

# *Nullity of Marriage:*

## *The case for reform*



*A report by  
the Law Society's Law Reform Committee*



*Law Society of Ireland*

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*October 2001*



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## EXECUTIVE SUMMARY

**T**he Law Reform Committee of the Law Society of Ireland was established in November 1997 in order to identify and focus upon specific areas of the law in need of update and reform. It aims to contribute towards improving the quality, fairness and effectiveness of Irish legislation in a number of selected areas. It also seeks to represent the views of the Society's members in relation to a number of legislative initiatives and to enhance the Society's contribution to the development of Irish law. More generally, it aims to build relationships between the Law Society and others involved in the review of law and policy, including senior policy-makers and the voluntary sector.

To date, the Law Reform Committee has published reports on Domestic Violence (May 1999), Mental Health (July 1999) and Adoption (April 2000), and continues to monitor developments in these areas and make contributions where appropriate. Work on other areas is ongoing.

As a result of information from members of the Society and other legal practitioners, the law of nullity was identified by the Committee as being one of a number of priority areas for reform. The law of nullity has already been the subject of several reports and commentaries, with recommendations for reform which were, however, published before the remedy of divorce was available in Irish law. Once divorce arrived, nullity lost its importance as being the only way out of a dysfunctional marriage. Our proposals have therefore been developed in a very different legal environment to that which existed previously. The advent of divorce gave the Committee an opportunity to radically review the nullity jurisdiction, and take advantage of the opportunities afforded by the constitutional and legal changes.

How to tackle the task of reform is a difficult and nuanced issue, and is not without controversy even among our own Committee. Much debate will be needed in advance of action and we offer our recommendations in that spirit in order to open up such a debate.

This report will be submitted to the Department of Justice, Equality and other government departments and will be circulated to members of the Oireachtas, the judiciary, both branches of the legal profession and to voluntary organisations working in the area of marriage support and breakdown. It is hoped that its findings and recommendations will form a basis on which to proceed and will lead to reform and codification of the law of nullity, helping to ensure fair and balanced treatment of all those, including children, affected.

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The members of the Law Reform Committee are:

Anne Colley, Chair

John Costello, Vice-Chair

Alma Clissman, Secretary (Parliamentary and Law Reform  
Executive, Law Society of Ireland)

Brian Gallagher

Rosemary Horgan

Keenan Johnson

Eamonn O'Connor

Geoffrey Shannon

Philip A Smith

# SUMMARY OF RECOMMENDATIONS

## Grounds of nullity

### 1

*The concept of a voidable marriage should be abolished and the grounds which make a marriage voidable, including impotence and the inability to enter and sustain a normal marital relationship, should be abolished. Cases which could be pleaded on those grounds should instead be pleaded under the divorce jurisdiction.*

### 2

*As recommended by the Law Reform Commission<sup>1</sup>, all restraints of marriage based on affinity should be abolished and legislation should be introduced to render void any marriages between a grand uncle and grand niece, and a grand aunt and grand nephew, a parent and an adoptive child, and between adoptive brothers and sisters. The prohibition against such marriages should apply even where the adoption order for some reason ceases to have effect.*

### 3

*As recommended by the Law Reform Commission<sup>2</sup>, the Marriage of Lunatics Act, 1811 should be repealed, as being over-inclusive and rendering incapable people who would be capable of marriage (in a lucid period) under the common law.*

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Footnotes:

1 Report on the Law of Nullity, 1984. LRC 9 - 1984

2 *ibid.*



4

*A court should be enabled to appoint a relative, friend or statutory body, on that person's or body's application, to protect the legal interests of a person suffering from an incapacity by challenging the validity of a marriage to which the incapacitated person is a party.*

**Effects of nullity**

5

*Limited ancillary relief on an equitable basis should be available as part of nullity decrees. Financial provision by way of ancillary relief should be finite, and should have the objective of enabling the financially weaker spouse to attain financial independence where possible. It should be based on criteria similar to those used in the divorce legislation, subject to the finite nature of any award.*

6

*In relation to the family home, a court should have discretion to permit a previous "spouse" (a party to a void marriage) to continue in residence in the family home until property adjustment or other financial orders are carried into effect, and their consequences realised, for example, partition of the property and sale.*

7

*The courts should be enabled to order that a right of residence in the family home should continue for a specified time.*

8

*Either party to a void marriage should have the right to apply to the court to prevent the other party from reducing the value of the home or making it uninhabitable, pending the cessation of a right of residence, or the carrying into effect of orders relating to the property and determining the right of one of the parties therein.*

9

*Section 61 (5) of the Bankruptcy Act, 1988 should be amended to include a spouse of a marriage in respect of which a declaration of nullity has been made, for such period as the court thinks fit but not to exceed the period for which the spouse continues to have a right of residence or beneficial interest in the home.*

10

*The reliefs available to married couples under Capital Acquisitions Tax, stamp duty and Capital Gains Tax on inter-couple transfers should be extended for a limited period such as one year after a decree of nullity to enable any orders in relation to transfers of property to be implemented as though the parties were actually married.*

11

*The discretionary award of maintenance pending suit should be available to either party to a potentially void marriage.*

12

*The definition of “spouse” in the Domestic Violence Act, 1996 should be amended to include a party to a void or annulled marriage.*

*13*

*A dependent party to a void marriage should be included in the list of persons who can claim compensation as a dependant in relation to financial loss under the Civil Liability Act, 1961, as amended.*

**Amendments to marriage legislation**

*14*

*A separate civil ceremony should be required to effect a valid marriage. Religious ceremonies should no longer include an element giving effect to a civil law marriage.*

*15*

*Any person who wishes to marry must notify the Registrar of any previous ceremony of marriage to which he or she has been a party (even if it is void) and must satisfy the Registrar as to his or her eligibility to contract the proposed marriage. Failure to comply with this requirement should be an offence.*

*16*

*Legislation should be introduced to allow for “clean break” divorce.*

**Jurisdiction and organisation of courts,  
procedures and services**

*17*

*Specialised regional family courts, and judges trained in family law, should be provided to hear nullity applications as part of their caseload. Decisions should be reasoned, and written judgments should be delivered in all substantive cases so that a jurisprudence is developed.*

*18*

*The in camera rule should be adapted, if necessary, to allow reporting of court proceedings, subject to the protection of the parties' privacy and their consent, in accordance with our constitutional and international obligations.*

*19*

*A court dealing with a nullity application should also have jurisdiction, without the need to issue additional proceedings, to deal with related matters.*

*20*

*In nullity cases where children are involved, their interests should be represented by a Guardian ad Litem.*

*21*

*The courts should be clearly empowered to appoint the Attorney General in the role of a legitimus contradictor to argue in support of the validity of a marriage where the constitutional imperative to protect the institution of marriage requires it, or an uncontested nullity is being sought.*

22

*Section 30 (4) of the Family Law Act, 1995, which provides that notification of a declaration under section 29 shall be given by the registrar of a court to an tArd Chlaraitheoir, should be implemented in practice and other decrees of nullity (not granted under section 29 of the 1995 Act) should be reported on a regular basis to the Registrar's Office by the registrar of the relevant court where each order of nullity is made. The Registrar should be required to note declarations or decrees of nullity on the Register, against the corresponding marriages, once the appeal period is past.*

23

*The recommendations of the report by the Department of Social, Community and Family Affairs entitled "Bringing Civil Registration into the 21<sup>st</sup> Century", published in May 2001, should be implemented.*

24

*The law of nullity should be codified.*

25

*The system of collection and collation of statistics currently operated by the Courts Service should be expanded and reviewed on a regular basis.*

## INTRODUCTION

Marriage enjoys a unique and privileged position in Irish law. The family based on marriage enjoys very strong Constitutional protection, which is not extended to families not based on marriage. Article 41.3.1 pledges the State to guard with special care the institution of marriage, on which the family is founded, and to guard it against attack. The fifteenth amendment to the Constitution proposed deleting the absolute prohibition on divorce in November 1995. In the event, this amendment was narrowly accepted by those who voted and following upon the rejection by the Supreme Court on 12<sup>th</sup> June 1996 of a petition challenging the validity of the referendum result, the new Article 41.3.2 was incorporated into the Constitution on 17<sup>th</sup> June 1996.

Marriage is not statutorily defined, but the essential features of marriage follow broadly the Christian concept of marriage. Costello J. in *Murray v Ireland*<sup>1</sup> pointed out that the Constitution clearly linked our concept and nature of marriage to the Christian notion of marriage based on irrevocable personal consent to a life-long relationship. He again opined on the nature of marriage in the later case of *B v R*<sup>2</sup> where he defined marriage as:

“the voluntary and permanent union of one man and one woman to the exclusion of all others for life.”

This reiterated the definition offered over a century earlier by Lord Penzance in *Hyde v Hyde*<sup>3</sup>. The Supreme Court in *TF v Ireland*<sup>4</sup> approved of Costello J.’s definition of marriage.

This definition is based on four principles:

- the marriage must be entered into freely and without force,
- it must potentially be for life,
- it must be monogamous and
- it must be between parties of a different sex.

The Report of the Constitutional Review Group in 1996 recommended significant changes to Article 41 of the Constitution, in the context of the demographic changes in traditional family composition since 1937.

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Footnotes:

- |   |  |   |                                    |
|---|--|---|------------------------------------|
| 1 | [1985] IR 532 (HC. SC)                             | 3 | (1866) LR 1 P&D 130; [1861-73] All |
| 2 | [1995] 1 ILRM 491 (HC). [1995] 1<br>Fam LJ 27 (HC) |   | ER Rep 176 (Ct. of P&D)            |
|   |  | 4 | [1995] IR 321                      |

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The law of nullity of marriage is concerned with the circumstances in which a marriage, because of some vitiating element at the time it was entered into, is regarded by the law as being invalid. Originally, the exclusive jurisdiction for the deliberation of cases concerning the validity of marriage vested in the ecclesiastical courts of the Church of Ireland. In the aftermath of the disestablishment of the Church of Ireland in 1869, the Matrimonial Causes and Marriage Law (Amendment) (Ireland) Act 1870 transferred that jurisdiction to the High Court. Between 1870 and 1996 the High Court has had exclusive jurisdiction at first instance in cases involving the validity of marriage. Section 13 of that Act required the Court to proceed on principles which were compatible with those formerly applied by the ecclesiastical courts. Practitioners and academic writers<sup>5</sup> have consistently complained about the lack of reform in this area. Reform has repeatedly been advocated. Relevant reports include:

- The Office of the Attorney General: *The Law of Nullity in Ireland*, the Stationery Office, 1976
- The Law Reform Commission: *The law relating to the age of majority, the age for marriage and some connected subjects* – working paper 1977
- The Law Reform Commission: *The age of majority*, no. 5, 1983
- The Law Reform Commission: *The law of nullity*, no. 9, 1984
- The Joint Oireachtas Committee on Marriage Breakdown: *Report*, 1985
- The Department of Justice: *White Paper on Marriage Breakdown, Review and Proposed Changes*, 1992
- The Second Commission on the Status of Women: *Report*, 1993
- The Constitution Review Group: *Report*, 1996.

All of these reports are consistent in calling for statutory reform in this area. The courts themselves have also called for reform and have very clearly pointed up the need for statutory reform in this difficult and complex area<sup>6</sup>. Thus far however the only aspects of legislative reform have concentrated upon the formalities of marriage: the Marriages Act, 1972<sup>7</sup>, the Age of Majority Act, 1985<sup>8</sup>, the Family Law Act, 1995<sup>9</sup> and the Family Law (Miscellaneous Provisions) Act, 1997<sup>10</sup>.

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### Footnotes:

5 Shatter, *Family Law* (4th ed. 1997), Duncan & Scully: *Marriage Breakdown in Ireland*, 1990; Binchy, William: "What has been happening in nullity in the nineties?" conference paper, 1998; Duncan, William: Supporting the institution of marriage in Ireland" 1978 13 Ir. Jur. 215; Shannon, Geoffrey: *Family Law Practitioner*. Roundhall Sweet & Maxwell 2000.

6 Most recently in the case of *PF v*

*GO'M*, unrep. SC. 28th November 2000, McGuinness J.

7 This legislation dealt with the various formalities for marriage and provided retrospective validation of "Lourdes Marriages" contracted by Irish citizens in France which did not comply with the *lex loci celebrationis*. The marriage laws of France require a prior civil ceremony of marriage to take place in advance of a religious ceremony before it is entitled to recognition under French

law.

8 Reduced the age of majority from 21 to 18.

9 See ss. 31 – 34 and s. 38 which deal with the age of marriage, notification of intention to marry, exemption of certain marriages from ss. 31 (1) and 32 (1) and abolition of the right to petition for jactitation of marriage.

10 See s. 3, which provides a validation provision for certain marriages which did not comply with the notification period set out in the 1995 Act.

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The grounds of nullity and the principles upon which a marriage may be found to be null and void or voidable are many and varied and are not easily summarised. They broadly fall into two categories: the neglect of formalities and substantive grounds invalidating the marriage. Failure to comply with formalities would include failure to give due notice to the Registrar, non-observance of certain formal requirements regarding venue and witnesses, and so on. Certain formal requirements are directory only, and others are mandatory so that failure to comply with these will be fatal to the validity of the marriage. Of the substantive grounds, certain will render a marriage void *ab initio*, for example the existence of a prior marriage, one of the parties being under age, marriage within the prohibited degrees of relationship, same sex partners and lack of full, free and informed consent<sup>11</sup>.

Other grounds can render a marriage voidable. A voidable marriage subsists until one of the parties to the marriage chooses to avoid it by obtaining a declaration that the marriage is void, whereupon it becomes void *ab initio*. Pleas of repudiation, approbation and delay may be argued in defence, as bars to a decree. The grounds for a voidable marriage are impotence and the inability to enter into and sustain a normal marital relationship. The development of this latter ground has not been without controversy, even among the judges who have been asked to extend and develop the ground in cases presenting before them. It is arguable that the radical development and extension of the law of nullity has come to a halt since the introduction of the divorce jurisdiction, and the nullity jurisdiction of the Circuit Court. Indeed, some decisions show evidence of a desire on the part of the judiciary to row back on earlier development of this ground.

It is clearly time to rationalise and consolidate the law of nullity. All existing reports and recommendations for reform point to this need as being urgent. Recent judicial pronouncements have also exhibited a clear reluctance to extend the grounds of nullity any further.

However, how to tackle the task of reform is itself a difficult and nuanced issue, and indeed not without controversy even amongst our own Committee. Much debate will be needed in advance of action and we offer our provisional recommendations in order to open such a debate.

In working on this report, we have noted related issues which would also merit examination with a view to reform. They include:

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### Footnotes:

- <sup>11</sup> A marriage which was entered into without full, free and informed consent may be ratified by the subsequent actions of the parties – *B v D* unrep. HC. 20 June 1973. Murnaghan J.



