McGuinness J’s decision in CM and OM v Delegacion de Malaga and Others [1999] 2 IR 363. For further judicial discussion on this subject see PAS v APS [2005] ILLRM 30G, SR v MM [2006] IEHC 7, AS v CS [2009] IEHC 345 and BU v BE [2010] IEHC 77 and CG & MG Supreme Court, 6 February 2015 which involved a reference to the European Court of Justice (ECJ).
Conflict of law

4. What procedure applies for a party applying to stay proceedings in favour of a foreign jurisdiction? What factors do local courts take into account when determining forum issues?

Procedure

Where proceedings are issued in more than one member state, the Brussels II Regulation provides that the court properly and first seized with proceedings (that is, the court at which the proceedings are lodged with the court) retains that jurisdiction and any second or subsequent court must decline jurisdiction in favour of the first court. The aim of the Brussels II Regulation is to avoid competing actions and the creation of “limping” divorces, incapable of recognition in other jurisdictions. The doctrine of forum non conveniens has limited application in Ireland. The Irish courts have followed the reasoning applied in Owusu v Jackson and Others [2005] EUECJ 28102 with regard to mandatory application of the Brussels Convention. At paragraph 46, the ECJ held that The Brussels Convention precludes a court of a contracting state from declining the jurisdiction conferred on it (Article 2) on the grounds that a court of a non-contracting state would be a more appropriate forum for the trial of the action even if the jurisdiction of no other contracting state is in issue or the proceedings have no connecting factors to any other contracting state.

See also MH v MH ECLI:EU:C:2016:542, in which the Irish Court of Appeal requested a preliminary ruling from the ECJ on the determination of time for when a court is seized. The case involved a race for jurisdiction between England and Ireland. Documents commencing Irish judicial separation proceedings were lodged with the court on 28th September 2015. A divorce petition was lodged with the Family Law Court in England earlier on the same day through document exchange, although proceedings were not issued until 31st September 2015. The ECJ ruled that Council Regulation (EC) No 2201/2003 must be interpreted so that the time when the document instituting proceedings or an equivalent document is lodged with the court is the time when the document is lodged with the court concerned (Article 16 (1) (a)). This is even if under national law lodging the document does not in itself immediately initiate proceedings. The Family Law Court in England was therefore the first court seized.

Following Brexit, it is highly likely that similar cases will be decided differently, and will perhaps lead to instances of parallel actions in different jurisdictions, in circumstances where EU member states are bound to recognise and enforce the orders of EU member states under the provisions of the Brussels Regulation, but the UK is not so bound.

Factors

The Irish courts apply lex fori, that is, Irish domestic law, in determining family law applications. Irish judges may have regard to foreign law in the context of divorce and ancillary relief applications. However, foreign law is not applied even between two foreign nations. In this regard, Ireland has opted out of Rome III, which aims to establish a consistent set of rules throughout the party EU member states. Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (EU Maintenance Regulation) (given effect in Ireland through SI No 274/2011) became effective in Ireland in June 2011 and Ireland has also opted into the Hague Protocol on the law applicable to maintenance obligations in member states 2007, and in this sense an element of applicable law has now been introduced in Ireland.

PRE-AND POST-NUP RTAL AGREEMENTS

Validity of pre- and post-nuptial agreements

5. To what extent are pre- and post-nuptial agreements binding?

There remains considerable discussion and uncertainty with regard to the status of pre- and post-nuptial agreements in Ireland. While no legislation or case law exists, the jurisprudence is shifting towards a greater emphasis on self-determination, provided certain procedural safeguards are observed. The Constitution continues to accord a special place to the family based on marriage and may continue to provide a basis for many of the traditional social and moral objections. More recently, a number of factors have arguably diminished the strength of these objections. In particular, the introduction of divorce in 1997 and the enactment of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (2010 Act), which allows cohabitants to regulate financial matters by written agreement.

An expert study group was established by the Irish Government in 2007 to review the role and status of pre-nuptial agreements. This comprehensive report recommended the introduction of legislation such that the courts would be required to have regard to pre-nuptial agreements without the terms of such an agreement becoming automatically determinative of the outcome. The report makes recommendations on the formalities necessary for making pre-nuptial agreements including proper disclosure, provision of independent legal advice and execution of the agreement at least 28 days prior to a marriage ceremony. While the recommendations set out in the report have not yet been implemented, pre-nuptial agreements are becoming more prevalent, particularly for wealthier clients.

DIVORCE, NULLITY AND JUDICIAL SEPARATION

Recognition of foreign marriages/divorces

6. Are foreign marriages/divorces/civil partnerships recognised?

Marriages

A foreign marriage will be recognised as valid in the Republic of Ireland where the formal legal requirements of the state where the marriage was celebrated are observed and where both parties have capacity to marry according to the law of their domicile at the time of marriage. Where such a marriage does not fall within the general understanding of marriage in Ireland, it may not be recognised on public policy grounds, for example, in the context of a polygamist marriage.

Divorces/annulment

Special rules apply in the context of recognition of foreign divorce, according to the date when the foreign divorce proceedings were issued. A foreign divorce obtained prior to 2 October 1986 would be subject to common law rules and the Irish courts now recognise such a decree in circumstances where either or both spouses were domiciled in the foreign state. In some cases, the High Court has recognised such a divorce on the basis of the residence of either spouse, although the precise parameters of such recognition remain unclear.

