



### PRE-NUPTIAL AGREEMENTS

There is no Irish case law involving prenuptial agreements but it is likely that the Irish courts will have regard to the general precedential value of the English case law and be somewhat influenced by the approach taken by the English courts and also by existing legislation which requires the court to consider a wide variety of circumstances and look at what is in the interest of justice.

Traditionally they were objected to on the following grounds

1. Public policy – an agreement that envisaged a breakdown in marriage was contrary to the common good. Such agreements were regarded as an inducement to leave a marriage and therefore void on the grounds of public policy.
2. Article 41 of the Constitution expressly stated any such agreement was unconstitutional. Thus, there is a constitutional obligation to protect the family unit as far as is practicable. Of course, the removal of the constitutional ban on divorce has changed the position.

Legislation does not prohibit parties from seeking to regulate their affairs in a prenuptial agreement and the fact that there is no express prohibition is one factor which had led to the view that such agreements are no longer unenforceable. However, in light of the recent McLeod decision we are once again plunged further into doubt.

In **MacLeod v. MacLeod (The Judicial Committee of the Privy Council, 17 December 2008)**, the court ruled that pre-nuptial agreements are not binding in Britain but post-nuptial agreements can be enforced.

This case involved an American couple who entered into a pre-nuptial agreement on the day of their marriage; each was separately advised by lawyers and each disclosed their resources. A year later the couple moved to the Isle of Man, where they made a home and raised their five children. When the couple had been married for about 8 years a further, post-nuptial, agreement confirmed the pre-nuptial agreement, but made some substantial variations. The husband and wife were represented separately during the negotiations, which lasted some 14 months.

On divorce, the wife sought financial relief, and argued that the court should disregard both the pre and post-nuptial agreements. The judge concluded that the agreement should be taken into account, but that it did not provide enough money to enable the wife to buy the children a house of a comparable size, and awarded the wife £1.25 million, rejecting the husband's argument that any such housing provision should be by way of trust until the children no longer needed to be accommodated. The husband eventually appealed to the Privy Council on the basis that any capital funding for children should be provided by way of trust, although he now conceded that the trust should last until the youngest child was 23, to avoid placing any pressure on the children to remain in education.

The court noted that under a long-standing rule, pre-nuptial agreements were not valid or binding in the contractual sense; this difficult issue was

more appropriate to legislative reform rather than judicial development. However, post-nuptial agreements were very different; there was an enormous difference between an agreement providing for a present state of affairs that had developed between a married couple and an agreement made before the parties had committed to the rights and responsibilities of the married state, purporting to govern what might happen in an uncertain and unhoped for future.

Post nuptial settlements could be varied by the court, whereas pre-nuptial settlements might not be covered by the variation power in Matrimonial Causes Act 1973, s 35. There was nothing to prevent a married couple from entering into a separation agreement, which would be governed by ss 34 to 36 of the 1973 Act, and a separation agreement could be made at any time; it did not have to be made after or on the point of separation. It was no longer the case that agreements providing for future separation were contrary to public policy.

The couple's post-nuptial agreement had therefore been a valid and enforceable agreement, although subject to the court's right to vary. When considering what weight to give such an agreement in an ancillary relief context, the court was looking for a change in the circumstances in the light of which the financial arrangements were made, the sort of change that would make those arrangements manifestly unjust, or a failure to make proper provision for the children of the family. Even if there were no change of circumstance, it would be contrary to public policy to place upon the state an obligation that ought properly to be shouldered within the family. In ancillary relief the circumstances in which the agreement had been made might also be relevant; family relationships were not like straightforward commercial relationships, and inequality of bargaining power was possible in a number of different contexts.

In this case, there had been no change of circumstance to justify a variation of the financial arrangements for the wife under the agreement. As the agreement had not purported to contain financial arrangements for the children the judge

had been right to make provision for them, however, the housing provision for the children should have been on the basis of a trust, not as a simple lump sum to the wife. The appeal was allowed, and an appropriate trust deed was to be drafted.

Prior to this decision there had been hope that the decision would in fact validate prenuptial agreements but the court ultimately held that it could not reverse the rule that such agreements are contrary to public policy. Earlier decisions had been more supportive of prenuptial agreements. We can consider the following cases briefly:

In May 2007 in the case of **Charman v. Charman**, Britain's Court of Appeal had expressed some support for prenuptial agreements .