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- cohabitation, because the position of a party to a void marriage is often that of a cohabitee. The development of a special legal framework for the large number of people choosing to cohabit would meet a social need. We propose the development of a code for cohabitees, out of which parties could contract, but which would lay down assumptions and basic rights, just as the Partnership Act and the Sale of Goods Act did in relation to those areas.
- the lack of availability of clean break divorce, because assigning cases previously based on the voidable grounds to the divorce jurisdiction would worsen the position of parties without this change. We also believe that clean break divorce should be examined on its own merits, in the interests of fairness and certainty.
- bigamy, because this can be a factor in nullity cases. If a first marriage is found to be void, a second marriage may be validated and no longer bigamous. At present the DPP and the criminal courts can disregard proceedings relating to the nullity of a marriage.
- same sex marriages, because of the uncertainty arising out of marriages involving transsexuals.<sup>12</sup> It is likely that the rights of homosexuals to recognition of their family lives will also require recognition in the future<sup>13</sup>, and the introduction of quasi-marriage between members of the same sex in an increasing number of jurisdictions, most recently Germany, may in due course bring with it recognition under international conventions.
- domestic violence, because of the unprotected position of a party to a void marriage. The Law Society report on Domestic Violence, published in May 1999, is still valid, as reform in the area has not been tackled to date.
- adoption, because of the change in status for children of an annulled marriage. The Law Society report on Adoption, published in April 2000, is likewise still valid, although we understand that work is in process on two bills in the Department of Health and Children.

Finally, we would like to thank those members of the bar, judiciary and Courts Service who assisted us. Our particular thanks go to Frank Martin of UCC and Fergus Ryan of DIT.

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### Footnotes:

12 Transsexual marriages are recognized in the US (*MT v JT* (1976) 355 A (2d) 204 (Appellate Division of the Superior Court of New Jersey) and New Zealand (*M v M* [1991] NZFLR 337, though not in the UK (*Bellinger v Bellinger* 17 July 2001, CA, a case

taken under Article 8 of the ECHR). A case *Foy v An tArd Chlaraitheoir* is currently waiting judgment by McKechnie J. in the High Court, on the question of whether a birth certificate can be changed to reflect the changed sex of the applicant.

13 Already, close to home, in a report published on 23rd August 2001 the Northern Ireland Human Rights Commission recommended the enactment of a law recognizing same sex partnerships.

## SECTION 1

# NULLITY: GENERAL PRINCIPLES

A marriage, once solemnised, is presumed valid until the contrary is established. Persons who have undergone a ceremony of marriage may nonetheless find that, notwithstanding the ceremony, they are not in fact legally married. This may happen where the parties to the marriage have failed to observe certain formalities or, more typically, where a party or parties lacked the relevant capacity to marry, either absolutely or relative to their respective spouses. In such circumstances a marriage may be void from its inception (void *ab initio*) or alternatively voidable at the instance of one or both parties.

Prior to 1995, and in the absence of divorce in this jurisdiction, the concept of nullity developed with some vigour. With the introduction of the Fifteenth Amendment of the Constitution Act 1995 and the Family Law (Divorce) Act 1996<sup>1</sup> it is now possible to dissolve a marriage while the parties thereto are still alive. Such relief being comparatively cheaper, easier and quicker to obtain than a decree of nullity, it may have been considered reasonable to assume that the number of instances in which the nullity jurisdiction was invoked would have dwindled in the coming years. This, to date, has not been the case as may be seen from the figures set out in Section 4. In fact, the number of applications for a declaration of nullity actually *rose* in 1999 and, it seems, again in 2000.

Indeed, there remain at least three reasons why a party may prefer to proceed to obtain a decree of nullity in preference to a divorce. First, a party may in conscience be opposed, for religious or personal reasons, to the option of divorce. Second and on a more practical level, a person may proceed to obtain a declaration of nullity in circumstances where the conditions for the granting of a divorce have not been satisfied. The main requirement laid down by the Fifteenth Amendment being that the parties have been living apart for a least four of the previous five years, it may prove impossible to obtain a divorce where the marriage is less than four years old.<sup>2</sup>

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Footnotes:

<sup>1</sup> No. 33 of 1996.

<sup>2</sup> Article 41.3.2. Constitution of Ireland 1937 as amended.

The third reason is more troubling. A person who obtains a judicial separation or divorce, legally recognised in this jurisdiction, is entitled to invoke the provisions of the Family Law Act 1995<sup>3</sup> or Family Law (Divorce) Act 1996<sup>4</sup> with a view to securing ancillary financial and proprietary relief. No such relief is available on a declaration of nullity. It is possible that a person may, with a view to avoiding the imposition of such ancillary orders, allege as a defence to a suit for divorce or judicial separation that the marriage in question was null and void. If this defense is established no ancillary orders may be made.

## **VOID AND VOIDABLE MARRIAGES**

The common law has traditionally distinguished between marriages that are void *ab initio* and those that are voidable. A marriage that is void *ab initio* is regarded in law as a marriage that never existed. It is not strictly necessary to obtain a declaration in a court of law that such a marriage is null and void although it is suggested that in all but the most clear-cut of situations it is highly advisable to do so. Any person with a genuine interest in the validity of the marriage may proceed to obtain a declaration of nullity. Indeed, where a marriage is void *ab initio*, a declaration of nullity may be sought even where either or both parties to the marriage are deceased.

A voidable marriage, on the other hand, is legally regarded as valid and subsisting until such time as it is avoided by a party to the marriage. Such party must, moreover, be entitled by law to rely on the ground for avoidance. A party so entitled may lose this right through delay or affirmation of the matrimonial bond.<sup>5</sup> Furthermore, a voidable marriage may only be avoided by a party to the marriage and not by a third party and proceedings to obtain a declaration of nullity of a voidable marriage may not be taken where either or both parties are deceased. Once avoided, however, a voidable marriage is deemed, with retrospective effect, *never to have existed*. The table opposite compares and contrasts void and voidable marriages:

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**Footnotes:**

3 No. 26 of 1995.

4 No. 33 of 1996.

5 'Approbation' - see p. 37.

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<b>VOID MARRIAGES</b>	<b>VOIDABLE MARRIAGES</b>
Any person who is materially affected by the issue may contest the validity of a marriage that is void.	Only the parties to a marriage may avoid a voidable marriage.
A claim that a marriage is void may be made at any time, even after the death of both parties.	A marriage may only be avoided during the lifetime of both parties to the marriage.
A court declaration is not necessary, but is nonetheless advisable, in the case of a void marriage.	A court declaration is always necessary in the case of a voidable marriage.
A void marriage is void from its inception i.e. void <i>ab initio</i> .	A voidable marriage is valid until avoided but then retrospectively deemed never to have existed.

### **THE GROUNDS OF NULLITY**

The grounds of nullity, that is the principles upon which a marriage may be found null and void or voidable, are many and varied and are summarised in this section and Section 2.

### **CAPACITY**

Here, one must distinguish between matters of essential validity that render a marriage void *ab initio* and those that render it only voidable.

#### **Void marriages - capacity**

A marriage will be void *ab initio* if contracted by a person who is already a party to a valid subsisting marriage recognised by law. Marriage being “the union of one man and one woman to

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the exclusion of all others”,<sup>6</sup> it is not possible to enter into a marriage where either party has previously gone through a ceremony of marriage unless the marriage created by the latter ceremony is shown either:

- (a) to be null and void or annulled, where such nullity or annulment is recognised as a matter of Irish law, or
- (b) to have been validly dissolved by divorce or death, such event having occurred before the marriage alleged to have been bigamous.

Where it is claimed that a marriage is invalid on this ground, the existence of a prior subsisting marriage must be clearly proved by the party alleging such invalidity.<sup>7</sup>

The problem of marriages being celebrated where a prior marriage remains subsisting seems to arise most frequently in this jurisdiction in relation to Roman Catholic marriages. The Roman Catholic Church grants a significant number of annulments each year. Such annulments are not recognised as terminating the civil bond of marriage but the petitioners in many such cases erroneously believe that a church annulment entitles them, as a matter of law, to remarry. Serious legal problems arise where a party remarries in church without first seeking to regularise his or her marital status at law. It should be stated in the interests of clarity that a marriage contracted subsequent to the granting of a church annulment will be invalid unless the prior marriage is also invalid as a matter of civil law. Indeed the parties to such a union (and the celebrant thereof) may feasibly be prosecuted for the crime of bigamy. This occurred in the *People (AG) v. Ballins (or se. Kenny)*<sup>8</sup> and in *People v. Hunt*<sup>9</sup> although it is worth noting that the accused in each case received a relatively light non-custodial sentence.

This issue has re-emerged in two more recent cases. In *G. McG. v. D. W.*<sup>10</sup> the prospect of criminal proceedings for bigamy seems to have been avoided only by McGuinness J.’s conclusion that a prior divorce obtained abroad was in fact valid. In *O’B. v. R.*<sup>11</sup> Kinlen J. also contemplated referring such a case to the D.P.P. As the law was unclear on whether the invalidity of the first marriage negates the crime of bigamy the learned judge declined to make any recommendation to the D.P.P. in this regard.

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### Footnotes:

6 *Per* Lord Penzance in *Hyde v. Hyde* (1866) L.R. 1. P. & D. 130 at 133.

7 See, for example, *Kelly v. Ireland* [1996] 3 I.R. 537 where bigamy was

alleged but, on the facts, not proved to the satisfaction of the court.

8 [1964] Ir. Jur. Rep. 14.  
9 (note) 80 I.L.T. & S.J. 19.

10 [2000] 1 I.L.R.M. 107.

11 Unreported. High Court, Kinlen J., July 20, 1999.

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### **Voidable marriages - capacity**

A marriage will not be invalid where a party thereto has participated in a prior ceremony of marriage with a third party if the prior marriage can be shown to be void. This proposition flows naturally from the fact that a marriage that is void is deemed, as a matter of law, never to have existed. More complex considerations surround the situation where the prior marriage is voidable rather than void. In such a case the marriage is technically regarded as valid until such time as it is avoided. The effect of a voidable marriage was considered in *F.M.L. v. An tArd-Chlaraitheoir*.<sup>12</sup> The first named plaintiff in that case, F.L. had married a Ms. O'C. in 1972 but subsequently obtained an ecclesiastical dispensation rendering that marriage void as a matter of Catholic canon law. Under the rules of his church, F.L. was allowed to remarry and availed of this right in 1979 by marrying the second named plaintiff, A.L., in a Roman Catholic ceremony. F.L. however waited a further year until 1980 before he obtained a civil decree of nullity in respect of the first marriage on the grounds of non-consummation (a ground rendering the marriage voidable rather than void). While advising against the chronological order in which F.L. had proceeded, Lynch J. nonetheless concluded that his second marriage was valid. With effect from 1980, he concluded, the voidable marriage to Ms. O'C. had been avoided with the result that it was retrospectively deemed never to have existed, that is, the Court in 1984 was compelled to regard the first marriage as void *ab initio*. Nevertheless it is hard to argue with Lynch J.'s belief that the "chronology of the steps taken by the first named plaintiff in this case is, so far as the civil and criminal law of the land is concerned, very undesirable...and is indeed very risky."<sup>13</sup>

### **Divorce subsequent to a bigamous marriage**

Different considerations apply to a divorce obtained subsequent to a bigamous marriage. A termination of a prior marriage cannot render a subsequent marriage (if contracted before the divorce) retrospectively valid, the divorce being of prospective effect only. This is the case even where the grounds for divorce existed at the time of the subsequent marriage.

### **Criminal law**

Bigamy, it should be noted, is also a crime subject to penalties of up to seven years' imprisonment on conviction. Section 57 of the Offences against the Person Act, 1861<sup>14</sup> states that "[w]hosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of a

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#### Footnotes:

<sup>12</sup> [1984] I.L.R.M. 667.

<sup>13</sup> *ibid.* at 670.

<sup>14</sup> 24 & 25 Vict. c. 100.

felony ...” The only mental element required here is an intention to enter into the second marriage. It is not necessary that the accused be aware that the marriage is in fact bigamous.<sup>15</sup> However, a number of defences may be pleaded in seeking to escape criminal liability.

**Lack of age**

With effect from August 1, 1996 both parties to the marriage must be at least eighteen years old.<sup>16</sup> The present minimum age applies first, to all marriages celebrated within the State and in addition, to all marriages wherever celebrated where both parties are or either party, at the time of the marriage, is ordinarily resident in the State. Subject to the exception outlined below a marriage contracted in contravention of the minimum age requirement will be null and void from the date of its apparent inception.<sup>17</sup>

Where either or both parties are under the age of eighteen it is nonetheless possible to contract a valid marriage where an exemption has been obtained under s. 33 of the Family Law Act, 1995. Such exemption may only be granted by the Circuit Court or High Court on application being made by or on behalf of both parties prior to the solemnisation of the marriage. Waiver of the age requirement, it should be noted, may only be obtained prior to the marriage ceremony and not subsequent thereto. A court may not grant such exemption lightly. It must be shown that the exemption is “justified by serious reasons and is in the interests of the parties to the intended marriage.”

Sections 33 and 38(4) of the 1995 Act at first cumulatively required that where an exemption was sought from the Circuit Family Court, it could only be granted by a judge of the Circuit in which either of the parties “ordinarily resides or carries on any business, profession or occupation”. In a significant number of cases, exemptions were obtained from judges not fitting the description outlined in section 38(4) and thus such exemptions were invalid for want of jurisdiction. Section 3(2) of the Family Law (Miscellaneous Provisions) Act 1997 (No. 18 of 1997), however, stipulates that no marriage shall be deemed invalid by reason only that the exemption was issued by a Circuit Court judge who is not authorised by s. 38(4) to grant such exemption.<sup>18</sup>

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**Footnotes:**

15 *D.P.P. v Morgan* [1975] 2 All E.R. 347.

16 Section 31 Family Law Act 1995.

17 Family Law Act 1995 (No. 26 of

1995), s. 31(1)(a)(i.) and s. 31(1)(c).

18 See the comments of Gallagher in the Irish Current Law Statutes Annotated,

1997 at 18-05.

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### **Marriages within the prohibited degrees of relationship**

A marriage is void *ab initio* where contracted between two persons who prior to marriage fall within the prohibited degrees of relationship. In other words A may not marry B where, prior to marriage, A and B are related to each other and such relationship falls within one of the categories of prohibited relationship. For these purposes a relationship of the half-blood (where the parties share only one parent in common) is treated as if it were a relationship of the full-blood.

### **Where the parties are of identical sex**

Although there is no Irish case or legislation directly on the point, it is generally understood that a valid marriage may only be contracted between parties who are respectively male and female. The definition of marriage referred to in *Hyde v. Hyde and Woodmansee*<sup>19</sup> alludes to the presence of “one man and one woman” in marriage as understood in Christendom. In *Corbett v. Corbett (otherwise Ashley)*<sup>20</sup> Ormrod J. observed that “sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural hetero-sexual intercourse is an essential element.”

In *Talbot (Poyntz) v. Talbot*,<sup>21</sup> the Petitioner, a widow, had gone through a ceremony of marriage with a person whom she believed (honestly but incorrectly) to be male. In fact the groom was, unbeknownst to the Petitioner, a female. Ormrod J. granted a decree of nullity on the ground that there had “plainly [been] no marriage.”

## **FAILURE TO COMPLY WITH FORMALITIES**

Where the *lex loci* is Irish, a marriage is generally deemed void if non-compliance occurred with the knowledge of the parties. The major exception to this is the requirement of three months prior notice laid down in the Family Law Act 1995, a requirement which now falls to be considered.

### **Failure to give due notice to the Registrar**

Since August 1, 1996 it has been necessary for all persons intending to marry within the State to give at least three months written notice of the intended marriage to the appropriate Registrar. The

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#### **Footnotes:**

19 (1866) L.R. 1 P. & D. 130 at 133.