A foreign divorce obtained on or after 2 October 1986 would be subject to the provisions of the Domicile and Recognition of Foreign Divorces Act 1986 (1986 Act). In such cases, the Irish courts recognise a foreign divorce where either spouse was domiciled in the foreign state at the date of commencement of the proceedings. Special rules apply with regard to cases concerning England and Wales, Scotland, Northern Ireland, the Isle of Man or the Channel Islands, such that the divorce is recognised if either party was domiciled at the relevant time in any of those jurisdictions. On or global.practicallaw.com/family-guide
after 1 March 2001 (or 1 March 2005 in respect of newer member states), foreign divorces granted in EU member states (excluding Denmark) receive automatic recognition based on a number of grounds, including residence. Where there is a dispute, it is possible to make an application under the Family Law Act 1995 (1995 Act) to seek a formal declaration as to marital status. Following Brexit, there are likely to be changes to the application of EU law with respect to the recognition and validity of UK divorces, particularly where there is conflict with another EU member state.

Civil partnerships

A foreign civil partnership is recognised in accordance with section 5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (2010 Act) and pursuant to the Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010, which provides full recognition of certain registered foreign relationships so that these are declared to be entitled to be recognised as a civil partnership for the purposes of Irish law. Following the Referendum on Marriage Equality, a same-sex marriage in Argentina, Belgium, Canada, Iceland and so on will be recognised and treated as a valid civil marriage for the purpose of Irish law. Legal partnerships and/or civil partnerships between same-sex couples in scheduled jurisdictions such as Austria, Czech Republic, Denmark, Finland and so on are also treated as valid civil partnerships for the purposes of Irish law.

Divorce

7. What are the grounds for divorce?

Divorce

Divorce was introduced in Ireland as of 27 February 1997, following a referendum that was won by a narrow majority, which resulted in a new constitutional provision and the introduction of the Family Law (Divorce) Act 1996 (1996 Act). A decree of divorce can only be granted where:

- The spouses have lived apart from one another for a period of five years or more.
- The marriage has broken down irretrievably.
- There is no reasonable chance of reconciliation.
- Such provision as the court considers proper having regard to the circumstances existing or likely to exist for the future.

As such, there is no requirement to illustrate fault for the purpose of grounding an application for divorce in Ireland. Formal evidence must be given to the court in respect of the period spent living apart, although the courts have allowed for periods of time spent living apart “while under the same roof”. In most cases, it is necessary to bring judicial separation proceedings in the first instance, the grounds for which are set out in section 2 of the Judicial Separation and Family Reform Act 1989 (1989 Act) and include adultery, unreasonable behaviour, living apart for a period of three years (or one year where the respondent consents) and desertion for a period of one year.

Nullity

Applications for a decree of nullity are less frequent since the introduction of divorce and can be made where a marriage is void or voidable. In Irish law, a marriage may be void due to lack of capacity or nonconsent of formalities or absence of consent. Grounds rendering a marriage voidable include impotence and incapacity to enter into and sustain a normal marriage relationship. It is not possible to seek ancillary relief on the grounds of a decree of nullity, the effect of which is to declare that no marriage ever existed between the parties.

Judicial separation

Where agreement is reached on the terms of judicial separation, this is usually granted on a no-fault basis, where there has been no normal marital relationship for a period of one year prior to issue of proceedings. Behaviour is not generally taken into account unless it is “gross and obvious” and where it would be unjust to disregard it.

Finances/capital and property

8. What powers do the courts have to allocate financial resources and property on the breakdown of marriage?

Initially contained in the Judicial Separation and Family Reform Act 1989 (1989 Act) and then substantially replaced by the Family Law Act 1995 (1995 Act), the court has wide-ranging powers to make financial relief orders in the context of judicial separation. The 1995 Act replicates many of these provisions in the context of divorce. Whether dealing with judicial separation or divorce, the court has extensive powers to make orders including for the sale or transfer of any property or assets owned by either or both of the spouses including trusts, company shares and other assets in which a spouse has an interest, whether legal or beneficial.

Once judicial separation/divorce proceedings are instituted, it is possible to apply for preliminary and/or ancillary relief including maintenance pending suit and freezing orders, among other things.

The family law courts can make a number of orders including:

- Maintenance (periodical payment) orders.
- Lump sum orders.
- Property adjustment orders for a transfer of any property or assets between the spouses.
- Orders conferring on one spouse an exclusive right to reside in the family home.
- Orders for the sale of property.
- Financial compensation orders, regarding life cover as security for maintenance payments or otherwise.
- Pension adjustment orders.
- Orders extinguishing Succession Act rights and dealing with relief orders following death.

9. What factors are relevant to the exercise of the court’s powers?

There is no provision for a “clean break” in Irish law whether in the context of judicial separation or divorce. G v G [2011] IESC 40, a decision of the Supreme Court delivered on 19 October 2011, is helpful as the Supreme Court remitted the case to the High Court for alteration and stressed that privately reached “full and final” separation agreements should be given significant weight in divorce orders. This case is also authority for the separate treatment of inherited assets.

In essence, the court’s obligation whether in the context of judicial separation or divorce is to ensure that “proper provision” is made for the spouses and any dependent children. Section 16 of the Family Law Act 1995 (1995 Act) and section 20 of the Family Law (Divorce) Act 1996 (1996 Act) set out the factors to which the court must have regard when considering whether to grant financial relief orders. These include the financial position of each party, the standard of living enjoyed by the parties, conduct where it would be unjust to disregard it, contributions made by each spouse and so on.

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While there are no specific rules governing assessment of proper provision, the seminal case is T v T [2002] 3 IR 335; which referred to a “benchmark of fairness” for the dependent spouse as between one-third and one-half of the net assets. While some recent cases have departed from this yardstick depending on the precise circumstances, it remains a helpful guideline.

