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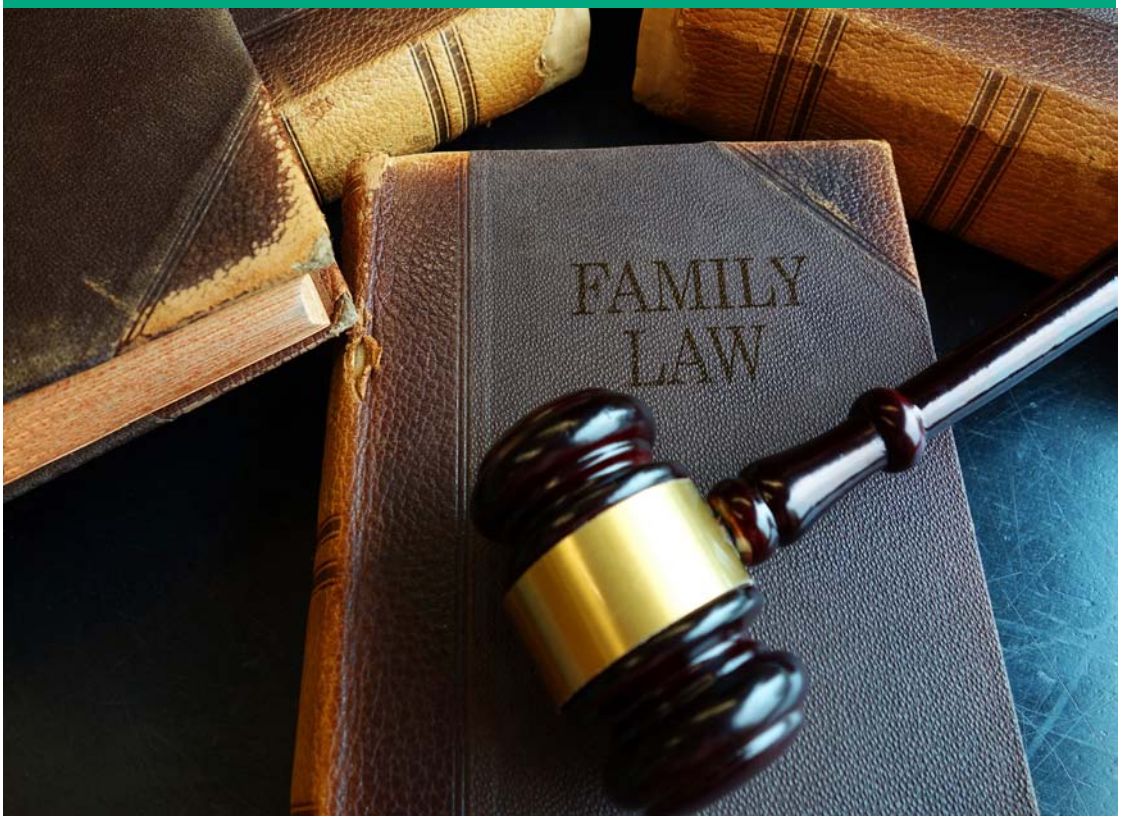
2017 Family Law Update



This article explains some of the significant developments that have occurred in family law in recent years, both constitutional and legislative, in addition to ongoing case law.

Marriage Equality

Although the marriage equality referendum success was widely celebrated, it was the Marriage Act 2015 that gave legal effect to the result. The commencement date was 16 November 2015. Thereafter no new civil partnerships can be registered, although the legal status of existing civil partnerships is not affected. Those who are already civilly partnered to each other can now marry without having to get dissolution of their civil partnerships. Same-sex couples who are already married in another country will now have their marriages automatically recognised as a marriage in Ireland, as will all such couples who get married abroad in the future. In the civil marriage ceremony itself couples can now accept each other as husband and wife, as

husband and husband, as wife and wife or as spouses of each other. Importantly, religious bodies and religious solemnisers of marriage appointed by a religious body cannot be compelled to solemnise a marriage that is not recognised by that religious body.