20 [1971] P. 83 at 105.

21 111 Sol. J. 213 (1967, HC).



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obligation to give notice was introduced by section 32 of the Family Law Act 1995 and is deemed thereby to be a substantive requirement for marriage. It is essential to note that, subject to the possibility of a court exemption, a failure to comply with this requirement will result in the marriage being null and void *ab initio*. This occurs even where the parties to the marriage are unaware of the failure in question.

It is not sufficient that notification be posted or postmarked before the deadline. It would appear that as notification is deemed to be effective only on receipt by the Registrar, postal delay or loss is most likely no defence to a claim that due notification was not made. Originally the fact that notice had been delivered to any other Registrar was fatal to the validity of the marriage in question. Section 3(1) of the Family Law (Miscellaneous Provisions) Act 1997<sup>22</sup>, however, ensures that a marriage will not be invalid by reason only of such notification having been made to the incorrect Registrar.

### **Other formalities**

The non-observance of a variety of other formalities (laid down for marriages other than those where both parties are Roman Catholic and celebrated according to the rite of the Roman Catholic Church) are deemed to render a marriage invalid only where the failure in question is the result of 'knowing and willful' non-compliance of both parties.

Section 49 of the Marriages (Ireland) Act 1844<sup>23</sup> deems void all marriages celebrated after the passing of the Act in the circumstances listed below, but only where both parties are aware of the non-observance of the formalities in question:

- (a) Where the parties have married in any place other than the venue stipulated in the banns, licence or certificate allowing the parties to marry.
- (b) Where the parties have married without due notice to the Registrar or without certificate of notice duly issued or without licence from the Registrar (in cases where such notice, licence or certificate is required.)
- (c) Where the parties marry otherwise than in the presence of a Registrar, where the presence of a Registrar is required.
- (d) Where the parties to a Presbyterian marriage wed without publication of banns or a licence.

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#### **Footnotes:**

22 No. 18 of 1997.

23 7 & 8 Vict. c. 81.

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A subtle, though probably insignificant, distinction applies in relation to the last-mentioned condition, in relation to which the legislation requires ‘knowing *or* willful’ non-compliance as opposed to the ‘knowing *and* willful’ non-compliance relating to the first three instances of a breach of formalities.

The formalities laid down by section 38 of the Matrimonial Causes and Marriage Law (Ireland) Act 1870<sup>24</sup> are of similar legal effect. By virtue of section 39 of that Act a failure to observe the formalities laid down for the celebration of such mixed marriages renders the marriage void only where such failure is ‘knowing and willful’.

### **CONSENT**

In order to enter into a valid contract of marriage both parties must give their “full, free and informed consent” to the marriage in question. *A fortiori*, where a party, at the time of the marriage, is unable due to mental or psychological incapacity to give such consent, a marriage will be void *ab initio*.

Various factors may render a party incapable of giving such consent. These may be transitory in nature (temporary intoxication) or more enduring in character (insanity). It is well recognised that intoxication of a sufficient degree will render a marriage invalid where it induces “a want of reason or volition amounting to incapacity to consent.”<sup>25</sup>

Psychological illness may also render a party unable to consent to marriage. In all cases the incapacity should be of a sufficient degree to render the party unable to understand the nature and consequences of the ceremony being celebrated. This means that the party must not merely be able to recognise that the ceremony is in fact a ceremony of marriage but must also be able to appreciate the responsibilities created thereby. A mere comprehension of the words used will not suffice.<sup>26</sup>

Some care is needed, however, not to set too high a standard of comprehension as a prerequisite to a valid marriage. As Hannen P. observed in *Durham v. Durham*<sup>27</sup> “the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend.”

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#### Footnotes:

24 33 & 34 Vict. c. 110. This Act applies to marriages of persons of mixed religion in Roman Catholic and Church

of Ireland churches.  
25 *Leggett v. O'Brien* (1834) Milw. 235.  
See also *Sullivan v. Sullivan* (1818) 2

Hag. Con. 238.

26 *Durham v. Durham* (1885) 10 P.D. 80.  
27 (1885) 10 P.D. 80 at 82.

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### **Absence of real consent**

In order for a marriage to be validly contracted both parties must give their 'full, free and informed consent' thereto.<sup>28</sup> It is not sufficient that the parties have by their words in the nuptial ceremony verbally indicated a wish to be married. The Courts have long recognised that there may be the appearance of consent where in fact no real consent has been given, as where a party enters into a marriage under duress or where the marriage is the product of a mistake or misrepresentation. The circumstances in which the Court will grant relief, however, have dramatically changed over the past thirty years.

Prior to 1970, it was possible to say with some confidence that the Courts would only grant relief for lack of consent in a narrowly defined set of circumstances. The traditional grounds of relief, duress, mistake and misrepresentation were restrictively defined so as to deny relief in all but the most pressing and obvious of cases. Duress for instance would only invalidate a marriage where a person acted as a result of a threat specifically to the 'life, limb, or liberty' of the person in question.<sup>29</sup> Mistake and misrepresentation were subject to similar limitations. In the intervening years, however, the approach of the Courts to consent was transformed almost beyond recognition. The most dramatic development was the conceptual shift from the narrowly defined traditional grounds set out above to a more broad-textured unified requirement of 'full, free and informed consent.'<sup>30</sup> In the process the traditional grounds were all but swept away. It was no longer necessary to establish for instance the presence of duress as a vitiating factor where a party entered into a marriage under pressure. It was enough to show the absence of consent, however caused. The results of this conceptual shift can be seen most vividly in the considerable expansion in the range of circumstances in which marriages were declared void for lack of consent.

It appears that even emotional pressure was sufficient to undermine an apparently free consent. In *S. v. O'S.*<sup>31</sup> Finlay J. granted an annulment in the case of a petitioner who married due to the respondent's claims that without her constant attention and presence he would die. In such circumstances the petitioner was found to be in a state of "emotional bondage" from which she could not escape. In the course of his judgment Finlay J. noted that "the freedom of will necessary to enter into a valid contract of marriage is one particularly associated with emotion and that a person in the emotional bondage of another person couldn't consciously have the freedom of will."

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#### **Footnotes:**

- 28 See *N. (or se. K.) v. K.* [1986] I.L.R.M. E.R. 905 and *Singh v. Singh* [1971] 2 75.  
75. W.L.R. 963. 31 Unreported. High Court, Finlay J.,  
29 See *Szechter v. Szechter* [1970] All 30 See *N. (or se. K.) v. K.* [1986] I.L.R.M. November 10, 1978.

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In *O'R v. B.*<sup>32</sup> a petitioner “entered into...marriage under the duress displayed by the distress of the respondent whenever he tried to break off the engagement.”<sup>33</sup> A decree of nullity was granted.

### **Subjective approach**

It was no longer necessary to show that a fear compelling a party to marry was a fear reasonably entertained. In other words it was possible to find that a party failed to give the required consent notwithstanding the fact that a person of average fortitude in like circumstances may have been able to withstand whatever pressure was imposed.

In *N.(orse. K.) v. K.*<sup>34</sup>, a decree was granted to a shy and reserved girl who complied more readily, perhaps, than most persons of her age with the wishes of her parents.

In *O'R v. B.*<sup>35</sup> a decree was granted notwithstanding the fact that the petitioner may have withstood the pressure imposed had he been emotionally stable.

In *A.C. v. P.J.*<sup>36</sup> Barron J. considered the case of a woman who became pregnant outside wedlock. Although the petitioner did not want to marry the respondent, she felt dominated by him. She also feared that her parents would react badly if they discovered she was pregnant and as a result of these pressures, she reluctantly agreed to marry the respondent. Considering the situation in which the petitioner found herself, Barron J. granted an annulment.

### **Informed consent**

Prior to 1976, the issue of informed consent centred on two narrowly defined grounds: mistake and misrepresentation. In family law at least (though not in contract law) these two grounds were treated in a broadly similar manner. The main distinction between them is that whereas a mistake exists where a belief is held in error, a misrepresentation occurs where such an erroneous belief has been induced (innocently or otherwise) by the false words of another. In the earlier cases, relief would issue only in limited circumstances. In *Swift v. Kelly*<sup>37</sup> for example it was clearly stipulated that only mistakes or misrepresentations relating to certain specified matters would render a marriage void. It was not sufficient to establish that but for the error the party would not have married. The petitioner had to establish that the error was such that there was the “appearance without the reality of consent”,<sup>38</sup> a situation that arose only where there was an error relating either to the nature of the ceremony or the identity (as opposed to the characteristics) of a spouse.

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#### **Footnotes:**

32 [1995] 2 I.L.R.M. 57.

33 *ibid.* at 74.

34 *op. cit.*

35 [1995] 2 I.L.R.M. 57.

36 [1995] 2 I.R. 253.

37 3 Knapp. 257 at 293.

38 *Moss v. Moss* [1897] P. 263 at 268.

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### **Nature of the ceremony**

Decrees have been granted in circumstances where parties have mistakenly believed the ceremony to be something other than a ceremony of marriage. In *Valier v. Valier*<sup>39</sup>, for instance, an Italian with a limited command of English went through a civil ceremony of marriage in England. The marriage was deemed null and void on the ground that the latter had believed it to be a ceremony of betrothal only and not of marriage per se.<sup>40</sup>

### **Error as to the identity of a spouse**

The second situation in which the courts traditionally granted relief was where there existed an error as to the identity of a spouse. The line of cases upon which this principle was based proceed on foot of an exceptionally fine distinction between the identity of a person (who he or she is) and his or her characteristics (what attributes he or she possesses.) In the words of a Canadian judge of the late nineteenth century “the maxim *Caveat Emptor* [‘let the buyer beware’][applies] as brutally and necessarily to a case of marriage as it [does] to the purchase of a rood of land or a horse.”<sup>41</sup>

### **New departures**

It appears that the courts in Ireland until recently largely loosened themselves from the shackles of these decisions and ventured towards relying on the broader concept of informed consent. The first inklings of change in this regard were evident in the decision of Kenny J. in *S. v. S.*<sup>42</sup> In that case, the learned judge (dissenting, in his conclusions on the facts, from his Supreme Court colleagues,) suggested that a marriage would be void for lack of consent where one party to a marriage had, at the time of the marriage, deceived the other as to his or her intentions regarding what the Court considered a ‘fundamental feature’ of marriage.

Though a dissenting party in the case, Kenny J.’s views seem, until recently, to have taken root with some vigour. It was generally accepted that where a party was deceived as to a fundamental feature of the marriage, the resulting marriage was void for lack of consent. With the advent of the broad-textured criteria of *N. (orsee. K.) v. K.*<sup>43</sup> it was suggested that similarly relaxed rules applied where the party was not misled but merely mistaken as to a fundamental feature, the crux of this approach being the fact that consent was lacking and not the reason why.

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#### **Footnotes:**

39 (1925) 133 L.T. 830.

40 A similar belief was entertained in *Ford v. Stier* [1896] P. 1. *Hall v. Hall*

(1908) 24 T.L.R. 756 and *Kelly (orsee.*

*Hyams) v. Kelly* [1932] 49 T.L.R. 99. 41 Falconbridge J. in *Brennan v. Brennan*

19 Ont. Rep. 327 (1889).

42 [1976-77] I.L.R.M. 156.

43 [1986] I.L.R.M. 75.

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The decision in *N. (or se. K.) v. K.*<sup>44</sup> largely transformed the approach of the courts to the issue of informed consent. It was no longer necessary to bring the facts of a case within the formula laid down in *Swift v. Kelly*. The new approach was very much in evidence in *F. v. F.*<sup>45</sup> and in *B.J.M. v. C.M.*<sup>46</sup> In the latter case, a marriage was declared invalid partly on the ground that the respondent had failed to reveal to the petitioner prior to marriage the extent of physical disfigurement sustained by her in a childhood accident. Not having been made aware of the full extent of the respondent's injuries, the petitioner, according to Flood J., had been deprived of 'proper election' in the matter.

This new approach was endorsed by the Supreme Court in *M.O'M v. B.O'C.* [1996] 1 I.R. 208. In that case it transpired that the respondent had concealed from his wife, the petitioner, the fact that he had undergone extensive psychiatric therapy prior to marriage. Overturning the decision of the High Court, the Supreme Court granted a decree of nullity due to a lack of informed consent. It is particularly noteworthy that in doing so the Court took into account the petitioner's evidence that had she known of the prior treatment, she would not have married the respondent.

More recently, however, both the High Court and Supreme Court have signalled a retrenchment of nullity law on the defined grounds of fraud, mistake and misrepresentation. In *P.M. v. T.R.*<sup>47</sup>, Lavan J., for example, refused to grant a decree in circumstances where a petitioner had been deceived as to the age of his bride. In *P.F. v. G.O'M.*<sup>48</sup> a similar conclusion prevailed. At the time of her marriage, the respondent, unbeknownst to the applicant, was secretly conducting an affair with a third party, K. Despite the applicant's ignorance of this fact, O'Higgins J. refused to grant a decree of nullity, there being no obligation on the parties to disclose inappropriate behaviour engaged in before marriage. The fact that the applicant may not have married the respondent had he known of the respondent's infidelity was deemed irrelevant. The consent of the applicant was sufficiently informed notwithstanding the non-disclosure of the affair. Of greater significance is the fact that the Supreme Court has most recently refused to grant a decree of nullity on the appeal of the same petitioner who claimed that had he known his wife was having an affair during their engagement he would not have consented to marrying her.<sup>49</sup> This Supreme Court decision signposts a return to the traditional restrictive approach to the granting of a decree of nullity.

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### Footnotes:

44 [1986] I.L.R.M. 75.

45 Unreported, High Court, Barron J., June 22, 1988.

46 [1996] 2 I.R. 574.

47 Unreported, High Court, Lavan J., February 18, 1998.

48 Unreported, High Court, O'Higgins J., March 26, 1999.

49 *P.F. v. G.D.M.* unreported, Supreme Court, November 28, 2000.

**Other matters relating to consent: marriage for ulterior purposes/sham marriages**

Occasionally, a marriage is contracted with some ulterior purpose in mind. The parties may for instance marry with the sole purpose of obtaining favourable immigration status or to obtain certain marital benefits.<sup>50</sup> The question of such ‘sham’ marriages (as they are sometimes called) is one that has been considered by the Irish Courts.

In summary, Irish law regards the motive to marry as irrelevant. Provided that the parties exchange a full, free and informed consent to marry their motive in doing so is of no consequence to the question of consent. As Barrington J. observed in *R.S.J. v. J.S.J.*<sup>51</sup>, people get married for “all sorts of reasons, and their motives have not always been of the highest. The motive for marriage may have been policy, convenience or self-interest.” It cannot be said, he continued, that a marriage is void “merely because one party did not love or had not the capacity to love the other.”

In *H.S. v. J.S.*<sup>52</sup> the Supreme Court (by a majority of 3-2) considered likewise that once the parties had freely consented to be wed and understood the nature and consequences of that decision, it mattered not that their motive or purpose in doing so was irregular or improper.

**Ratification of a void marriage (consent only)**

Where a marriage has been solemnised in the absence of full, free and informed consent, it may nonetheless be rendered valid by means of ratification. Ratification occurs subsequent to the marriage retrospectively to supply the missing consent. A party may ratify an otherwise void marriage by conduct consistent with a full, free and informed acceptance of the marriage, notwithstanding the initial absence of consent.