Subsequently in **Crossley v. Crossley**, the Court of Appeal on 19 December 2007 held that the judge had acted within his discretion in requiring a party to ancillary relief proceedings to show good cause why a pre-nuptial contract, stating that no provision was to be made between husband and wife on divorce, should not govern the division of assets on the dissolution of marriage.

On 28 July 2008, in the case of **NG v KR** the Family Division Court noted that the pre-nuptial contract, which provided for separation of assets on marriage and made no provision for either spouse on divorce, would not be recognised or enforced by the court because: the husband had not received legal advice; there had been no disclosure; there was no provision for the two children of the marriage; and, most unfairly, the contract provided no prospect of any financial settlement even in the case of real need. However, the contract would have been binding in both Germany and France, the wife and the husband's respective home countries, and it would not be right to ignore it completely, given that the husband was a man of commerce aware of the effect of the contract. The husband's award would be circumscribed to reflect the existence of the pre-nuptial contract.

Ultimately, the Irish court will be bound by its overriding constitutional duty to endeavour to make “proper provision” for both parties. Perhaps if a prenuptial agreement allows this, the court will be satisfied to abide by its terms. If it doesn’t and would lead to unfairness then the likelihood is that the court will disregard it. Any prenuptial agreement, in particular one concluded many years prior to the divorce, will be no more than a factor in the overall consideration of the case. In **C(R) v C(C) 1997 ILRM 401**, Barron J alludes to this constitutional duty that will override any prenuptial agreement. He also stated “*I am satisfied that these provisions are proper in the overall circumstances of the family*”. This shows the Judge viewed the circumstances in their totality. One could therefore argue the terms of a prenuptial agreement are just another circumstance to be taken into account.

In **F v F 1995 2 IR 354**, Denham J stated that the principles of certainty apply to family law as well as to other areas of law. Her approach was met with approval by Keane CJ in **T v T 14 October 2002, unreported**. He stated that he did not believe that the Oireachtas intended that the courts should exclude the possibility of achieving certainty and finality when financially reordering assets upon divorce or of avoiding further litigation between ex-spouses.

In conclusion, in the absence of legislation and Irish case law it would appear that prenuptial agreements are generally unenforceable. If drafting a prenuptial agreement the following should be considered:

1. Full financial disclosure must be made by the parties
2. Each party must get independent legal advice,
3. the parties should acknowledge and consent to the agreement being legally binding
4. The agreement should not purport to deal with matters concerning children

5. The agreement should contain review clauses, perhaps a sunset clause and/or a clause allowing a review after a major change in circumstances.

In addition to the foregoing, the court is likely to take into account the absence of a dominant financial position and the absence of duress. It is worthy to note that where a clause attempts to oust the jurisdiction of the court, such clause will be severed. Furthermore, a prenuptial agreement is intended to regulate the relationship between the intended husband and wife. It should not seek to regulate issues affecting children of the intended marriage and where it does, these clauses are unlikely to be enforced. The court will guard its power to make and to vary ancillary orders and will do so zealously.

## POST NUPTIAL AGREEMENTS

While the situation regarding prenuptial agreements is quite unclear. It is absolutely settled that the Irish courts can take a post nuptial agreement into account when considering an application for Divorce. Section 20 of the Family Law (Divorce) Act 1996 specifically directs the court to have regard to, inter alia, any separation agreement.

If the parties have entered into a Separation Agreement, they are not entitled to apply for a Judicial Separation and thus are unable to apply for any of the ancillary orders under the Judicial Separation Act 1989. Consequently, there is no direction that the court must consider separation agreements as one of the factors to be taken into account. Of course, couples may enter into post nuptial agreements without separating. Can a court taken take any such post nuptial agreement into consideration on an Application for Judicial Separation?

McGuinness J in **N(C) v N(R) 1995 1 FAML 14** considered the matter and stated that “separation agreements made between the parties in the instant case come squarely within this established definition of post-nuptial settlement”. The parties

had executed two separation agreements, one in 1981 and one in 1986. Judicial Separation proceedings were subsequently issued. McGuinness J held that the court was given a specific power to vary separation agreements by the legislature under s15 of the 1989 Act (as repealed by s9 of the Family Law Act 1995 and equivalent to s.14 of the 1996 Divorce Act).