While the benchmark of fairness and the factors contained in the legislation offer helpful guidance, they are not determinative of the outcome in any given case. Judicial discretion is exercised widely in these matters and is often heavily influenced by the specific facts and circumstances of the case.

Discovery and exchange of financial reports/information is imperative in financially complex cases. For example, it may be necessary to bring into play applications for discovery orders. More recently, the Irish High Court and the Circuit Family Court have each introduced processes of case management/progression that are designed to ensure that discovery and other pre-trial matters are dealt with prior to listing of the matter for hearing. This process also assists in the management of settlement discussions as each party has greater clarity as to the net asset position.

10. What is the court’s current position on the division of assets?

The approach of the Irish courts in ancillary relief applications has been neatly summarised in the High Court decision of MB v VB (Birmingham J, 19 October 2007 (unreported)).

In considering the concept of proper provision the court wrote that “the Supreme Court [in T v T] eschewed any adherence to any particular mathematical formula, making it clear that there was no automatic principle of assets being distributed on the basis of equality and that equally, on the other side of the coin, the claiming spouse was not confined to the share of the assets that would be required to meet their reasonable needs”.

The court further commented that “there is no right percentage to be applied... I have not approached this case on the basis of deciding on any particular percentage, but rather I have considered percentages only at the final stage and then done so as a form of safety check, so as to confirm to my satisfaction that the approach I was taking was not an unreal one”.

Recent financial difficulties and the collapse of the Irish property market have resulted in a number of applications for variation of previous maintenance/capital orders, many of which have been successful. See AK v JK IEHC [2008] 341 with regard to differentiation between “fine tuning applications” and “strategic applications” where variation is sought in a post-separation context. See also D v D [2011] IESC 18 where the Supreme Court allowed the husband to adduce new evidence to show a material change in circumstances (namely the reduction in the value of agricultural land). The matter was remitted to the High Court for a determination of how the assets should be divided. In a recent decision, MD v ND, 26 February 2013, the Supreme Court set out several points of suggested good practice in matrimonial proceedings where there are issues of significant controversy or complexity. The court found that the ascertainment and valuation of the parties' resources was an important starting point. The court must be presented with the competing positions of the parties, on the issue of their available resources. Each party must also set out their position on proper provision in the context of the resources available. See also NQ v T(S) [2016] IECA 421, dealing with the implications of conduct which is not taken into account unless it is “gross and obvious” and the case of HH v BN [2016] IEHC 330, involving the unfortunate division and sale of a farm which had been in the wife's family for generations.

11. How does ongoing spousal maintenance operate following marital breakdown?

On application for judicial separation or divorce, the courts may grant a maintenance order for the support of a financially dependent spouse either as a periodical payment, a secured periodical payment or a lump sum payment. The amount of the payment should be specified including the times at which these are to be made. Consent orders often provide for increases in accordance with the Consumer Price Index. These maintenance orders are subject to variation, discharge or suspension in circumstances where they are successfully reviewed at a later date.

The court also has power to make retrospective payments for maintenance, although this seldom occurs. While typically opened-ended, maintenance orders can be limited in duration. In addition, in the context of separation or a divorce, the court can make orders for maintenance pending suit or interim maintenance. Alternatively, the court can make a stand-alone maintenance order under the Family Law (Maintenance of Spouses and Children) Act 1976 even where there are no proceedings for separation/divorce.

The obligation to maintain a dependent spouse continues after divorce, even where no maintenance order was made at that time. The obligation of spousal maintenance only terminates on the death or remarriage of the receiving spouse, although a court is unlikely to impose a maintenance payment where a dependent spouse is cohabiting with a new partner in circumstances similar to that of husband and wife. The Circuit Family Court and High Court have unlimited jurisdiction with regard to the level of maintenance orders for spouses and children. There are limitations as to the level of maintenance orders that can be made in the District Court.

12. Is it common for maintenance to be awarded on marital breakdown?

Maintenance is frequently awarded in ancillary relief applications on judicial separation and divorce where one of the spouses is financially dependent on the other. In recent times, there is a greater emphasis on the ability of the dependent spouse to re-train and return to remunerative employment. Where there are ample resources and valuable assets available for distribution, maintenance is unlikely to be ordered.

13. What is the court’s current position on maintenance on marital breakdown?

Maintenance orders generally form part of a comprehensive range of ancillary relief orders, whether made by agreement or order of the court. See CD v PD (High Court, O’Higgins J, 15 March 2006) and MB v VB (High Court, Birmingham J, 19 October 2007 (unreported)).

There is no formula for calculation of appropriate maintenance payments and the test is what constitutes “proper” maintenance support for a spouse and/or any dependent children. The court has regard to the financial position of each party and the needs of the dependent spouse/child in reaching a fair assessment of appropriate maintenance. Reference is made to the High Court decision in JC v MC (No 2) (Abbott J, 14 November 2007 (unreported)) where an applicant wife sought additional financial relief subsequent to the grant of a full and final decree of divorce, on the basis of a significant improvement in the husband's financial circumstances.
The court held that it had jurisdiction to increase the periodical payments order but not the lump sum order. Abbott J stated: “I am satisfied having carefully considered the evidence that this figure will be sufficient to enable the ex-wife to cater for her own needs and also to keep house for her adult children. It also gives her scope to build up security (by not having to dip into capital) for her future, to cater for any normal contingencies of life and particularly the necessity to provide security in the event of the earlier death of the ex-husband. To avoid needless applications for a review of this figure, the figure should be reviewed annually in accordance with the Consumer Price Index”.