Some care is needed however, where a party appears to conduct herself/himself in a manner tending to confirm the existence of a marriage. Such conduct may be the result of the same pressure or misinformation that operated to invalidate the marriage in the first place. In *B. v. D.*<sup>53</sup>, Murnaghan J. was called upon to consider whether acts of sexual intercourse, occurring subsequent to the celebration of a marriage void for lack of free consent, amounted to a ratification of the marriage. The judge considered it more likely that these instances of sexual intercourse, like the marriage itself, were probably not consensual on the wife’s part and thus did not amount to ratification.

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**Footnotes:**

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| 50 For instance, in <i>B. v. D.</i> unreported, High Court, Murnaghan J., June 20, 1973, where the respondent wished to marry partly to obtain additional salary | 51 increments in respect of his work as a teacher. [1982] I.L.R.M. 263 at 264. | 53 1992. Unreported. High Court, Murnaghan J., June 20, 1973. |
| 52 Unreported, Supreme Court, April 3,   |  |   |

## SECTION 2

# VOIDABLE MARRIAGES

### IMPOTENCE

A marriage may be avoided on the ground that a party thereto was unable, at the time of the marriage, to consummate the marital bond owing to physical or psychological impotence. This inability must have existed at the time of the marriage, although this criterion has not always attracted strict adherence. The rationale behind this ground is not immediately apparent. It is not concerned with the capacity of either or both parties to procreate, still less with the ability of the parties to satisfy each other sexually during the marriage. In *A.B. v. E.B.*<sup>54</sup> Denham J. points out that “there is no ground *per se* for nullity on the issue of frequency of sexual relations.” It remains a rather curious anomaly in the law, a relic perhaps of medieval times, when the first act of intercourse was thought to ‘mark’ a new bride as the ‘property’ of her husband. Whatever its origins, it is not entirely clear what modern purpose this ground serves and it is suggested that it should be dispensed with.

#### Psychological impotence

It should be noted that this ground is not, however, impervious to change. More recent psychiatric developments have prompted some broadening of its confines. In the light of medical developments, the psychological as well as physical origins of impotence have been recognised by the Courts.<sup>55</sup> Indeed in *E.C. v. A.M.*<sup>56</sup> Barr J. noted that the ultimate origin of many instances of physical impotence is psychological in nature.

#### The meaning of “consummation”

Consummation occurs where the parties to a marriage, at any time subsequent to the marriage ceremony, engage in one act of ordinary sexual intercourse *per vaginam*.

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#### Footnotes:

<sup>54</sup> [1996] I.F.L.R. 75 at 80.

<sup>55</sup> See e.g. *R (W) v. W.* unreported. High Court. Finlay P. February 1, 1990.

<sup>56</sup> Unreported. High Court. Barr J., December 5, 1990.



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The matter as to what amounts to sexual intercourse has been addressed on a number of occasions. For consummation to occur there must be erection and penetration by the male party of the female party *per vaginam*. The penetration must, per Dr. Lushington in *D-e v. A-g*.<sup>57</sup> be “ordinary and complete, not partial and imperfect”.

In order for consummation to occur, however, it is not necessary that there be any ejaculation or emission of seed. In *M.M. (orse. G.) v. P.M.*<sup>58</sup> the petitioner argued, without success, that in the absence of the male party’s ability to inseminate his wife, the marriage should not be regarded as having been consummated.

The potential for procreation is no part of the rationale of this rule. While Hanna J., in *McM. v. McM. & McK. v. McK.*<sup>59</sup>, refers to “the act of generation”, it is clear that the ability to perform a single act of consummation is in no way fettered by a person’s inability to bear children. Infertility (as opposed to impotence) is no bar to full consummation.

### **Time of incapacity**

In line with the general principle that nullity is judged by reference to the time at which the marriage is celebrated, the party whose impotence is being pleaded must have been incapable of consummating the marriage at the time of the marriage. In this regard evidence of prior or subsequent incapacity may be highly persuasive but is never conclusive in and of itself. At face value this requirement may appear somewhat arbitrary. It relates nonetheless to a central feature of the nullity jurisdiction: that a marriage is null and void because of defects existing at the time the contract of marriage is made and not those affecting the relationship arising from that contract.

It is indeed possible that a party may be deemed impotent even where the parties engaged in full sexual intercourse before marriage.<sup>60</sup>

### **Relative incapacity**

Significantly, it is possible for a marriage to be avoided in circumstances where a party is impotent relative only to his or her spouse and not generally impotent. The party is sometimes referred to as impotent *quoad hunc* in the case of a woman unable to have intercourse with her husband, and

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#### **Footnotes:**

57 (1849) 1 Rob. Eccl. 279 at 297.

58 [1986] I.L.R.M. 515.

59 [1936] I.R. 177 at 220.

60 *S. v. S.* [1976-77] I.L.R.M. 156.

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*quoad hanc* in the case of a man unable to have intercourse with his wife. Lynch J., for instance, granted a decree in *L.C. v. B.C.*<sup>61</sup>, where a wife, impotent relative to her husband, subsequently enjoyed a full sexual relationship with another man.

In order for relief to issue, the relative incapacity must, however, be complete and not partial.<sup>62</sup>

The fact that consummation has not occurred because either party is unwilling rather than unable to engage in sexual intercourse does not in itself affect the validity of a marriage. Where one party intended at the time of the marriage to shun conjugal relations and failed to inform the other party of this fact, the marriage may be void, but for lack of informed consent rather than for inability to consummate.<sup>63</sup>

Considering that psychological repugnance may give rise to a claim under this ground it is not easy to distinguish between instances where a party is psychologically constrained from engaging in intercourse and those where a party is simply unwilling to consummate the marriage. An exceptionally fine line may exist between wilful refusal and psychological repugnance. This is evident from *S. v. S.*<sup>64</sup>, where the Supreme Court found themselves divided on the point.

In *A. O'H. v. F.*<sup>65</sup>, however, Barron J., noting that the husband in that case was generally affectionate and loving towards his wife, observed that “[i]f an affectionate husband... who is physically capable of performing the sexual act, refuses to make any real effort to do so or to assist his wife to be able to do so, it must be, in my view, because psychologically it is impossible for him to do so.” This is a remarkably far-reaching statement that arguably whittles the distinction between wilful refusal and psychological repugnance to vanishing point.

### **Medical intervention: physical and psychiatric examination**

In order for impotence to render a marriage voidable, it must be established that the impotence is incurable. This does not mean, however, that a party may be required to undergo intrusive surgery to rectify the defect in question. Impotence may be deemed incurable notwithstanding the possibility that a medical operation may cure a party of such incapacity. The incapacity in question must not be temporary in nature.

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#### **Footnotes:**

61 Unreported. High Court. November 1, 1985.

62 *A.B. v. E.B.* [1996] I.F.L.R. 75 at 80.

63 See *the dictum of Kenny J.* in *S. v. S.* [1976-77] I.L.R.M. 156.

64 [1976-77] I.L.R.M. 156.

65 [1986] I.L.R.M. 489 at 492.

A further, obvious prerequisite to the giving of relief is proof of the impotence alleged. Order 70, r. 32 of the Rules of the Superior Courts<sup>66</sup> allows the Master of the High Court, in respect of nullity proceedings where impotence or incapacity is alleged, to appoint two medical inspectors “to examine the parties and report to the Court the result of such examination.” In the absence of such an order being made, the Court itself has jurisdiction to order such an examination. In *J.S. v. C.S. (orse. C.T.)*<sup>67</sup> Budd J. ruled that the Master of the High Court had jurisdiction to appoint medical inspectors for the purpose of conducting a psychiatric as well as a physical examination of the parties. A social report can also be obtained in nullity cases under section 47 of the Family Law Act, 1995<sup>68</sup>. In *P.McG. v. A.F.*<sup>69</sup> it was stated that the appointment of a medical inspector did not preclude the making of an order under section 47.

A refusal to submit to an examination is not necessarily fatal to the grant of relief.<sup>70</sup> In *A. O'H. v. F.*<sup>71</sup> Barron J. concluded that where an otherwise affectionate husband had not consummated a marriage, a presumption arose that this failure arose from the husband's impotence and that a declaration of nullity could be granted in such circumstances. In other words the courts do not consider a medical examination a strictly necessary prerequisite to the establishment of impotence; it is possible to find that a party was impotent in the absence of medical evidence.<sup>72</sup> It is suggested, however, that a Court, mindful of the possibility of collusion, should be wary of accepting the uncorroborated evidence of interested parties as to a medical condition of such an intimate and complex nature.

## **INABILITY TO FORM AND SUSTAIN A NORMAL AND CARING MARRIAGE RELATIONSHIP**

It is now possible to avoid a marriage on the ground that a party thereto, due to an inherent factor existing at the time of the marriage, lacked the capacity to form and sustain what is variously termed ‘a caring and considerate marital relationship’ or ‘a normal marital relationship’. This is a comparatively recent innovation in Irish law, a largely home-spun ground with nebulous origins. It was certainly unheard of when the jurisdiction of the Ecclesiastical Courts was transferred to the High Court in 1870. Prior to 1982 the only circumstance in which a party could avoid a marriage

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**Footnotes:**

66 S.I. No. 15 of 1986.

67 [1997] I.F.L.R. 140.

68 No. 26 of 1995.

69 Unreported, 28 January 2000, High Ct.

Budd J.

70 See *E.M. v. S.M.* (1942) 77 I.L.T.R.

128.

71 [1986] I.L.R.M. 489 at 492.

72 See e.g. *S. v. S.* [1976-77] I.L.R.M.

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due to incapacity (i.e. where a marriage is voidable) was where one of the parties (usually the respondent) was unable to consummate the marriage due to impotence. Mental incapacity could only be pleaded where it affected the party's understanding of the nature of marriage and the duties attached thereto and not where it merely affected the party's ability to carry out those duties.

The Irish Courts first contemplated the possibility that mental incapacity could allow a marriage to be avoided, where it interfered with the ability *to carry out* the responsibilities of marriage, in *R.S.J. v. J.S.J.*<sup>73</sup> Barrington J. noted that "marriage implies an intention on behalf of the parties to live in some form of society together", and pointed out that "if one of the parties... has not the capacity to maintain and sustain a relationship with the other a real marriage becomes impossible."<sup>74</sup> Barrington J. commented further that "[i]f . . . it could be shown that, at the date of the marriage, the petitioner, through illness, lacked the capacity to form a caring or considerate relationship with his wife I would be prepared to entertain this as a ground on which a decree of nullity might be granted." On the facts, however, the judge was not satisfied that the petitioner was so incapacitated as to render the marriage voidable.

It was left then to the Court in *D. v. C.*<sup>75</sup> to grant the first annulment based on this new ground. In that case, the respondent had been diagnosed as suffering from manic depression to such a degree as to render him unable to sustain a normal relationship with the petitioner. Costello J. concluded, that where a party is, at the time of marriage, owing to a psychiatric disability, disorder or illness, unable to enter into and sustain a normal relationship of marriage, that marriage would be voidable on principles similar to those applicable in the cases of inability arising from impotence.

### **Psychiatric disability or illness?**

At first it appeared that the ground could only be invoked where the incapacity arose from a recognised psychiatric disease or disability. In several cases, for instance, the absence of an established mental illness was fatal to a claim for relief.<sup>76</sup>

That said, several other more recent cases seem to suggest that it is indeed unnecessary to establish the presence of a mental illness. In *B.D. v. M.C. (orse. M.D.)*<sup>77</sup> Barrington J. granted a decree in circumstances where the respondent suffered from a severe lack of emotional maturity sufficient to render him incapable of entering into the requisite marital relationship.

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#### **Footnotes:**

73 [1982] I.L.R.M. 263.

74 *ibid.* at 264.

75 [1984] I.L.R.M. 173.

76 See *E.P. v. M.C.* [1985] I.L.R.M. 34 and *P.C. v. D. O'B.* unreported. High Court. October 2, 1985. at 8.

77 Unreported. High Court. Barrington J. March 27, 1987.

The Supreme Court, however, swept away any lingering doubts in its decision in *U.F. v. J.C.*<sup>78</sup> In the course of his judgment, Egan J. stated<sup>79</sup> that “strict proof of actual mental illness” is not required to secure relief.<sup>80</sup> The latter case represents a high watermark from which the law has slowly though not yet fully receded.<sup>81</sup>

The development of this new ground has not occurred without its share of controversy. It is arguable that the creation of a new ground of nullity in this manner is unconstitutional. In *M.M. v. P.M.*<sup>82</sup>, McMahon J. rejected endeavours to extend the definition of consummation as amounting to a request for him to usurp the legislative functions of the *Oireachtas*.<sup>83</sup> “To treat insemination as a necessary element in the consummation of a marriage” he believed “would amount to adding a new ground of nullity to those recognised by the ecclesiastical law” in force prior to 1870.<sup>84</sup> This was, he considered, a request to add a new ground of nullity, and to add new grounds of nullity, he noted, would be to disregard the legislative requirement that the High Court act and grant relief on the basis of those principles laid down in the Ecclesiastical Courts. In other words the Courts would be making rather than following law.

Nonetheless, this ground survives and indeed has come to be one of the most frequently invoked grounds of nullity. It is difficult to gauge how this ground has fared in the context of the Courts’ jurisdiction to grant divorces, to which, it is suggested, many of the cases decided on this ground are more suited.

## **BARS TO RELIEF**

### **Repudiation**

If a marriage was potentially voidable, it was formerly thought that a petitioner could rely on his own incapacity only where the respondent had repudiated the *verum matrimonium*. This meant that a petitioner, in such circumstances, could only avoid a marriage where it was established that the respondent had acted in such a way as to indicate that he or she did not wish to assert, or rely on, the validity of the marriage.<sup>85</sup>

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#### **Footnotes:**

78 [1991] I.L.R.M. 65.

79 *ibid.* at 85.

80 See also *P.C. v. V.C.* [1990] 2 I.R. 91.

81 See the cases of *K.T. v. D.T.* [1996]

I.F.L.R. 82 and *J.W.H. (otherwise W.) v.*

*G.W.* unreported, High Court,

O’Higgins J., February 25, 1998.

82 [1986] I.L.R.M. 515.

83 Cf. Article 15.2 of the Constitution.

84 *ibid.* at 517.

85 See *R.S.J. v. J.S.J.* [1982] I.L.R.M.

263.

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In more recent times judicial support for the requirement of repudiation has gradually been eroded although it remains unclear whether it still applies. In *P.C. v. V.C.*<sup>86</sup> O'Hanlon J. felt that where both parties were, at the time of the marriage, unaware of the incapacity "the petitioner should not be denied a decree of nullity because the respondent wishes to hold him to the marriage bond". In *O'R. v. B.*<sup>87</sup> a similar conclusion prevailed, Kinlen J. ruling that a petitioner may rely on his own incapacity, notwithstanding the absence of repudiation (although in that case it also appeared that there had also been elements of incapacity on both sides).

