

## **PRE-NUPTIAL AGREEMENTS IN IRELAND**

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### I. Pre-nuptial Agreements are Unenforceable

Under Irish Law today pre-nuptial or ante-nuptial agreements as they are referred to in this country are not enforceable as they are considered to be contrary to public policy for a number of reasons. First, because such agreements contemplate the dissolution of marriage which is specifically protected under Article 41.3.1. of the 1937 Irish Constitution and thereby undermine the institution of marriage. Until 1996 the Oireachtas or Irish Parliament, was prohibited from enacting any legislation providing for the termination of marriage in Ireland but following a referendum undertaken in 1995. an Amendment to the Constitution was made on 17 June 1996 permitting divorce subject to specific constitutional conditions.

Secondly, there is a public interest in ensuring that spouses in a breakdown of marriage situation receive appropriate financial provision assessed judicially if not agreed between the parties. Finally, the parties to a marriage breakdown are not permitted to oust the jurisdiction of the court

One of the conditions laid down by the Constitutional Amendment of 1996 was that any legislation providing for the dissolution of marriage should include a requirement that the court must be satisfied that “proper provision” for spouses and dependent members of the family existed or would be made on the granting of the decree of divorce. The concept of “proper provision” was a new concept in Irish Law where the previous criterion regarding the provision of satisfactory arrangements for dependent spouses and children was based on adequacy or need as referred to in the 1995 Act which was subsequently amended to allow for “proper provision” based on the particular circumstances prevailing at the time that the application for a decree of Judicial Separation was sought

Pre-nuptial or ante-nuptial agreements while not enforceable in Ireland may be relevant however, in both Judicial Separation and Divorce proceedings and, in some cases, be significant or very significant. In applications under the 1995 Family Law Act and 1996 Family Law (Divorce) Act the court must consider “all the circumstances of the case” including “the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the cases be unjust to disregard it”.

A pre-nuptial or ante-nuptial agreement would be relevant under the above circumstances but a number of aspects would need to be taken into account both by the court and the legal advisers of the parties at the time reliance is being placed on such an agreement. These aspects include the facts at the time of and surrounding the making of the agreement and the facts at the time of the ancillary relief application.

Clearly the length of the marriage would fall into these categories just as an unintended pregnancy would influence the decision to marry and any influence brought to bear on either or both of the parties as a consequence. Among the other considerations to be taken into account are the following: Was there full and frank disclosure of all assets and liabilities and financial positions generally? Did each party receive independent legal advice at the time of the making of the agreement? Was there equality of bargaining power between the parties? Was the agreement objectively fair at the time the agreement was made? How close to the date of the marriage was the agreement executed? What was the position of children at the time of the making of the agreement or subsequently? Since children are not party to such agreements their interests must be protected. What is the passage of time since the making of the agreement? Would the terms if applied would cause hardship? Would the agreement now provide “proper provision” for the parties concerned? Have there been any important changes in circumstances unforeseen at the time of the making of the agreement?

Even though no legislation currently exists in relation to such agreements in Ireland today such agreements are of increasing importance in both divorce and separation applications in that legal advisers are asked to draft such agreements to give advice to parties contemplating marriage of the consequences of such a step. The Government has recently indicated that it intends to give consideration to the importance of such agreements but until appropriate legislation is enacted pre-nuptial or ante-nuptial agreements are unenforceable in the this jurisdiction.