Where the court is considering the terms of a Separation Agreement in the context of an application for Divorce the following issues are of importance:

### **1. Time**

**MK v JP (or se SK) [2001] 3 IR 371 (SC) and [2003] 1 IR 326 (HC)** is authority for the argument that the Separation Agreement must be one of “distant origin”. In this case the agreement was 5 years old. However, in **RG v CG [2005] 1 IR 418** the court held that the Consent order before it which was 5 years old was open to reconsideration by the court to ensure that proper provision was made.

### **2. Fairness at the time**

**WA v MA [2005] 1 IR 1** is authority for the proposition that if a Separation makes proper provision at the time of its execution then it should be upheld by the court in granting a subsequent Divorce. However, **DT v CT [2003] 1 ILRM 321** had held that the appropriate time for determining proper provision is the date of the Divorce hearing. Therefore, irrespective of the apparent fairness of the Agreement at the time of execution the court should determine what constitutes proper provision in light of the current circumstances of the parties.

### **3. Full and Final Clause**

The extent of judicial deference to such clauses has been varied. In the Circuit Court, Judge Buckley gave a judgement on July 25th

2000, in the case **M.G. v M.G.** where he decided the following

*"Where the parties (to proceedings involving the making of ancillary Orders to a Divorce), are well educated intelligent persons, who have had the benefit of competent legal advice before entering into a Separation Agreement which is of recent date, the Court should be slow to make any radical alterations to the terms of such agreement unless there have been sufficient changes in the situations of the parties."*

In **MP v AP unreported HC 2 March 2005** the court held that this clause is simply another clause to be taken into account by the court when determining proper provision. The clause is designed to achieve a clean break between the parties. The decision of the Supreme Court in **DT v CT [2003] 1 ILRM 321** strengthened the validity of such clauses. A number of 2005 decisions are notable. **WA v MA [2005] 1 IR 1** suggests that not only is a clean break achievable on Divorce but also on the execution of a Separation Agreement by virtue of a full and final settlement clause. The court was of the view that it was desirable to achieve certainty and finality to Divorce proceedings where possible.

However, **RG v CG [2005] 1 IR 418** curbed the dramatic effect of that decision. It held that the Consent before it reached in November 2000 was different in nature and in character to an agreement entered into with legal advice either during divorce proceedings already commenced or in contemplation of proximate divorce proceedings.

**MP v AP unreported HC 2 March 2005** considered the weight to be attached to a prior settlement. The court was of the opinion that this will vary depending on 1. the length of time since it was reached 2. the financial background against which it was reached and 3. reasonable expectation of the parties.

There has certainly been an erosion in confidence in such full and final clauses. Abbott J in the High Court has delivered a number of decisions that has further called further into question the utility of entering such clauses.

**McM v McM , unreported High Court, Abbot J, 29 November 2006** considered the weight to be attached to a separation agreement that had been entered into in 1991. Abbott J held that the settlement was of a more distant origin in time and did not amount to a sharing of assets and business opportunities between the parties. As such he distinguished it from **WA v MA** and held it was closer to **MK v JP (or SK) [2001] 3 IR 371 (SC) and [2003] 1 IR 326 (HC) and RG v CG.[2005] 1 IR 418** Therefore, the court granted further orders to the Applicant including a lump sum order and a pension adjustment order.

Abbott J delivered his judgment in **SJN v PC O'D** on the same day. Again consideration was to be given to a settlement of recent origin but this was a case where there had been “*information deficit*”. Abbott J held that “*very considerable weight*” should be given to full and final settlement clauses. While, he did award a substantial lump sum to the applicant, it was significantly less than what the applicant would have received if it hadn't been for the earlier settlement in 2001 and the existence of a full and final clause therein.

This issue came before Abbott J again in January 2007 in the unreported High Court case of **JC v MC**. The question before the court was whether the court had jurisdiction to grant new orders following an order for divorce and if so, what was the effect of a full and final settlement clause on such jurisdiction. Abbott J held that sections 12 to 15 inclusive and sections 17 and 18 of the Divorce Act provide the court with the orders to ensure it achieves “proper provision”, but that section 22 of the Act allows the court to ensure that the appropriate orders are made in all the circumstances of the case. As a

consequence of this case, the only ancillary relief to be renewed is that which can be varied and operates into the future, for example periodic maintenance.

Those who enter “full and final settlement” clauses want to have certainty and finality and it appears Abbott J was very conscious of that desire. His judgments seem to once again give confidence in such clauses but their validity will always be subject to the overriding constitutional duty to provide “proper provision”.

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