### **Approbation**

A person otherwise entitled to avoid a marriage, on one of the above-mentioned grounds rendering a marriage voidable, may lose that right by means of approbation. Approbation occurs where a person conducts himself in a manner from which it may reasonably be inferred that he has affirmed the existence of the marriage. He has thereby implicitly agreed not to rely on his right to avoid it. This barrier to relief operates in a manner somewhat similar to estoppel. The party by virtue of his or her actions is estopped from relying on his strict legal right to avoid the marriage. In *G. v. M.*<sup>88</sup> Lord Selborne L.C. defined approbation as including "any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation existed."

With rare exceptions, it is generally the case that a marriage will not be considered approbated where a party acts without knowledge of his or her right to avoid the marriage. As noted in *Pettit v. Pettit*<sup>89</sup> it would be unfair to deny a spouse relief "simply because, when ignorant of the law, he behaves like any ordinary decent husband".<sup>90</sup>

In *M.O'D. v. C. O'D.*<sup>91</sup>, however, the petitioner was deemed to have approbated his marriage. The petitioner and his wife in that case had married in 1968. The husband had been actively studying his legal position from the early 1970s. He had first prepared nullity proceedings in 1983 but did not initiate them until March, 1990. In the meantime,<sup>92</sup> "the wife has been allowed to continue

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#### Footnotes:

86 [1990] 2 I.R. 91.

87 [1995] 2 I.L.R.M. 57 at 72.

88 (1885) 10 A.C. 171 at 186.

89 *Per* Donovan L.J., [1962] 3 All E.R. 37

at 45.

90 See *N.F. v. M.T.* [1982] I.L.R.M. 545.

*D. v. C.* [1984] I.L.R.M. 173 and *P.K. v.*

*M.B.* unreported. High Court. Costello

J., November 11, 1992.

91 Unreported. High Court. O'Hanlon J.  
August 5, 1992.

92 *Per* O'Hanlon J., *ibid.* at 24.

regarding her marriage as a valid subsisting marriage for over twenty years, during which time children have been born to her.” The husband’s conduct amounted then to approbation “of such a character as should disqualify him from being granted relief even if (as was not the case) he had succeeded in establishing incapacity.”

Notwithstanding the fact that a party has no knowledge of the right to avoid, it is possible that a court may refuse to grant relief on the ground that it would otherwise be inequitable to make a decree.<sup>93</sup>

Where a party to a marriage “by conduct or overt acts consistent only with such affirmation, approbated the existence and validity of the particular marriage” he or she may be barred from avoiding the marriage<sup>94</sup>. Reliance on rights granted only to married couples may be such as to deny relief to the person invoking those rights.<sup>95</sup> Matrimonial proceedings, however, do not always act as a bar to relief. In *D. v. C.*<sup>96</sup> the petitioner had sought a barring order and a declaration of custody. In doing so she arguably acted on the assumption that she was married at the time. Costello J. ruled that the petitioner, not having been made aware of her right to avoid the marriage, could not be regarded as having approbated it.

In *A.B. v. E.B.*<sup>97</sup> Budd J. implied that the financial and other contributions of a spouse may be taken into account in considering whether it is fair to grant relief in these circumstances.

### **Delay**

Where a long delay precedes the institution of proceedings for relief, a court may decline to grant a decree. In *M. O’D. v. C.O’D.*<sup>98</sup> for instance, a “serious delay” of some 20 years was deemed sufficient to disqualify the petitioner from relief. Therefore a delay implies an intention on the part of the parties to forego their rights. That said, where evidence is adduced tending to suggest other reasons for delay the courts have tended not to refuse relief. In *W. v. P.*<sup>99</sup> for instance relief was granted despite a three and half year delay in instituting proceedings. The delay in that case was explained by the fact that the petitioner did not have sufficient financial resources to take a case at the time she became aware of her rights. Similarly a delay will normally not be fatal where the failure to seek a decree is caused by the parties’ ignorance of their legal right to do so.<sup>100</sup>

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#### **Footnotes:**

93 *Pettit v. Pettit* [1962] 3 All E.R. 37.

94 *G. v. M.* [1885] App. Cas. 171.

95 *R. McG. v. N.K.* unreported, High Court, Morris J., May 23, 1995.

96 [1984] I.L.R.M. 173.

97 Unreported, High Court, Budd J., October 14, 1995, affirmed by the Supreme Court [1996] I.F.L.R. 75.

98 Unreported. High Court, O’Hanlon J. August 5, 1992.

99 Unreported, High Court, Barrington J., June 7, 1984.

100 *N.F. v. M.T.* [1982] I.L.R.M. 545.

### Collusion

Where parties combine with a view to obtaining a decree of nullity, relief may be denied, at the discretion of the court, on grounds of collusion.<sup>101</sup> In *E.P. v. M.C.*<sup>102</sup> Barron J. refused to grant a decree on this very ground. The onus of proving that there were in fact “no reasonable grounds for thinking that the true case was not presented to the Court” was on the petitioner, and this onus, according to Barron J., had not been satisfied.<sup>103</sup>

Owing to the potential for collusion and improper co-operation in nullity cases, some judges have suggested the possibility of appointing a ‘defender of the bond’ in undefended petitions to argue in favour of the validity of the marriage. In *O’R. v. B.*<sup>104</sup> for instance, Kinlen J. recommended that a *legitimus contradictor* or *amicus curiae* should be appointed in such cases.<sup>105</sup>

### THE ONUS AND STANDARD OF PROOF

In *Griffith v. Griffith*<sup>106</sup> Haugh J. noted that where parties have gone through a ceremony of marriage, “the presumption of law weighs heavily in favour of its validity”, although this presumption “can be rebutted by evidence.” The onus of proof, in other words, lies on the petitioner who must establish the invalidity of the marriage even in circumstances where, as often happens, the petition is uncontested.<sup>107</sup>

It would appear from recent decisions, however, that the *standard* of proof required to rebut and displace nullity is no longer as exacting as in former times. It was once thought that a very high degree of proof, sometimes compared to that required in criminal cases, was needed to displace the presumption.<sup>108</sup>

In recent times it would seem that there has been some movement towards a dilution of the standard of proof, with the result that it would now appear to be no higher than the standard applicable in other ordinary civil cases. This trend can be traced back to *N. (orse. K.) v. K.*<sup>109</sup> where McCarthy J. noted (although the point, not having been argued in court, was probably *obiter*), that the standard

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#### Footnotes:

101 *Churchward v. Churchward* [1895] P. 7.

102 *E.P. v. M.C.* [1985] I.L.R.M. 34.

103 *ibid.* at 38.

104 [1995] 2 I.L.R.M. 57.

105 See also *N. (orse. K.) v. K.* [1986] I.L.R.M. 75 at 92 and *U.F. v. J.C.*

[1991] I.L.R.M. 65 at 94.

106 [1944] I.R. 35 at 39.

107 *N. (orse. K. v. K.)* [1986] I.L.R.M. 75 at 89.

108 *Sec U. (falsely called J.) v. J.* (1867) 1 L.R. P. & D. 460 at 461. *McM. v. McM and McK. v. Mc.K.* [1936] I.R. 177.

*R.S.J. v. J.S.J.* [1982] I.L.R.M. 263 at 265. *J.E. v. W.E.* [1985] I.L.R.M. 691 at 693. *U.F. v. J.C.* [1991] I.L.R.M. 65 at 74 and *S. v. K.* unreported. High Court. Denham J. July 2, 1992.

109 [1986] I.L.R.M. 75 at 93-94.



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of proof should be “on the balance of probabilities”. In *K. W. v. M.W.*<sup>110</sup> it was assumed that the standard of proof was on “the balance of probabilities”. In *O’R. v. B.*<sup>111</sup> Kinlen J. opined that the balance of probabilities was probably the correct standard of proof in these cases.

The court came to a less equivocal conclusion on the matter in *S.C. v. P.D. (or se. C.)*.<sup>112</sup> In that case McCracken J. observed that while older authority “appears to impose an onus of proof approaching that necessary in a criminal prosecution, the attitudes of the courts seem to have altered in recent years”. McCracken J. considered, but ultimately rejected, the possibility of an intermediate standard of proof higher than that in ordinary civil cases but less exacting than a requirement of proof beyond a reasonable doubt. While warning that great care was needed in considering petitions for a decree of nullity, especially in drawing inferences from the facts, McCracken J. concluded, nevertheless, that the standard of proof in nullity cases should be no higher than the balance of probabilities.

It is suggested that this generally reflects a greater willingness on the part of judges to make a finding of nullity. In addition to the significantly weakened standard of proof, several cases exhibit a loosening of evidential rigour in matrimonial law. In *S. v. S.*<sup>113</sup> for instance the Supreme Court accepted that a husband had been impotent relative to his wife. This was despite the fact that the latter made no appearance in the case and that no medical report concerning his condition at the time of the marriage (or indeed at any time) was put before the court. Instead the Court appears to have accepted the wife’s testimony alone as adequate proof of her husband’s incapacity.

This trend appeared to survive the introduction of divorce. That said, McGuinness J. recently in *P.F. v. G.O’M.*<sup>114</sup> has signalled a retrenchment of nullity law.

With the advent of divorce, couples are unlikely to use the nullity jurisdiction improperly with a view to obtaining the right to remarry (although it should be noted that the nullity jurisdiction may be invoked in some cases where parties wish to avoid the various obligations which may be imposed on the granting of a divorce). Judges should be careful to ensure that the nullity jurisdiction does not become a facility to release parties from their family obligations on marital breakdown. The most reliable way of obviating this problem would be to allow ancillary orders

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### Footnotes:

110 Unrep., High Court. July 19, 1994.

111 [1995] 2 I.L.R.M. 57 at 75.

112 Unrep. High Court, March 14, 1996.

113 [1976-77] I.L.R.M. 156.

114 Unrep. Supreme Court. November 28, 2000.

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similar to those available consequent upon divorce and judicial separation to be granted when a declaration of nullity has been made, as is the case in England and Wales.<sup>115</sup> Similar provisions were contemplated in the initial stages of what eventually became the Family Law Act 1995 but were dropped at a late stage owing to fears of unconstitutionality.<sup>116</sup>

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### Footnotes:

115 See Matrimonial Causes Act, 1973.

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## SECTION 3

# EFFECTS OF A DECREE OF NULLITY

### **VOID MEANS VOID *AB INITIO***

**A** decree of nullity effectively means that the marriage which was presumed to exist in fact does not, and the parties' status is changed from being apparently married, to being single again.

In the case of a void marriage, a decree of nullity recognizes that the marriage never existed, so any legal consequences flowing from the supposed marriage were based on a mistake of fact. In the case of a voidable marriage, the effect of a decree is to render what was a potential marriage void *ab initio*, with the same practical effects.

The effects are wide ranging for both the parties and their children, in law and in practice.

#### **Children of an annulled marriage – guardianship**

When questions of custody and access arise in the context of a petition for a declaration of nullity, it is necessary to separately invoke the provisions of the Guardianship of Infants Act 1964 as the court has no jurisdiction to deal with such matters as part of a nullity hearing.

Assuming that the petition for a declaration of nullity is granted, the children cease to be the children of a marriage, and become children born outside marriage. While the mother is automatically recognised as the guardian of her children, the position of the father depends on whether the marriage annulled was a void or a voidable marriage. Section 9 of the Status of Children Act 1987 substitutes a new section 2 of the Guardianship of Infants Act which provides that if the marriage was void, such a father shall be regarded as a joint guardian with the mother provided if he reasonably believed that the marriage was valid either during the 10 months before the birth of the child (the marriage ceremony took place before the birth of the child), or at the time of the ceremony (if the ceremony took place after the birth of the child) and any child in question was born within a certain time frame of the marriage. The belief may have been based on a mistake of law or fact, and there is a rebuttable

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presumption that the father reasonably believed the marriage was valid. The new section 2 also provides that if the marriage was voidable, the father remains a joint guardian of the children born to the parties before or within 10 months of the declaration of nullity.

Section 46 of the Family Law Act 1995 provides that a court pronouncing a decree of nullity also has jurisdiction to declare either of the parents unfit to have custody of a minor dependent member of the family. The effect of such a declaration is that in the event of the death of the custodial parent, the “unfit” parent does not automatically become entitled to the custody of the child.<sup>1</sup>

The position of parents and children outside marriage as members of a family unit has been strengthened by judgments of the European Court of Human Rights.<sup>2</sup> The right to respect for family life set out in Article 8 of the European Convention of Human Rights, shortly to be implemented directly into Irish law<sup>3</sup>, has been held to extend to families not founded on marriage. This can only strengthen the mutual rights of parents and children coming from an annulled marriage. The Constitutional Review Group has proposed that the Constitution should retain a pledge by the State to protect the family based on marriage but also to guarantee to all individuals a right to respect for their family life whether that family is, or is not, based on marriage.<sup>4</sup> This further represents a trend towards recognizing the rights of children and their parents to a family life, with the rights and obligations entailed, even if it is not based on marriage.

### **Children of an annulled marriage - maintenance**

The obligation of both parents to maintain their children continues after a decree of nullity. To obtain a maintenance order, separate proceedings for child maintenance must be instituted under Family Law (Maintenance of Spouses and Children) Act 1976, as amended. The Status of Children Act 1987 provides that a child’s legal relationship with its parents (which would include its right to be maintained by them and to be properly provided for after their deaths) should not be affected by the fact of the parents being married, or not.<sup>5</sup>

Section 46 of the 1987 Act provides that if there is a dispute as to paternity in the context of a maintenance or custody application after a decree of nullity, the presumption of paternity subsists if the marriage was voidable. If the marriage was void, there is no presumption.

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#### **Footnotes:**

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|---|--|---|--|---|---|
| 1 | There is an equivalent provision in s.41 of the Family Law (Divorce) Act 1996. | 3 | <i>Keegan v Ireland</i> (1994) 18 EHRR 342     | 4 | Report of Constitutional Review Group, May 1996 at p. 323 |
| 2 | <i>K v UK</i> no. 11468/85 50 DR 199.  |   | European Convention on Human Rights Bill, 2001 | 5 | S. 3 of the Status of Children Act, 1987                  |

**Children of an annulled marriage - adoption**

The Supreme Court has held that there is no difference in the rights of a child, whether born within or outside a marriage.<sup>6</sup> They include “the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being”.<sup>7</sup> The State has a duty to vindicate these rights, and the adoption legislation is one way in which the State does so.<sup>8</sup>

In Article 41 of the Constitution the family is described as “a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law”. In Article 42, “The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.” As a result of these provisions, the rules for the adoption of children born within marriage are different to the rules for those born outside marriage or in a marriage which is subsequently annulled. It is more difficult to adopt a child of a marriage than it is to adopt a child born outside marriage, including the child of an annulled marriage. Generally, only orphaned children, children born outside marriage or, in some circumstances, legitimated children whose births have not been re-registered, are eligible for adoption. In exceptional circumstances which amount to abandonment, both children born within and outside marriage may be adopted.<sup>9</sup>

In most cases of children of annulled marriages, the father will automatically be a guardian in accordance with section 9 of the Status of Children Act 1987, as outlined above, and as such will be entitled to be heard. If he is not, he may apply to be made a guardian under section 12 of the same Act<sup>10</sup>, and then will have standing to be heard as a guardian as well as the natural father, and may claim custody. Thus both unmarried parents are entitled to be heard, and may each object to or consent to an adoption.