Children and Family Relationships

A precursor to the referendum in May 2015 was the passing of the Children and Family Relationships Act 2015, which made significant changes with regard to family relationships and extended the persons who can be parents and guardians. Part of the Act was commenced on 18 January 2016. The provisions of the Act dealing with donor-assisted human reproduction and adoption have not yet been commenced. The sections that allow a pathway to parenthood for non-biological parents have been commenced. A person can now be appointed a guardian of a child if he or she is the spouse, civil partner or cohabiting partner of the biological parent provided that the person is living with the parent and has shared responsibility for the child's day-to-day care for a period of more than two years. The 2015 Act also gave automatic guardianship to non-marital fathers if they have lived with the mother for 12 months consecutively including three months following the birth of the child. The Act also gives entitlement to certain relatives, being grandparents, aunts/uncles and siblings, to apply for custody of a child.

The tax code has not yet caught up with all of these new family relationships. For capital acquisitions tax purposes the Class A threshold between parent and child is limited to parents, adoptive parents, step-parents and in some cases foster parents but does not include persons who are guardians but who are none of the above.

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"Best Interests" of a Child

The 2015 Act also defines the "best interests" of a child and the factors that the court shall have regard to in deciding on them. These include the benefit to the child of having a meaningful relationship with parents and other extended family; the views of the child, if ascertainable; the child's physical, psychological and emotional needs; the child's religious, spiritual, cultural or linguistic upbringing and needs; the child's social, intellectual and educational upbringing and needs; the child's age; and any special characteristics.

The Act also gives the court additional powers to make certain orders if access to the non-custodial parent is not occurring. These include awarding compensatory time; reimbursing expenses incurred; and directing that parents attend (individually or together) a parenting programme and/or family counselling and/or receive information on availing of mediation as a means of resolving disputes between them.

Financial Provision on Separation and Divorce

The Circuit Court deals with the majority of family law cases in Ireland. Decisions given in the Circuit Court are generally not delivered as written judgments; case law and judgments are often confined to decisions of the High Court and, more recently, the Court of Appeal. In the separation and divorce regime that we operate, each judge has discretion to decide on what is "proper provision" financially in the circumstances of each case. The judge must have regard to a list of statutory factors, including the income and earning capacity of the spouses; their overall financial circumstances; their age; the length of the marriage; the accommodation needs; the standard of living enjoyed by the couple; the extent to which one spouse may have

prejudiced or given up a career for the sake of the other spouse and family responsibilities; and the loss of benefits forfeit. The judge should consider these factors against the particular facts of the case. There have been a number of appeals to the Court of Appeal from decisions of the High Court. Although the appeal judgments are often fact-specific to the particular cases, there is a discernible trend that the Court of Appeal will give great weight to the judgment and decision of the trial judge who heard the case in the first place and, unless the judge has strayed significantly from a proper application of the statutory factors, the Court of Appeal is unlikely to interfere with the initial judgment.

International Cases

All courts are now dealing increasingly with international cases. There is a special regime for the recognition of separation and divorce decrees between all EU Member States (save Denmark). This is known as the Brussels IIB Regulation (Council Regulation 2201/2003). The basic principle is that a spouse who is resident in a Member State and who starts proceedings for separation/divorce/nullity there is entitled to have his or her case heard in that Member State if the summons issued is the first in time. If the other spouse subsequently issues an application in another Member State, that application must be stayed until the first application is heard. This creates an intense competition to be "first in time to issue" and serve proceedings in any case involving an international element.

This problem was brought into sharp focus in a recent decision at the Court of Appeal here and the Courts of Justice in London. On a certain Friday afternoon a London solicitor acting for a wife wrote to his colleague acting for the husband, telling him as a matter of courtesy that he had sent divorce papers to the Court Office to issue a divorce application on his client's behalf. Over the weekend the husband instructed solicitors in Dublin to issue judicial separation proceedings in the High Court here. This was done on the Monday afternoon. The English divorce petition was received in the Court Office on the Monday morning by post and was date-and-time stamped for 10.30 that day, but the divorce petition itself was not issued and given a record number until the Wednesday. So the question was: which application was issued first in time and which country's court was seized of the case, England or Ireland? The Court of Justice held that a court is seized for the purpose of Article 16 of the Regulation when the documents are lodged with it irrespective of the date on which such documents were issued.