See also H v D [2011] IEHC 233 in which Irvine J held that a reduction in income did not automatically entitle the applicant to a proportionate reduction in his maintenance payments unless he could demonstrate that the reduced maintenance would be sufficient to meet the ongoing needs of the respondent and their two children. See also CC v NC [2016] IECA 410 in which the Court of Appeal refused to make further provision for a dependent wife in circumstances where it found that the High Court had already made proper provision and that the other spouse should not suffer the consequences of poor and improvident investment decisions.

**Child support**

### 14. What financial claims are available to parents on behalf of children within or outside of the marriage?

Parents continue to share rights and responsibilities for their child/children following separation whether within or outside marriage. The parent with the greater financial resources tends to pay maintenance for the care and support of the dependent child/children by agreement or as directed by the court. It is also possible to seek a lump sum maintenance order pursuant to section 42 of the Family Law Act 1995, within or outside the marital context.

Additional financial claims are available to parents on behalf of children in the context of marital breakdown. In such cases, a spouse or a person on behalf of a dependent member of the family, may also seek the following orders:

- Orders with regard to occupation and the sale of the family home.
- Financial compensation orders for the purpose of ensuring financial security.
- Pension adjustment orders in respect of retirement and/or contingent benefits.
- Orders for the sale of property and division of the proceeds of sale.
- Relief after divorce or separation outside the State.
- Maintenance pending relief orders.

### 15. On what basis is child maintenance calculated?

An application for child maintenance can be made independently or ancillary to judicial separation/divorce proceedings in respect of a dependent child. A child remains dependent under Irish law until they have attained the age of 18 years, or 23 years if they continue in fulltime education. This obligation arises regardless of the marital status of the parents and/or whether a father enjoys rights of guardianship.

The level of maintenance is determined following consideration of the income and assets of each parent, the needs of the child and in the marital context, the standard of living enjoyed by the parties prior to separation, together with the other factors set out in:

- Financial claims can be brought on behalf of a dependent member of the family to include applications for maintenance, lump sum(s) and / or property adjustment and pension orders.

### 16. What is the duration of a child maintenance order (up to the age of 18 years or otherwise)?

A child remains dependent under Irish law until they have attained the age of 18 years, or 23 years if they continue in fulltime education. A child also remains dependent where he/she is suffering from mental or physical disability to such an extent that it is not reasonably possible for him to maintain himself fully.

### 17. Can a child make a claim direct against their parents?

A person, on behalf of a dependent member of the family may make a claim for child maintenance, during the lifetime of either or/ both parents. Children remain dependent until they attain the age of 18 years, or 23 years if they continue in fulltime education (Question 18).

### Reciprocal enforcement of financial orders

### 18. What is the legal position on the reciprocal enforcement of financial orders?

The EU Maintenance Regulation together with the Hague Protocol, now regulate maintenance obligations and recognition of cross border orders. These orders were previously recognised and enforced pursuant to the Brussels I Regulation, which also facilitated enforcement of lump sum orders and pension orders where the purpose was to make provision for maintenance. These provisions have now effectively been replaced by the provisions of the EU Maintenance Regulation. The provisions of the revised Brussels II Regulation are confined to recognition and enforcement of decrees of divorce, separation and nullity throughout these states and as such do not assist with recognition and enforcement of ancillary or financial relief orders. However, choice of jurisdiction remains pivotal in many cases concerning international families and undoubtedly has an impact on financial issues.

The Maintenance Act 1949 in effect ratified the Rome Convention 1990, and the UN New York Convention on the Recovery Abroad of Maintenance 1956. Each of these Conventions, together with the EU Maintenance Regulation, provides for the establishment of a central authority in each state. As such, a person with a maintenance order can apply through the central authority in his or her state for enforcement through the central authority in the other jurisdiction. Enforcement proceedings are conducted in accordance with the provisions of the Convention or EU Maintenance Regulation, whichever is applicable. In Ireland, the existing maintenance enforcement procedure is used by the Irish Central Authority. The EU Maintenance Regulation simplifies the procedure as member states. For enforcement of non-EU orders, an application is first made to the Master of the High Court for a determination as to its enforcement under section 5 of the Jurisdiction of Courts and Enforcement of Judgments Acts 1988 and 1993. Enforcement proceedings are thereafter generally processed through the District Court. Following Brexit, there may be some difficulties with recognition and enforcement of UK maintenance orders, particularly where there is a conflict between UK and EU law.
Financial relief after foreign divorce proceedings

19. What powers are available to the court to make orders following a foreign divorce?

Part III of the Family Law Act 1995 (1995 Act) provides for applications for financial relief orders proceeding from foreign decrees of divorce or separation. These orders are more limited in scope than the ancillary orders available to an applicant for domestic divorce or separation. Special leave must first be sought from the court prior to bringing such an application. In determining an application for relief, the court must consider several factors including the connection the spouse may have with the state, existing financial arrangements and the possibility of seeking relief in the original state.

There are few reported decisions on Part III to date. Reference is made to MR v PR (High Court, Quirke J, 5 July 2005), where the court held that the applicant wife was entitled to financial relief as it was satisfied that no remedy was available to her following grant of a Spanish decree of divorce where full disclosure had not been made by the husband. This decision was confirmed in the later decision of PMY v PC (High Court, Sheehan J, 23 November 2007) where relief was refused on the basis that the wife was not precluded from seeking financial relief, including maintenance, in Hong Kong, where the original divorce had been granted.

CHILDREN
Custody/parental responsibility

20. What is the legal position in relation to custody/parental responsibility following the breakdown of a relationship or marriage?