In contrast to the position for unmarried parents (which includes parties to an annulled or void marriage), married parents cannot consent to the adoption of a child unless they have effectively abandoned him or her, in which case their consent is not necessary anyway.<sup>11</sup> A child born to

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**Footnotes:**

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|---|--|--|----|---|
| 6 | <i>The State (Nicolaou) v An Bord Uchtala &amp; The Attorney General</i> [1966] IR 567 | p. 56, O’Higgins CJ                                  | 10 | Inserted as section 6A into the Guardianship of Children Act 1964 |
| 7 | <i>G v An Bord Uchtala</i> , [1980] IR 32 at   | 8 <i>Adoption no. 2 Bill 1987</i> [1989] IR 656 (SC) | 11 | Adoption Act 1988   |
|   |  | 9 Adoption Act 1988                                  |    |   |

married parents can only be adopted if the parents have effectively abandoned him or her, and under no other circumstances, which procedure is slow and cumbersome.<sup>12</sup>

In the event that adoption would be sought for children of an annulled marriage, the change in their status to children born outside marriage as a result of the annulment would make the process of their adoption easier, and so could be argued to be advantageous in most cases.<sup>13</sup>

### **Subsequent validation of a bigamous marriage**

A logical outcome of the theoretical position that a void marriage never existed is that a subsequent, potentially bigamous, marriage entered into by one of the parties before the decree of nullity was made, may be retrospectively validated. Further, any children born of the second, now valid marriage will become children of a marriage protected by the Constitution.<sup>14</sup>

### **Ancillary orders**

There is no jurisdiction vested in the courts to make ancillary orders relating to maintenance, financial matters and property between the parties. In some cases involving longer marriages this can have a devastating effect on the financially weaker party, who is often the wife because of her obligations to the children of the family. Having set aside her independence to rear children, she may be left with no share of the family resources and an obligation to maintain not only herself but if possible contribute towards the maintenance of the children also. The social injustice of this situation is evident and is commonly acknowledged by the practice of agreeing financial settlements in nullity cases prior to the hearing of the case, so that the court may be told that a financial settlement has been reached and provision has been made for the financially weaker party, although not required by the court or by the legislation. This practice has the additional benefit of permitting transactions between the parties to take place while the parties are still “married”, that is, before the decree of nullity is actually handed down. The parties are therefore still able to enjoy the tax benefits of marriage, such as exemption from stamp duty or gift tax on transfers of property.<sup>15</sup>

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#### **Footnotes:**

12 See Shatter. *Family Law* (4th ed. 1997) p. 486

13 For example, the Constitutional Review Group reporting in 1996 at p. 323 notes that the Constitution may emphasize the rights of the family to the detriment of the rights of individual members, and mentions adoption law as an instance of this. “The history of adoption legislation in the State and the reluctance of the Oireachtas until recently to permit the adoption of

legitimate children undoubtedly was influenced by a fear that such a provision would conflict with the rights of the family in Art. 41.1.1°.”

14 Examples of this situation occurred in *AMN v JPC* [1988] 8 ILRM 170 (HC) and *O’B v R, O’B Notice Party*, unrep. HC. Kinlen J., 20 July 1999. In the latter case one child in his twenties lost his status as a member of a family based on marriage, and his two half sisters in their teens gained this status.

15 See for example the closing remarks of Mr. Justice Patrick Smith, HC, in his judgment in *WD v CD*, 3 April 1998: “I note that it has been agreed between the parties that no Order is to issue in this case until such time as the family home is transferred into the children’s names and also until such time as the judgment mortgages registered against the family home are discharged by the Petitioner herein.”

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If property is disputed, section 36 of the Family Law Act 1995 provides a summary procedure for the determination of disputes as to title or possession. The Partition Acts 1868-1876 give powers to the court to grant orders for partition or sale in lieu of partition if property is held in joint names. This however can assist only in resolving the legal position as to ownership, and does not address the loss of entitlements which may be suffered by a spouse whose marriage is annulled.

### **Succession rights**

Once a marriage is annulled, the parties have no claim on each other's estates and are not entitled to any legal share on an intestacy. If there is a bequest in a will, this will remain valid, though subject to capital acquisitions tax at the normal rate between non-family members. Any bequest may also be subject to a spouse's legal right share, if the deceased was party to a valid marriage with a second partner, and may also be subject to a claim under section 117 of the Succession Act 1965 for proper provision for the deceased's children.

A void (not a voidable) marriage may be impugned by any person, even after the death of one of the parties. Succession rights may be affected if the allegation is upheld.

### **Family home**

The Family Home Protection Act 1976 no longer applies to the family home of parties to a void or annulled marriage, so for example if the property is in the name of only one spouse, it may be sold or mortgaged without the consent of the other. The legal right to reside in the family home, by a spouse or previous spouse who has no proprietary interest in it, arises only by virtue of the marriage relationship. Once the marriage is annulled, no right remains.

Further, the remedy in section 5 of the Act, which can be used to prevent a spouse from "engaging in such conduct as may lead to the loss of any interest in the family home or may render it unsuitable for habitation as a family home with the intention of depriving the applicant spouse or a dependent child of the family of his residence in the family home", is not available to a non-spouse, including the former spouse in an annulled marriage. This is a loss of a potentially valuable remedy, as under certain circumstances the court is empowered to transfer one spouse's interest in the family home to the other, or compensate the party who has suffered loss. Section 5 also gives a remedy to a dependent child, but if the parties are not spouses, and the home is therefore not a family home, any dependent child of an annulled marriage is left without the protection of this section.

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It has been decided that the Act does not protect spouses against judgment mortgages and bankruptcy.<sup>16</sup> However, it was held in *First National Building Society v Ring*<sup>17</sup> that the mere registration of a judgment mortgage did not entitle the creditor to an order for sale of the home.<sup>18</sup> Another advantage to a spouse is section 61 of the Bankruptcy Act 1988. Section 61 (5) gives power to the High Court “to order postponement of the sale of the family home having regard to the interests of the creditors and of the spouse and dependants of the bankrupt as well as to all the circumstances of the case.” The postponement for whatever period may give a spouse an important advantage, which is not available to a party to a void or annulled marriage.

### **Remedies under the Domestic Violence Act 1996<sup>19</sup>**

Only a spouse, a former spouse or a divorced spouse<sup>20</sup> is eligible for all the remedies available under the Act: safety order, protection order, barring order and interim barring order. A person who was a spouse prior to a marriage being annulled does not come within the category of spouse, and so is eligible only for the lesser remedies available to a cohabitee or co-resident.

The Act sets out different categories of people who are eligible to apply for the various orders. The first category consists of spouses, and includes divorced spouses.<sup>21</sup> It does not include parties to a void or annulled marriage. The second category consists of cohabitees, and to qualify as a cohabitee in order to avail of the different orders, duration of cohabitation “as husband and wife” for six months in either the previous twelve or nine months is required. The third category relevant for the purposes of nullity is “someone being of full age who resides with the respondent in a relationship the basis of which is not primarily contractual”, and persons in this category are not eligible for the barring orders.

It is uncertain whether a party to a void marriage who does not qualify as a cohabitee, perhaps because of the required co-habitation periods, could seek a safety order as a person who resides with the respondent in the fourth category. No specific length of time of co-residence is required to qualify under this heading. In deciding whether a person comes within this heading, the court must have regard to:

- (i) the length of time those persons have been residing together

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#### Footnotes:

- |  |                         |  |   |  |                 |
|--|-------------------------|--|---|--|-----------------|
| 16 <i>Containercare (Irl) Limited v Wycherley</i> [1982] IR 143 (HC) and <i>Murray v Diamond</i> [1982 2 ILRM 113 (HC) | 17 [1992] 1 IR 375 (HC) | 18 See discussion by Shatter, <i>Family Law</i> (4th ed. 1997), p. 749 | 19 For a general critique of the Act and its application in practice, see “Domestic Violence: The Case for Reform”, a | 20 Family Law (Divorce) Act 1996, s. 51. | 21 <i>Ibid.</i> |
|--|-------------------------|--|---|--|-----------------|



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- (ii) the nature of any duties performed by either person for the other person or for any kindred person of that other person;
- (iii) the absence of any profit or of any significant profit made by either person from any monetary or other consideration given by the other person in respect of residing at the place concerned;
- (iv) such other matters as the court considers appropriate in the circumstances.<sup>22</sup>

As pointed out by Alan Shatter<sup>23</sup>, questions of cohabitation and precise periods of time may be hard to prove and will leave parties to void or annulled marriages (and others in domestic relationships) in uncertain positions as to the applicability of the Act. Further, he points out that where there is uncertainty as to marital status, it is possible that no remedy under the Act will lie pending the conclusion of proceedings to establish the married or unmarried status of the parties.

Difficulty also arises because of the requirement in relation to cohabitantes that in order to benefit from a barring or interim barring order, the applicant must have a beneficial interest in at least half the home. This if contested may also lead to delay or failure in obtaining the protection needed.

### **Taxation**

Prior to a decree of nullity, the parties to the 'marriage' are treated by the Revenue Commissioners as being married and can benefit from tax reliefs available to married persons. Transfers of property can therefore be made free of capital acquisitions tax and stamp duty. They can be jointly assessed for income tax, and share their capital gains tax allowances. Once a decree of nullity is made, this position ceases and they are treated by the Revenue Commissioners as strangers in law, and only benefit from very limited tax free allowances in relation to any transfers of property, which are subject to normal stamp duty. They revert to single assessment for income tax and cannot share income tax or other tax allowances. However, they are not, in practice, held retrospectively liable for tax as single persons, even though technically a declaration of nullity means that a marriage is void *ab initio*.<sup>24</sup>

### **Presumption of advancement**

The presumption of advancement, which applies to transfers of property from a husband to a wife and entails a rebuttable presumption that the transfer was a gift, does not apply in a void marriage,

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#### **Footnotes:**

<sup>22</sup> Section 2 (1) (b) of the Domestic Violence Act 1996

<sup>23</sup> Alan Shatter. *Family Law*, (4th ed. 1997) p. 851

<sup>24</sup> *Dodworth v Dale* [1936] 2 All ER 439

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but in voidable marriages only. Any gift made by a 'husband' to a 'wife' in the course of their void marriage will fail, and the gift will be held by the 'wife' on trust for the 'husband'.<sup>25</sup>

The presumption of advancement is an equitable principle which arises as the result of a relationship between the parties, and which involves an obligation recognised in equity by one person to provide for another.<sup>26</sup> So for example it applies in relation to gifts from a husband to his wife, and from a father to his child or a child to whom he stands *in loco parentis*. The presumption is to the effect that property placed by a husband into his wife's name, or by a father into the name of a child, is intended to be a gift, and the recipient is intended to be the beneficial owner. As it is a presumption only, it may be rebutted by evidence that this was not the intention of the donor, and in this event, another equitable concept may come into play, being the presumption of a resulting trust.

The presumption of a resulting trust means that if a person advances money to buy property in the name of another, or buys property in that other person's name, the person in whose name the property is bought is presumed to hold that property on a resulting trust for the person who has provided the purchase price. Therefore the presumption of advancement can make the difference between owning and not owning property.

It should be said that the constitutionality of the presumption of advancement has been questioned by some commentators as going against the constitutional equality of spouses<sup>27</sup>. This is because there is no such presumption in equity applying to transactions made by a wife in favour of a husband.<sup>28</sup> To date, however, it continues to be applied in the High Court and Supreme Court.<sup>29</sup>

There is authority that the presumption applies if the marriage is subsequently dissolved or is voidable and annulled, but not where the marriage is void.<sup>30</sup>

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### Footnotes:

- 25 *Dunbar v Dunbar* [1090] 2 Ch 639 and *Re Will Trusts* [1968] 1 WLR 120. See Shatter *Family Law* (4th ed. 1997) p. 777
- 26 See *RF v MMF* [1995] 2 ILRM 572 at p. 756 "The equitable doctrine of advancement as applying to transactions between husband and wife has the effect that when a husband (at least where the circumstances show that he is to be expected to provide for the wife) buys property and has it conveyed to his wife and himself jointly, there is a presumption that the wife's paper title gives her a beneficial estate or interest in the property".
- 27 See for example H. Delaney, *Equity and the Law of Trusts in Ireland*, (2nd ed. 1999), p. 160. Hogan and Whyte, Kelly, *The Irish Constitution* (3rd ed. 1994) p. 713 discuss the equality of spouses under the Constitution, though not the presumption of advancement specifically.
- 28 *Mercier v Mercier* (1903) 2 Ch 98. *Containercare (Ireland) Ltd. v Wycherley* [1982] IR 143
- 29 *W v W* [1981] ILRM 202,204, (Finlay P.), *JC v JHC* unrep. HC, Keane J., 4 Aug. 1982. *RF v MF* [1995] 2 ILRM 572 (SC), *Malone v McQuaid* unrep. HC, O'Sullivan J., 28 May 1998
- 30 *Dunbar v Dunbar* (1909) Ch. 639. *Re D'Altroy's Will Trusts* [1968] 1 WLR 120

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Calverley v Green<sup>31</sup> is a decision of the High Court of Australia which confirms that the presumption does not apply to cohabittees, a category into which parties to a void marriage could be fitted. In such cases where the presumption of advancement does not apply, the presumption of a resulting trust will arise in favour of the person making the greater financial contribution, with the likelihood of less beneficial results for the financially weaker partner in a void marriage.

Cohabitation agreements clearly do not equate to the status of marriage, and may not be enforceable in this jurisdiction.<sup>32</sup> A party to a void or annulled marriage only has the standing of an erstwhile cohabitee. Where voidable marriages are concerned, the rigor of the law's logic is softened by the concession that while the marriage lasted, the presumption of advancement was valid. This is in keeping with the line of decisions which leave property transactions which are concluded during a marriage undisturbed when the marriage is annulled.<sup>33</sup>

### **The effect of nullity on transactions concluded prior to or during the marriage**

It is not clear to what extent arrangements made during a voidable marriage would be reversible in this jurisdiction. The Irish courts have not had to decide this question, but are likely to apply the doctrine of concluded transactions, following the line of English authority to this effect.

The Law Reform Commission's report on Nullity of Marriage<sup>34</sup> gives a summary of the English decisions on this point. Two principles emerge from these decisions. The first is that transactions concluded during a period when a marriage was regarded as valid and subsisting cannot be set aside when the marriage is annulled. The second is that once the marriage is annulled, a party thereto can resume his or her status prior to the annulled marriage, and take advantage of benefits ancillary to that status, provided that these have not been dismantled meanwhile, while the marriage was regarded as valid.

Aside from the established law followed in England and Wales, which is of persuasive value in this jurisdiction, it should be borne in mind that the transfer of property into someone's name is

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#### Footnotes:

31 [1984] 56 ALR 483. Two of the judgments (by Murphy J. and Deane J.) are very critical of the presumptions of a resulting trust and advancement. Gibbs C.J. in the minority found that a presumption of advancement applied in favour of the female cohabitee, but that it was rebutted on the facts. The court found, on varying grounds, that the respondent had a beneficial as well

as a legal interest in the property disputed.  
32 *Ennis v Butterly* [1997] ILRM 28. See however John Mee, *The Property Rights of Cohabitees*, (1999), at p. 31, where he suggests that the ground for the decision – that it would be contrary to the pledge in the Irish Constitution to guard the institution of marriage and protect it against attack – involves an

unreasonably conservative interpretation of the Constitution and is inconsistent with the Supreme Court's more realistic attitude to unmarried cohabitation in *WO'R v EH* [1996] 2 IR 248.