The problem of jurisdiction will become more complex when the UK leaves the EU. The UK Government published a White Paper on 30 March 2017 centring on the Great Repeal Bill. This Bill will provide that all existing EU legislation/regulation will be preserved until the UK leaves the EU in 2019. Worryingly, the paper includes no information on the family law framework, so we will have to watch with interest.

Cohabitants

Under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, if a couple have lived together in an "intimate and committed" relationship for five years if they do not have children together or two years if they have children together, one party may make a financial claim against the other party if he or she is dependent on the other either during the relationship or at the ending of it. Similar to the situation with regard to separation and divorce, there are a number of statutory factors that the court must consider; however, these are not as comprehensive as those to be taken into account by the court in separation and divorce. They do not include the standard of living of the cohabitants; the accommodation needs of the cohabitants; the age of the cohabitants; or the value of any pension benefits forfeit. Also, the level of financial relief that the courts can award to a cohabitant is less than that to which a spouse may be entitled. The court can make orders for compensatory maintenance, a pension adjustment or a property adjustment – the last

only if compensatory maintenance or pension adjustment is not appropriate in the case – and provision from the estate of a deceased cohabitant. This is known as a redress scheme, and it effectively provides a safety net for dependent cohabitants, who, in the past, would have had no entitlement to relief. It is based more on need than "proper provision".

The 2010 Act encourages cohabitants who live together to enter into an agreement on what, if any, provision they want to make for each other. Couples can also opt out of the redress scheme referred to above, or they can tailor it to their own needs and can negotiate the precise arrangements that they want in the event of their relationship ending by death or otherwise. Although the Act encourages agreements, the tax regime for those agreements is not supportive. If a cohabiting couple agree to make provision for the survivor on the death of the other – such as the transfer of their home – this will attract inheritance tax under the Capital Acquisitions Tax Consolidation Act 2003. If, however, a cohabitant makes no provision for his or her life partner on death, the survivor makes an application to the court for provision out of the estate of the deceased partner and the court makes an award in his or her favour – such as a transfer of the home – no inheritance tax will be payable. This is because the tax relief is available only when provision is made pursuant to an order of the court under the 2010 Act.

Pensions

Pensions and pension adjustment orders are now a significant feature of any separation or divorce case. Pensions are complex at the best of times. The value of the spouses' pension benefits must be disclosed at the outset of any case, and a pension adjustment order will be sought if there is a significant discrepancy between their pension benefits, particularly if the spouses are at an age where considerable value has accrued to the pension benefits of one of the spouses, often the husband, during the marriage. The current standard fund threshold (SFT) amount of €2m has also caused difficulties in some cases. A senior public servant, banker, company director or self-employed professional may have accumulated value or funds that are currently at this threshold level or are likely to exceed it in the near future. Once the SFT is exceeded, chargeable excess tax (CET) is levied at 40% of the excess. Section 19 of Finance Act 2014, which came into effect on 1 January 2015, provides that the CET is now apportioned between the parties on the same basis as the pension adjustment order split the benefits. Although a pension adjustment order may have been made over a significant percentage share of a spouse's pension, his or her SFT of €2m remains the same.

Resolving Disputes

Relationship breakdown is always difficult as there is a significant emotional overlay to the legal issues presenting. Although invariably a number of cases will have to be determined by the courts, more and more parties are choosing alternative dispute processes to try to agree the terms under which they are to live separately and apart from each other. Family mediation is now widely available not only as a free service to everyone through the Legal Aid Board's Family Mediation Service but also through the many private mediators and solicitors who are experienced practising mediators.

New Developments

There are other new developments on the horizon. Josepha Madigan TD has recently introduced a Bill to reduce the living-apart period before which either spouse can apply for a divorce from four years to two. Also, considerable work is going on behind the scenes for the construction of a new family court building near Smithfield. An overhaul of the family justice system is also under way, which will hopefully allow parties to access the support services that they need at an early stage in the process and, if possible, divert people away from the adversarial court system into alternative ways of resolving matters, for the benefit not only of themselves but also of their children.