In all cases involving children in Ireland, their best interests and welfare are considered to be the guiding and paramount consideration in all matters affecting them. Where parties are married, joint custody is assumed and orders directing joint custody are generally made by the court on the basis that primary care and control is with one of the parents with days and times for access for the other parent set out in detail, or, in less contentious cases, by using the formula "as agreed between the parties from time to time".

In non-marital cases, the mother is the sole legal guardian and custodian of the child/children. The father can apply to court for guardianship and/or custody and access orders. Alternatively, the mother can appoint the father guardian by statutory declaration.

Following the introduction of the Children & Family Relationships Act 2015, an unmarried father will automatically become guardian where he and the mother have been cohabitants for not less than 12 consecutive months occurring after 18 January 2016, of which not less than three consecutive months, both the mother and the father have lived with the child.

Where there is a dispute between the parties as to the most appropriate custody/access arrangements, in the context of proceedings before the High or Circuit Family Court, the court may direct a section 32 assessment by a child specialist. Generally, the court will be guided by the specialist in reaching a determination on these issues. There is no panel of child specialists and access to these services is generally limited to litigants who are in a financial position to discharge associated costs.

Parents continue to share rights and responsibilities for their child/children following separation and/or divorce. For married parents, this usually results in a continuation of joint custody, with the children spending specific days and times with each parent. Both parents remain joint guardians of the child/children and they each continue to have a right to be consulted and to be involved in determining all decisions with regard to the child/children's welfare and best interests. These matters are now covered by the provisions of the Children and Family Relationships Act 2015 (2015 Act) and are determined by the court in accordance with Part V of the 2015 Act.

For unmarried parents post-separation, where the father is involved in the child's life, he will usually be appointed as a joint guardian and he may also be appointed as a joint custodian of the dependent child/children. Provision will usually be made for access arrangements in accordance with the terms of the UN Convention on the Rights of the Child.

For both married and non-married parents and non-marital families, where there is a dispute with regard to custody and access arrangements, it is usual (in the Circuit Court and the High Court) for the court to appoint a child expert under section 32 of the Guardianship of Infants Act, 1964, as amended. The expert will be responsible for carrying out an assessment and making recommendations to the court regarding the best interests of the child/children in all the circumstances, and also the most appropriate custody and access arrangements. Section 32 facilitates the appointment of an expert for the purpose of procuring a written report on any question affecting the welfare of a child or for the purpose of determining and conveying the child's views.

In determining the best interests of the child, the court will consider (section 31, Part V of the 1964 Act as amended):

- The benefit to the child of having a meaningful relationship with each parent and any other relatives and persons who are involved in the child's upbringing and having sufficient contact with them to maintain such a relationship (except where such contact is not in the child's best interests);
- The views of the child (whether in accordance with the written report provided by an expert under section 32 of the 2015 Act, or not). In obtaining the ascertainable views of the child, the court:
  - must facilitate the child's freedom of expression in relation to their views, and in particular, try to ensure that any views are not expressed as a result of undue influence; and
  - can make an order under section 32 of the 2015 Act.
- The physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and level of development and the likely effect that any change in circumstances will have.
- The history of the child's upbringing and care, including the nature of the relationship between the child and each parent and other relatives and persons involved in the child's upbringing, and the desirability of preserving and strengthening such relationships.
- The child's religious, spiritual, cultural and linguistic upbringing and needs.
- The child's social, intellectual and educational upbringing and needs.
- The child's age and any special characteristics.
• Any harm that the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological wellbeing.

• Where applicable, proposals made for the child's custody, care, development and upbringing and access and custody arrangements, while considering the wishes of the parent or guardian of the child in agreeing to and co-operating with such proposals.

• The willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and other relatives.

• The capacity of each person in respect of whom an application is made under the Act to:
  - care for and meet the needs of the child;
  - communicate and co-operate on issues relating to the child;
  - exercise the relevant powers, responsibilities and entitlements to which the application relates.

The court must also have regard to any household violence that has occurred or is likely to occur in the household of the child, or a household in which the child has been or is likely to be present, including the impact or likely impact of such violence on the (subsection (2)(h), Part V, 2015 Act):

• Safety of the child and other members of the household concerned.

• Child's personal wellbeing, including psychological and emotional wellbeing.

• Victim of such violence.

• Capacity of the perpetrator of the violence to properly care for the child and the risk, or likely risk that the perpetrator poses to the child.

In this section "household violence" includes behaviour by a parent or guardian or a household member that causes or attempts to cause physical harm to the child or another child, parent or household member. It includes sexual abuse or causing a child or a parent or other household member to fear for their safety or that of another household member. A parent's conduct can only be considered to the extent that it was relevant to the child's welfare and best interests for the purposes of this section of the 2015 Act.

The court follows the general principle that, unreasonable delay in determining the proceedings can be contrary to the best interests of the child.

Whether between married parents or unmarried parents, it is usual to put in place interim access arrangements immediately following the breakdown of a relationship, whether by agreement or by court order.

Depending on the circumstances of the case, it may be necessary to seek supervision of access, for example, where there is a serious risk to the welfare of the dependent children, on account of the behaviour of one of their parents. Where there is a dispute with regard to access arrangements, the court may direct an assessment to be carried out by an appropriate child specialist pursuant to section 32 (see Question 17). Access to legal aid is limited and can result in difficulties in enforcement of access/contact arrangements.