33 Discussed in the next section.

34 LRC 9 1984 at p. 75.

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considered significant by most people, and is not generally understood to be conditional. This point was made in the Australian case of *Calverley v Green*<sup>35</sup> by Murphy J.: “Transfer of the title of property wholly or partially to another is commonly regarded as of great significance, especially by those in *de facto* relationships”. This consideration could serve to reinforce the persuasiveness of the English authorities.

### **Separation agreements**

Separation agreements (unless specifically providing that they should survive a declaration of nullity) are generally considered no longer to apply on the ground that the parties both made a mistake of fact material to the existence of the agreement (that the marriage was valid).<sup>36</sup>

A separation agreement entered into by parties to a void marriage is invalid because the agreement was based on a mistake of law.<sup>37</sup> However, there is authority that an agreement made between parties to a voidable marriage does appear to survive a declaration of nullity.<sup>38</sup> If it specifically provides that it should continue in force in the event of a decree of nullity, its validity is probably secured. In practice, such agreements are made and transactions completed on foot of them, often to take advantage of the tax relief available to married persons.

In a case of a potentially voidable marriage, a separation agreement may be evidence of approbation of the marriage. As a precaution, therefore, many separation agreements contain a clause specifically providing that the agreement is not to be taken as approbation.

### **Fatal injuries and civil compensation for dependants**

Under Part IV of the Civil Liability Act, 1961, as amended<sup>39</sup>, a right of action for damages is available to certain persons in a family-type relationship with a deceased victim of a wrongful act, where the deceased would have been entitled to sue but for his or her own death. The categories of relations entitled to sue include a spouse, a divorced spouse and a cohabitee living with the deceased as husband and wife for the three years prior to his or her death. In addition to the relationship, the family member must be dependent on the deceased or show mental

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#### **Footnotes:**

35 *Calverley v Green* [1984] 56 ALR 483

36 *Galloway v Galloway* [1914] 30 TLR 531. Ridley J.

37 *Galloway v Galloway* (1914) 30 TLR 531

38 *Fowke v Fowke* [1938] 2 All E.R. 637 and *Adams v Adams* [1941] 1 All E.R. 333. In the first case, there were

indications that the agreement was made when the parties were aware of the possibility of nullity, and for many years the agreed maintenance had been paid by the husband. When he died, it was his second wife who sought to have the agreement set aside. In *Adams*, it was held that there was

nothing in the agreement to specify that it should only continue as long as the marriage was valid. Both parties knew that the marriage had not been consummated, and therefore that nullity was possible.

39 Amended by the Civil Liability (Amendment) Act 1996

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distress. Parties to a void, or voidable and annulled marriage are not included, and have no right of action as such.

The right of action arises in respect of three kinds of damage:

- funeral expenses
- mental distress (not open to divorced spouses)
- injury being loss of financial support, or other services which can be quantified, such as domestic services.

In particular, a previous spouse in a void or annulled marriage is entitled to no financial support. The provisions of the Civil Liability legislation are a logical extension of the current legal position governing the relationship between parties to void, or voidable and annulled, marriages. If however the law were to be changed to give such previous spouses limited ancillary relief, this aspect of civil law should also be reviewed.

### **Citizenship**

Irish citizenship does not automatically follow marriage to an Irish citizen.<sup>40</sup> If a marriage is annulled or the parties are living apart before the lodgment of the required declaration after the expiry of three years, any person seeking Irish citizenship must apply and qualify under different criteria. To this extent, the rules on the acquisition of citizenship for separated or annulled marriages are the same, and no extra prejudice is suffered by the party to the void or annulled marriage.

Section 19 of the 1956 Act deals with revocation of citizenship. Nullity or indeed separation are not listed as grounds for revocation by the Minister.

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#### **Footnotes:**

40 Irish Citizenship and Nationality Act 1956 as amended by the Irish

Citizenship and Nationality Act 1986. s. 3

## SECTION 4

# THE FACTUAL CONTEXT

**W**e now turn to the facts behind the law and the analysis of the statistical information on nullity. By way of background, it is important to note the very low Irish marriage rate in the 1950s and the older age of spouses on marriage by comparison with other European countries. This phenomenon has been quoted as being an example of the 'preventative check'<sup>1</sup> on population growth so approved of by demographers such as Malthus.<sup>2</sup> This situation however reversed itself in the 1960s. The statistical information<sup>3</sup> also indirectly shows a significant increase in the number of pre-marital conceptions, from 7.0% of all live births in 1961 to 15.5% in 1979.<sup>4</sup> The adverse legal status of children born outside of marriage prior to 1987 greatly influenced many couples to marry "for the sake for the child". The "shot gun wedding" phenomenon also meant that couples found themselves married under duress of one kind or another. In effect the law of nullity developed against this back drop in the absence of a divorce jurisdiction and in a society which only approved of families firmly based on marriage.

### **Numbers of nullity applications**

The first issue to be examined from the Court Statistics is the frequency of proceedings. In the second edition of 'Family Law in the Republic of Ireland' in 1981 Alan Shatter noted that "Nullity cases have arisen very infrequently in the courts in recent years".<sup>5</sup> He cited the statistical information underpinning this statement by reference to the statistical information contained in table 1 overleaf. In a ten-year period 60 nullity petitions were issued in the High Court and only 26 decrees of nullity were granted during the same period. Whilst the number of decrees does not relate directly to the number of petitions in any one year (as they may not be decided in the same year, and some may be withdrawn), it is quite clear that the success of these applications is far from certain.

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#### **Footnotes:**

- |   |  |  |  |
|---|--|--|--|
| 1 | Malthus, T., <i>An Essay on the Principle of Population</i> . Everyman's Library ( 2 vols., London, 1933), vol.II, pp.4-5. |  |  |
|   | and, Cohen L., <i>Condorcet inédit. Notes pour le tableau des progrès de l'esprit humain</i> in 'La Revolution Francaise', |  |  |
| 2 | Fitzpatrick D., <i>Marriage in post famine Ireland</i> in <i>Marriage in Ireland</i> .                                     |  |  |
|   | Cosgrove A., ed. (College Press,   |  |  |
|   |  |  | Dublin 1985), pp.116-131                                     |
| 3 |  |  | Census of Population and Annual reports on vital statistics. |
| 4 |  |  | <i>Ibid</i> at p. 144  |
| 5 |  |  | Wolfhound Press, 1981 at p. 61                               |

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Year	Number of High Court nullity petitions issued	Number of nullity decrees granted by High Court
1970	1	-
1971	4	2
1972	2	1
1974	3	2
1975	8	4
1976	3	3
1977	11	1
1978	11	2
1979	9	3
1980 (up to 31 July)	8	8

**Table 1** Number of nullity petitions and decrees granted by the High Court, 1970-1980

Shatter also noted that in the small number of nullity cases which came before the court, there was judicial emphasis that “the court must proceed with great caution before giving relief”.<sup>6</sup> He quoted the apprehensions of Hanna J. in *McM. v McM.* and *McK. v McK.* that anything other than the most conservative treatment of such cases could result in the introduction of divorce by the back door:

“. . . discontented spouses could find an easy road to circumvent, not only the law, but also the established public opinion which exists in this country against divorce and ‘make their marriage vows as false as dicers’ oaths’”.

The law of nullity was not to be seen as a way of relieving parties from hasty and ill advised marriages.<sup>7</sup> The court set a high standard of proof necessary to establish that a marriage was void or voidable. The standard required was described by Haugh J. as being “severe and heavy” in the High Court case of *Griffith v. Griffith*<sup>8</sup>, while Kenny J. in the Supreme Court case of *S. v. S*<sup>9</sup> benchmarked the test in less absolute terms when he opined that “ a petitioner must establish his or her case with a high degree of probability “ or “must remove all reasonable doubt”.

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**Footnotes:**

- 6 B. v D. unrep., HC, June 1973 1L.T.R 95 (HC)  
7 R.M v. M.M (1941) 76 I.L.T.R 165 9 unrep. HC, November 1974 ; unrep.  
8 [1944] I.R 35 at p.41 ; (1943), 78 SC, July 1976

However the *S. v. S* Supreme Court judgment marked the beginning of the trend towards the development of the nullity jurisdiction from its hitherto fossilized state.

Wood has highlighted that in 1981 eight nullity decrees were granted. By 1990 that figure had risen to 30 and by 1993 the figure had increased to 45 (per year).<sup>10</sup> As can be seen from figure 1 below, apart from a decrease in 1996 (after the introduction of divorce) the numbers of nullity petitions has continued to rise.

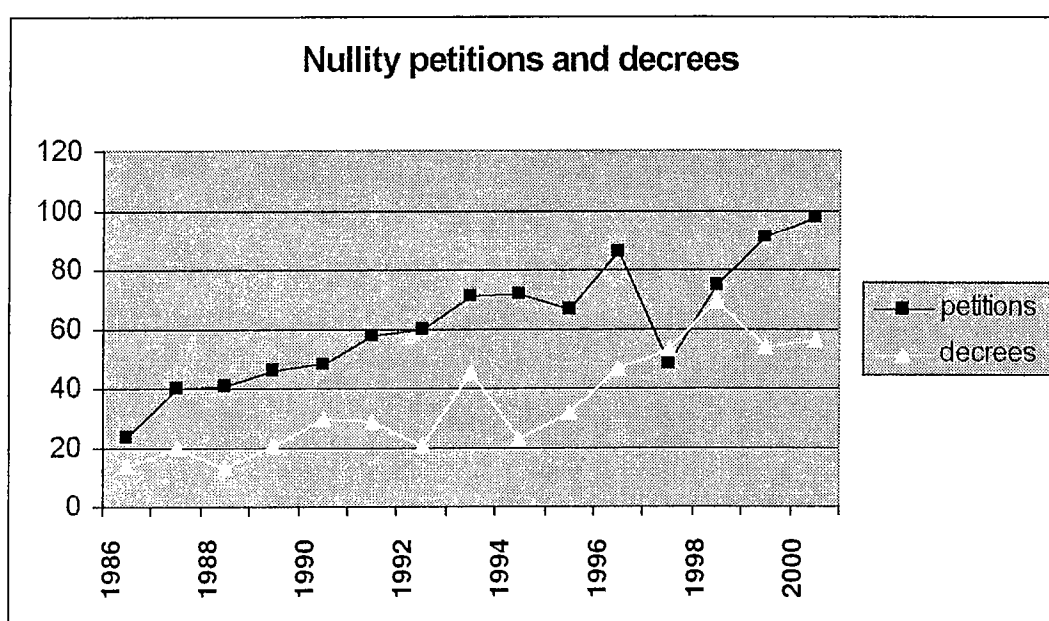


Figure 1 Nullity decrees, 1986-2000

### Pre and post divorce context of nullity decrees

It is clear from the reported cases that the judiciary was influenced by the strict contractual nature of marriage in their development of nullity law, within a legal system which did not permit divorce. In *N (orse K) v N*<sup>11</sup> the Supreme Court were at pains to emphasise the unusual nature of the marriage contract which involved both the making of a contract and the acquisition of a 'status' which was specially protected by the Constitution. For a marriage to be valid it had to be the full free exercise of the independent will of the parties. This was again emphasised and developed in *MO'M (orse O'C) v BO'C*<sup>12</sup> when the Supreme Court opined that the consent must be 'informed' and based

#### Footnotes:

<sup>10</sup> Kieron Wood [1999] 2 I.J.F.L., p.12.      <sup>12</sup> [1996] 1 I.R. 208 (SC)

<sup>11</sup> [1985] I.R. 733 (SC); [1986] 6 ILRM 75 (SC)



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upon 'adequate knowledge' of every circumstance of substance relevant to the decision made to marry. As stated earlier however, the Supreme Court would appear to have reached the limit of judicial development of the concept of 'informed consent'. The case of *P.F. v G.O'M*<sup>13</sup> which came before the Supreme Court in the latter part of 2000 concerned a nullity petition by a man who claimed that had he known that his intended was maintaining an affair during their engagement he would not have proceeded with the marriage. The decree was refused. The issues raised in the case were not new. This case manifestly displays a different judicial attitude to the concept of concealment of a fundamental feature of a marriage. The Supreme Court, however, rationalised the earlier case law by simply declaring that to grant a nullity for such a concealment would bring uncertainty to a wide variety of marriages, and that divorce was the more appropriate remedy.

### **Court jurisdiction, venue and choice of remedy**

It is important to note that until 1<sup>st</sup> August 1996 only the High Court was vested with an original jurisdiction to hear and determine nullity proceedings. The Family Law Act 1995 vested a concurrent jurisdiction in the Circuit Court.<sup>14</sup> Furthermore, Article 41.3.2<sup>o</sup> of the Constitution and the Family Law (Divorce) Act 1996 now permit the granting of a decree of divorce. On 27<sup>th</sup> February 1997 the Circuit Family Court was granted jurisdiction to make divorce decrees.<sup>15</sup>

As can be seen from the graph at figure 1, in general the number of nullity applications and decrees continues to rise, notwithstanding a sharp decrease in the number of nullity applications in 1996/1997 after the introduction of divorce. Wood commented that

“ Many family law practitioners had predicted that, with the introduction of divorce, a number of those, who might earlier have sought a decree of nullity would opt for divorce instead. The figures seemed to prove them right . . . the question must now be asked whether the erstwhile development of the jurisprudence on nullity will start to petrify, following the introduction of what is effectively an alternative remedy”.<sup>16</sup>

It would seem however from the statistical information available that nullity petitions have in fact exceeded pre-divorce levels at this point. It is difficult to say why this is the case, although there is anecdotal evidence to suggest that the inability to achieve a “clean break” under the divorce jurisdiction makes nullity an attractive option where such a clean break is desired. In a recent High Court case of *C.O'R and M.O'R*, Mr Justice Diarmuid O'Donovan regarded the institution of

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#### **Footnotes:**

- 13 Unrep. 28 November 2000 (SC). (commencement Order) 1996 (SI s.38(1).  
14 Family Law Act. 1995 Section 38(2). 46/1996). 16 Supra at p.12.  
and Family Law Act 1995 15 Family Law (Divorce) Act 1996,

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nullity proceedings by a husband petitioner to be “an irresponsible effort on his part to escape his responsibilities”.<sup>17</sup> It is now possible to counterclaim and seek a decree of nullity in response to an application to the court for a decree of divorce and *vice versa*, and such counterclaim forms part of the defence. The use of the separation and divorce jurisdiction for the legal years 1997 – 2000 is detailed in figures 2 and 3 for comparison purposes.