**International abduction**

22. What is the legal position on international abduction?

With effect from 1 October 1991, the Child Abduction and Enforcement of Custody Orders Act 1991 incorporated both the Hague Convention on the Civil Aspects of International Child Abduction 1980 and the European Child Abduction Convention 1980 into Irish law. The revised Brussels II Regulation also applies to the Republic of Ireland with regard to international child abduction. While the Convention continues to apply, the Regulation provides that its provisions take precedence in cases of abductions between member states. As with the Hague Convention, the Regulation is based on the best interests principle. Child abduction between member states and, where such abduction takes place, establishes a system to ensure the prompt return of the child to their member state of habitual residence.

Child abduction cases in Ireland are heard in the High Court and legal aid is available to applicants in these cases. The Irish courts adopt a consistent approach and endeavour to return the child speedily to the country of habitual residence. Refusal to return is considered where a grave risk defence is mounted. The courts do not generally hear direct evidence from children during these proceedings, although child specialists and/or a guardian ad litem may give evidence in certain circumstances. Again, there is no panel of child specialists available to the court in these cases.

Unmarried fathers who did not have any automatic rights of custody and guardianship were somewhat vulnerable in the Irish context (prior to the enactment of the Children and Family Relationships Act 2015). Previous case law held that the removal of a child in the absence of the consent of an unmarried father (who had not been appointed guardian) is not a wrongful removal as a breach of rights of custody had not occurred. Another case found that where the unmarried father had applied to the courts for guardianship and/or access, the court itself has rights of custody. See CM v Delegacion de Malaga [1999] 2IR 363 In re J (A Minor) (Abduction) [1990] 2AC 562; In re H (Abduction: Custody Rights) [1991] 2AC 476; R v R [2006] IESC 7 and AS v MS (child abduction) [2008] IR 341; ABU v JBE [2010] IEHC 77; AU v TNU [2011] IESC 39, which refers to Baroness Hale’s decision in Re D (A Child) (Abduction: Rights of Custody) [2007] IAC 619, “there is now a growing understanding of the importance of listening to the children involved in children's cases”. Also see MN and RN [2008] IEHC 382 where Finlay Geoghegan J states: “A mandatory positive obligation is placed on a court by Article 11(2) to provide a child with an opportunity to be heard, subject only to the exception where this appears inappropriate having regard to his or her age or degree of maturity” (which follows Re F [2007] EWC1 Civ 468). Also see JMcB and LE [2010] IEHC 123. See also W v W in unannounced Court of Appeal judgment handed down on 2 December 2016, regarding the conditional nature of consent to change of habitual residence.

**Leave to remove/applications to take a child out of the jurisdiction**

23. What is the legal position on leave to remove/applications to take a child out of the jurisdiction? Under what circumstances can a parent apply to remove their child from the jurisdiction against the wishes of the other parent?

Where a parent applies to a court seeking liberty to relocate or remove a child/children to another jurisdiction, the court will determine the matter based on the best interests principle. The court also considers the best interests of the child in a pragmatic sense having regard to a number of factors set out in the case law. The courts generally require information on the arrangements that have been made in the proposed new location, with regard to accommodation, education and the availability of support networks. Where the court grants leave to relocate, it will endeavour to ensure ongoing contact with the other parent. It is often envisaged that orders will be obtained in similar terms in the new jurisdiction depending on mechanisms available for enforcement.
There are an increasing number of cases in Ireland on this subject. At a minimum, very compelling reasons for relocation are required. Flood J sets out factors to which the court should have regard in a leave to remove application. See EM v AM (High Court, 16 June 1992 [unreported]). These include the following criteria:

- Which of the two hypothetical outcomes will provide the greater stability of lifestyle for the child.
- The contribution to such stability that will be provided by the environment in which the child will reside, with particular regard to the influence of his extended family.
- The professional advice tendered.
- The capacity for, and frequency of, access by the non-custodial parent.
- The past record of each parent, in their relationship with the child insofar as it impinged on the welfare of the child.
- The respect, in terms of the future of the parties, to orders and directions of the Court.

See also GF v DC (Circuit Court, McMahon J, 10 May 2007 [unreported]), KB v LO’ R (High Court, Murphy J, 15 May 2009 [unreported]), PC v PW [2008] IEHC 469 and UV v VU [2011] IEHC 519 in which McMenamin J considers the criteria set out in EM v AM in addition to factors such as financial implications, the children’s views, schooling, healthcare and an overall appraisal.

SURROGACY AND ADOPTION

Surrogacy agreements

24. What is the legal position on surrogacy agreements?

There is no legislation governing surrogacy in Ireland. As a result, Irish couples wanting to have children through surrogacy are driven overseas for fertility treatment. The Minister for Justice, on 21 February 2012, published a guidance document (see www.justice.ie for Irish couples on surrogacy arrangements made abroad. The purpose of the guidance document is to provide information to prospective commissioning parents on the steps necessary to ensure that a child born abroad through a surrogacy arrangement may enter and reside in the Republic of Ireland. It is intended to develop legislative proposals in the coming years for the purpose of comprehensively dealing with this complex area.

In a recent case before the High Court, the genetic parents of two small children born to a surrogate mother sought to have their names listed as the children’s parents on their birth certificates. Declarations were sought under the Status of Children Act 1987 that the genetic mother was the legal mother and should be named as such on the birth certificate. The surrogate mother consented to the application. The Registrar General defended the action, stating that the policy in Ireland is that the name of the woman who gave birth to a child, and not the genetic mother, is the name placed on the child’s birth certificate. While the genetic parents were successful in their application to the High Court, the decision was overturned by the Supreme Court in November 2014. The Supreme Court ruled that the genetic mother was not the legal mother and stressed the need for legislation to address this gap in the law. The continued lack of a legislative framework for surrogacy arrangements creates risk, uncertainty and costs for those involved.

Adoption

25. What is the legal position in relation to adoption? Is adoption available to individuals and cohabiting couples (both heterosexual and same-sex)?

Adoption is on a statutory basis pursuant to the provisions of the Adoption Acts 2010 to 2015. For eligibility, a child (between six weeks and 18 years) must be an orphan, “illegitimate” (until Constitutional amendment is enacted) or abandoned. The father’s consent is required in respect of a non-marital child. Reduced availability has increased demand for the adoption of overseas children. The child must come within the jurisdiction of the courts and it must be demonstrated that the order, if granted, would be compatible with the principle of the “welfare of the child as the first and paramount consideration”.

Pursuant to section 3(1) of the Adoption Acts 2010 to 2015, the law now states that a parent, in relation to a child, “means the mother, father or second female parent of the child”. Section 3(2) of the Act makes it clear that references to adopters in that Act will “include references to an adopter”. As such, adoption by a single applicant is now permitted and is for the first time provided for on a statutory basis. Following the enactment of the Children and Family Relationships Act 2015, adoption is now available to same-sex, civil partners and cohabiting couples on a joint applicant basis. In general terms, the prospective adopters are assessed by the Health Service Executive as to their eligibility and suitability. Statutory conditions relating to residence, marriage, religion and minimum age must be satisfied if adopters are to satisfy the eligibility criteria. Neither Irish domicile or nationality is required. Other conditions relating to factors such as maximum age, quality of and lifestyle must also be met by the adopters.

COHABITATION

26. What legislation (if any) governs division of property for unmarried couples on the breakdown of the relationship?

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (2010 Act) entered into force in Ireland on 1 January 2011. In addition to introducing civil partnership for same-sex couples, this legislation introduced a new statutory regime for cohabiting couples, whether same-sex or opposite sex, provided they are not married or civilly partnered to each other. The Act establishes a “presumptive”, “redress” or “safety net” scheme for certain cohabiting couples. The aim is to protect the economically dependent or vulnerable party at the end of a long-term cohabiting relationship, whether on relationship breakdown or death. Qualified cohabitants can apply to court for certain financial relief, including property adjustment orders, compensatory maintenance orders, pension adjustment orders and other orders for provision from the estate of a deceased cohabitant. Qualified cohabitants are defined as cohabitants residing together as an unmarried couple in an intimate relationship for a period of five years, or two years where there is a child or children from the relationship.

The orders available to qualified cohabitants are not as extensive as those available to spouses and/or civil partners. The claims partner must illustrate financial dependency and the court must have regard to the factors contained in the legislation, which include the rights of other parties (such as any spouses or civil partners in existence), the duration of the relationship and the contributions made by each cohabitant, whether financial or otherwise. Section 201 of the Act provides for regulation of financial matters by written agreement between cohabitants thereby facilitating opt out from the statutory regime. The Act provides that such an agreement will be valid and enforceable where it is in writing, signed by both cohabitants with the benefit of independent legal advice and where it accords with contract law.
FAMILY DISPUTE RESOLUTION
Mediation, collaborative law and arbitration

27. What non-court-based processes exist to resolve disputes? What is the current status of agreements reached through mediation, collaborative law and arbitration?

Prior to embarking on proceedings, there is a statutory obligation on solicitors to provide their clients with information and advice on the alternatives available to include counselling and mediation. A number of family lawyers have trained as mediators and collaborative lawyers, and as such these services are now available to clients. A proposed agreement reached through either the mediation process or the collaborative process is not legally binding and as such lawyers are usually instructed for the purposes of drafting consent terms or a deed of separation. Arbitration is not generally used in family law disputes, although this is an area that may develop.

28. What is the statutory basis (if any), for mediation, collaborative law and arbitration?

There is no current statutory basis for either mediation or collaborative law. The draft General Scheme of The Mediation Bill 2017 is intended to introduce a definition of mediation, which accords with that contained in Directive 2008/52/EC on mediation in civil and commercial matters (Mediation Directive), that is, mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. The proposed legislation will put the obligation to consider mediation on a statutory footing.

There is no concept of requiring the parties to attempt a family dispute resolution in advance of instituting proceedings, except for a limited scheme involving an information session on mediation, available in the District Court in the Dublin Metropolitan area. In practice, most good family law solicitors would tend to seek resolution by agreement in the first instance. This might take place in the form of mediation, collaborative practice or traditional negotiations at a neutral venue. Solicitors must certify prior to issue of jurisdiction of a separation or divorce proceeding, that they have advised and given their clients information on the alternatives available including counselling, mediation and negotiation of a deed of separation.

CIVIL PARTNERSHIP/SAME-SEX MARRIAGE

29. What is the status of civil partnership/same-sex marriage? What legislation governs civil partnership/same-sex marriage?

As of 22 May 2015, following a Referendum on Marriage Equality, Ireland voted in favour of introducing same-sex marriage. Previously, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (2010 Act) introduced civil partnership for same-sex couples and provided for extensive rights and obligations once a civil partnership has been registered.

The 2010 Act governs civil partnership and also sets out the grounds on which civil partnership may be dissolved. As with marriage, civil partnership only ends on the death of one of the civil partners or on dissolution by the court. The 2010 Act makes provision for the formalities and procedures surrounding registration of civil partnership and legal effect is given to a range of rights and entitlements that flow from civil partnership. These include provision for maintenance, protection of the shared home, inheritance entitlements and pension provision. The 2010 Act also makes provisions for the legal right share of the civil partner, which are broadly similar to the provisions applicable to spouses. In addition, certain classes of foreign relationship are also recognised under the provisions of the 2010 Act on the basis of further ministerial orders. The Children and Family Relationships Act 2015 contains provisions with regard to guardianship, custody and access matters in the context of civil partnership and cohabitation.

MEDIA ACCESS AND TRANSPARENCY

30. What is the position regarding media access to and press reporting of family law cases?

Family law cases are heard in camera (that is, in private) such that the parties and their children are not identified in written judgments or court reports. The press has access to the proceedings as specified by statute, but is not at liberty to disclose identifying material.

CONTROVERSIAL AREAS AND REFORM

31. What areas of the law (if any) are currently undergoing major change? Which areas of law are considered to be particularly controversial?

A constitutional referendum concerning children’s rights, the 31st Amendment of the Constitution (Children) Bill 2012, was held on 10 November 2012. While the proposal was approved by voters, the signing of the amendment into law was delayed by a legal challenge brought in the High Court, and appealed to the Supreme Court, which was ultimately rejected by that court. The amendment reinforces the paramountcy principle, regardless of the marital status of a child’s parents, thereby facilitating adoption of marital children in appropriate circumstances. The recent introduction of same sex marriage in conjunction with the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (2010 Act) has effected very significant changes in the legal and social landscape in Ireland.

The recently enacted Children and Family Relationships Act 2015 may prove controversial given the extent of change in providing for the new family forms in which children are being raised. The failure to provide for surrogacy on a statutory basis may also give rise to further controversy and indeed an increasing tendency for people to avail of these services in other jurisdictions, which can result in complex legal difficulties.

Additionally lawyers and clients alike have called for the introduction of legislation with regard to pre-nuptial agreements. Also, given the complex rules that apply to the recognition of foreign divorces, a simplification and clarification of these rules would be greatly welcomed.

Finally, there are signs that a body of law is starting to develop surrounding the interaction of family law and social networking websites on the internet. Postings on these websites are becoming a feature of an increasing number of cases raising questions with regard to defamation, discovery, privacy and child protection. See P v Q [2012] IESC 593 in which White J accepted the principle of constitutional law with regard to inadmissibility of illegally obtained evidence but states that this and rights of privacy have to be balanced against the welfare and interests of a child. Extensive discovery orders were affirmed in respect of the wife’s e-mail and mobile phone accounts. The discovery so ordered could not be used for the purpose of the financial proceedings but only in respect of matters pertaining to the welfare of the child.

global.practicallaw.com/family-guide
**ONLINE RESOURCES**

**Irish Statute Book**

[www.irishstatutebook.ie](http://www.irishstatutebook.ie)


**The Courts Service**

[www.courts.ie](http://www.courts.ie)

**Description.** The Courts Service was established as an independent corporate organisation on 9 November 1999 following the enactment of the Courts Service Act 1998. Its functions are to:

- Manage the courts.
- Provide support services for the judges.
- Provide information on the courts system to the public.
- Provide, manage and maintain court buildings.
- Provide facilities for users of the courts.
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Areas of practice. Family law; judicial separation and divorce - court applications; civil partnership and cohabitation; nullity; collaborative law and mediation - non-court approach; ancillary relief - property transfer orders, maintenance, lump sum; life insurance and pension adjustment orders; non-marital cases - division of assets and other issues arising; child law - guardianship, custody and access matters; adoption; recognition of foreign divorces; international child abduction: Hague Convention and Brussels II; relocation applications.

Non-professional qualifications. University College Dublin (BCL)
Recent transactions
• Advising client on International Family Law Matter concerning recognition of orders of a non-EU State; successful handling of preliminary issue before the High Court with regard to jurisdiction; advice on complex matters concerning custody/access, habitual residence, jurisdiction, enforcement, application for financial relief on foot of foreign decree of divorce; advice with regard to procurement of section 47 report from a guardian ad litem; consideration of matters of EU Law and possible reference to ECJ; Negotiation of comprehensive settlement of High Court proceedings.
• Advising on a reference to ECJ regarding time at which the courts of a member state become seised of proceedings for purpose of Brussels Regulation.
• Advising on re-location application to another EU member state, for employment purposes, in context of separation.
• Advising private clients with regard to separation, divorce and nullity. Instructing lawyers in foreign jurisdictions where relevant.
• Advising and litigating Child Abduction and Hague proceedings.
• Advising on applications to court for pension adjustment orders, post-divorce or in the context of divorce proceedings.
• Working as a mediator in family law and family business matters.
• Advising private clients with regard to considerations arising for the family business/assets in the context of separation and divorce.
• Advising corporate clients on concerns arising where a key person is involved in matrimonial proceedings.
• Advising public clients with regard to international enforcement of child care orders.

Professional associations/memberships. International Academy of Family Lawyers; Family Lawyers Association; International Association of Collaborative Practitioners; Dublin Solicitors Bar Association; Resolution; Law Society of Ireland; Chair of Education Programme for International Academy of Family Lawyers Meeting in Singapore, 2012; Former chair of DSBA Family Law committee; Current member of the Law Society Family Law committee; Current member of the Nominations committee of International Academy of Family Lawyers; frequently lectures on family law, mediation and related topics. Ireland, International Relocation of Children, Thomson Reuters.

Publications
• Ireland, Family Law Jurisdictional Comparisons, 2nd & 3rd editions European Lawyer Series, Thomson Reuters.
• Ireland, International Relocation of Children, Thomson Reuters.
• Various articles for Law Society Gazette, DSBA Parchment and internationally.