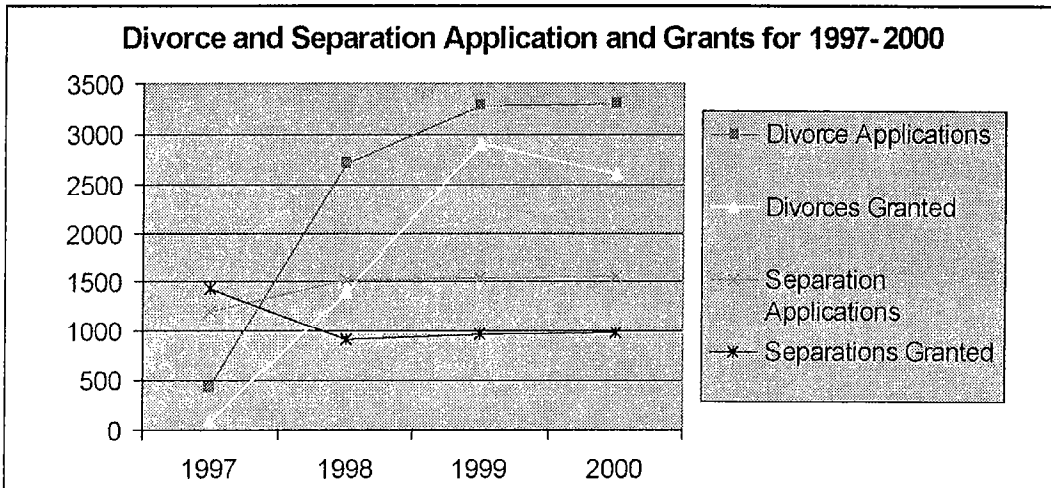


Figure 2 Divorce and separation applications and grants for 1997 - 2000

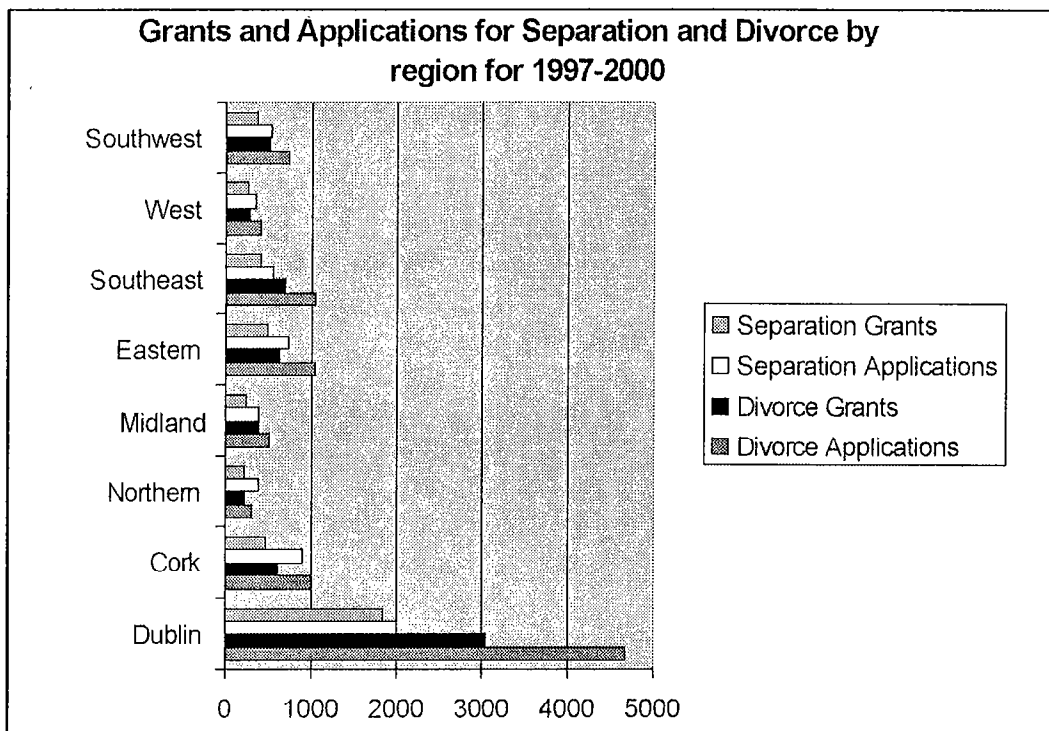


Figure 3 Circuit Court statistics for divorce, separation and nullity 1997-2000

**Footnotes:**

<sup>17</sup> Unrep., HC. 19th September, 2000.

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The desire of the Oireachtas to reduce the volume of family law work in the High Court and divert it to the lower courts was noted in 1980 in the Twentieth Interim Report of the Committee on Court Practice and Procedure.<sup>18</sup> The reasons given for this were that the increase in the number of family law cases coupled with their repetitive nature due to 'changing circumstances' meant that they were more appropriately dealt with at a local venue. An appeal by way of rehearing would then lie to the higher court rather than the costly and time-consuming system of appeals to the Supreme Court. The Law Reform Commission Consultation Paper on Family Courts noted constitutional questions raised by the conferring of exclusive additional family law jurisdiction at lower court level, in view of the constitutional status of the High Court as having "full original jurisdiction".<sup>19</sup> The decisions of *R.v.R*<sup>20</sup> and *Tormey v. Ireland*<sup>21</sup> confirm that jurisdiction may be distributed with exclusive effect to courts other than the High Court, provided that the High Court retains an adequate power of review. The High Court remains the principal court of first instance under Article 34.3.1<sup>o</sup> with a wide inherent jurisdiction to determine all justiciable controversies but the Oireachtas is free to distribute business on an exclusive basis to other courts.<sup>22</sup>

It seems to be quite clear that practitioners are commencing nullity proceedings at Circuit Court rather than at High Court level for the most part since the conferring of jurisdiction on the Circuit Court. As can be seen from figure 4, most applications for nullity are now made in the Circuit Family Court.

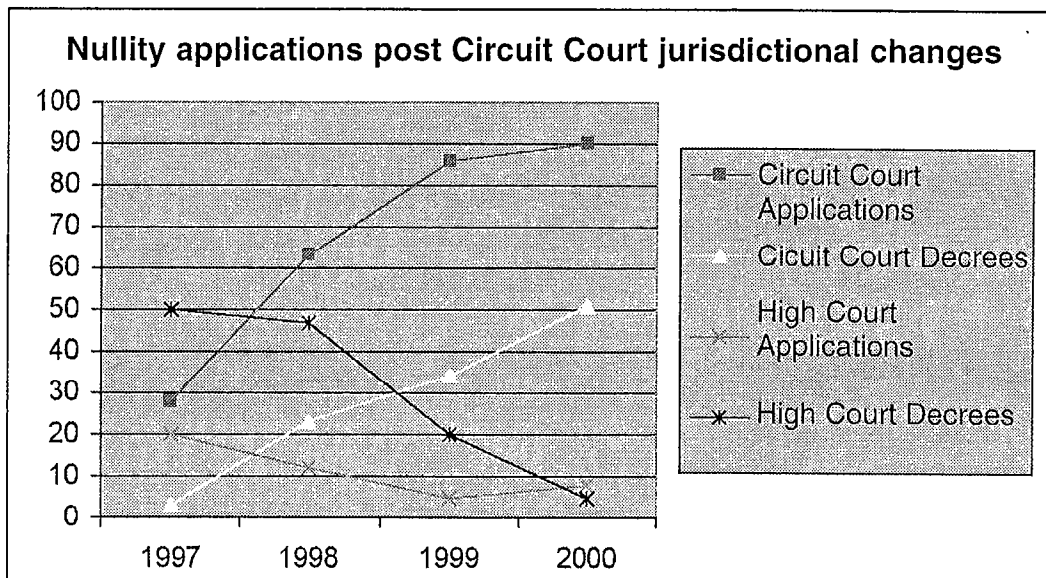


Figure 4 Nullity applications and decrees 1997-2000

### Footnotes:

18 Twentieth Interim Report of the Committee on Court Practice and Procedure 1980.

19 March, 1994 p.13. See G.W Hogan,

*Constitutional Aspects of the Distribution and Organisation of Court Business*, (1984) D.U.L.J. p. 45-50.

20 [1984] I.R. 296

21 [1985] I.R. 289

22 Report of the Constitution Review Group, 1996, p.159.

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This, however, begs the question as to whether this has affected the existing jurisprudence or whether there are regional differences in the application of the existing jurisprudence as a result. There are eight Circuit Court areas in the country with different courts within each Circuit Court area. An appeal from the Circuit Court goes to the High Court. The legislation provides for a power to remit cases from the High Court to the Circuit Family Court and vice versa. In 1998, the sixth Report of the Working Group on a Courts Commission concluded that whilst there had been an abundance of High Court judgments on nullity during the late 1980s and early 1990s, this was unlikely to continue. In fact they predicted that there would be a shortage of jurisprudence in this field in the future due to the lowering of the nullity jurisdiction to Circuit Court level.<sup>23</sup> The lack of reported judgements at Circuit Family Court level has been deplored as leading to ‘... judicial roulette where the outcome of the case could be affected by which judge hears the case rather than be affected by a previous set of precedents’.<sup>24</sup>

Martin has complained of the lack of “...a cogent and sophisticated body of legal precedents”<sup>25</sup> in family law cases generally, particularly where the court is exercising discretion or applying a standard to a general set of facts. The Hon. Mr. Justice Ronan Keane, Chief Justice, in an article entitled “The Irish Court System in the 21<sup>st</sup> Century: Planning for the Future”<sup>26</sup> noted that the court system has never been subjected to any critical analysis. In the course of his lengthy article he undertook a comparative study of the existing system with a view to ascertaining how far the Irish system falls short of achieving the presumed objectives of any such system. He noted that

“The anomalous and irrational features of our court system principally derive from the fact that we have a three tier system of courts of first instance, unlike most of the other systems which I have examined and in which a two tier system is the norm. A rationally designed Irish system would consist, at the first instance level, of a District Court with a significantly enhanced civil jurisdiction and an expanded High Court to which would be transferred all existing civil and criminal jurisdiction of the Circuit Court.”<sup>27</sup>

However he noted the special requirements required by the nullity jurisdiction:

“There is also a strong case to be made for vesting the entire family law jurisdiction in the District Court, with the exception of nullity cases. Unless and until the legislature intervenes to clarify the boundaries of the last mentioned jurisdiction, the development of the relevant jurisprudence should be left to the High Court and the Supreme Court”.<sup>28</sup>

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### Footnotes:

23 See p. 65.

24 Alan Shatter. “Open Sesame for Divorce”. Irish Times. 18 February 1997.

25 Frank Martin. *Distribution of marital* 27 P. 326

*assets on divorce in the Republic of Ireland*. [1999] IFL pp.109-117. 28 P. 328

26 Bar Review. April 2001 pp. 321-328

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Anecdotal evidence from family law practitioners, the paucity of judgments at Circuit Court level as well as Departmental statistics suggest that although jurisprudence is not as such being 'developed' at Circuit Court level, decisions are made *ex tempore* for the most part and are generally not reported. Few petitions are actually rejected. The level of through-put in most Circuit Court areas outside of Dublin suggests a speedy determination. The table of Circuit Court decisions at table 2 below, represented graphically in figures 5, 6 and 7, certainly confirms this supposition.

Circuit Court Area	Applications	Decrees granted	Orders refused	Withdrawn/ struck out
Dublin	111	35	0	3
Cork	58	30	1	0
Northern	6	4	0	0
Midland	15	4	0	1
Eastern	36	15	3	0
S. Eastern	8	7	0	1
Western	15	11	1	0
S. Western	16	7	0	0
<b>Totals</b>	<b>265</b>	<b>113</b>	<b>5</b>	<b>5</b>

Table 2 Circuit Court nullity cases 1997-2000 inclusive

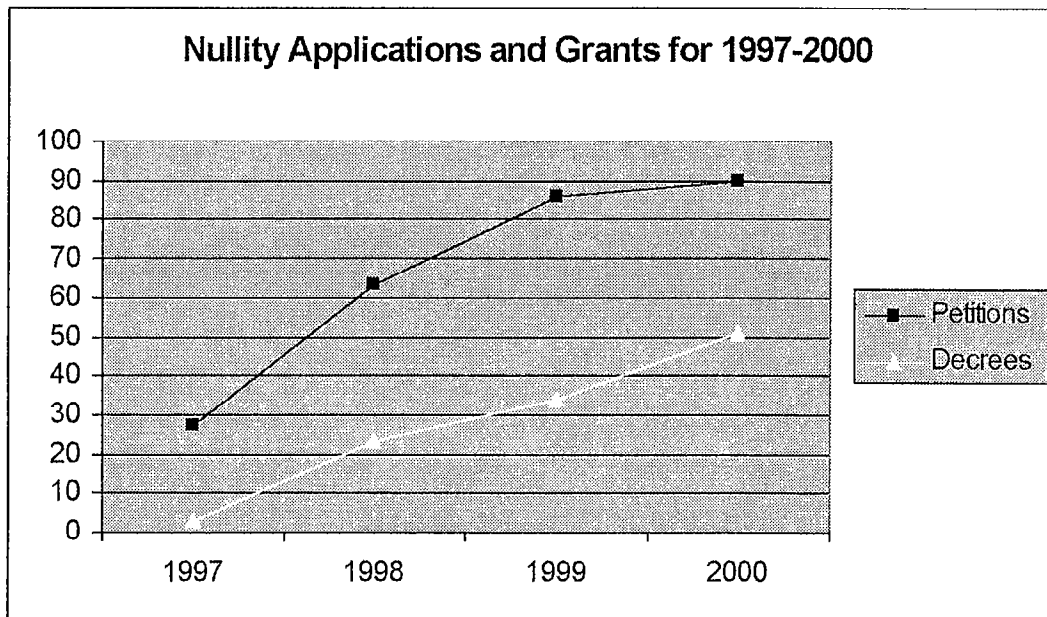


Figure 5 Circuit Court nullity applications and orders 1997-2000

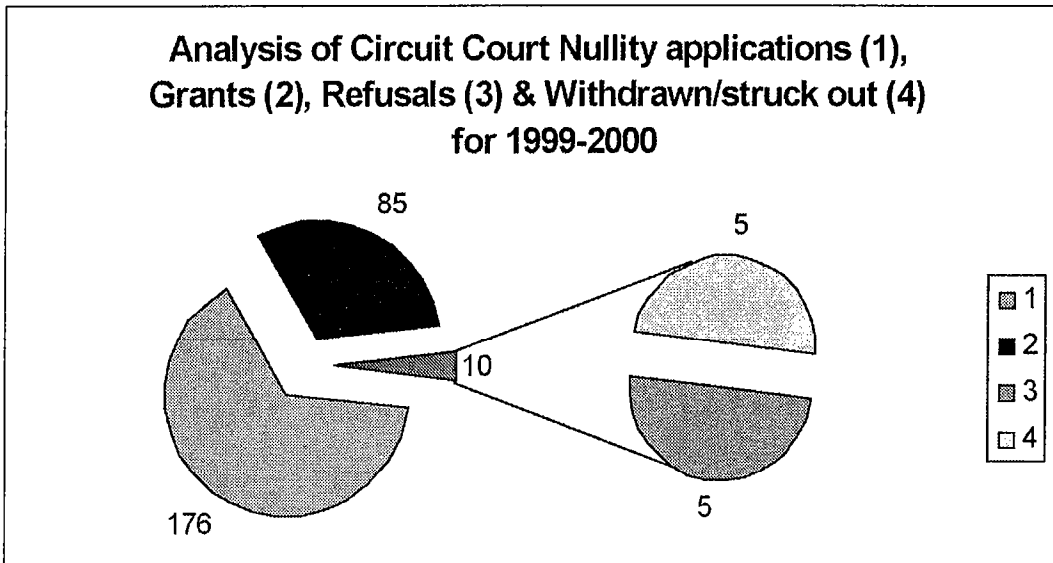


Figure 6 Circuit Court applications and decrees 1999-2000

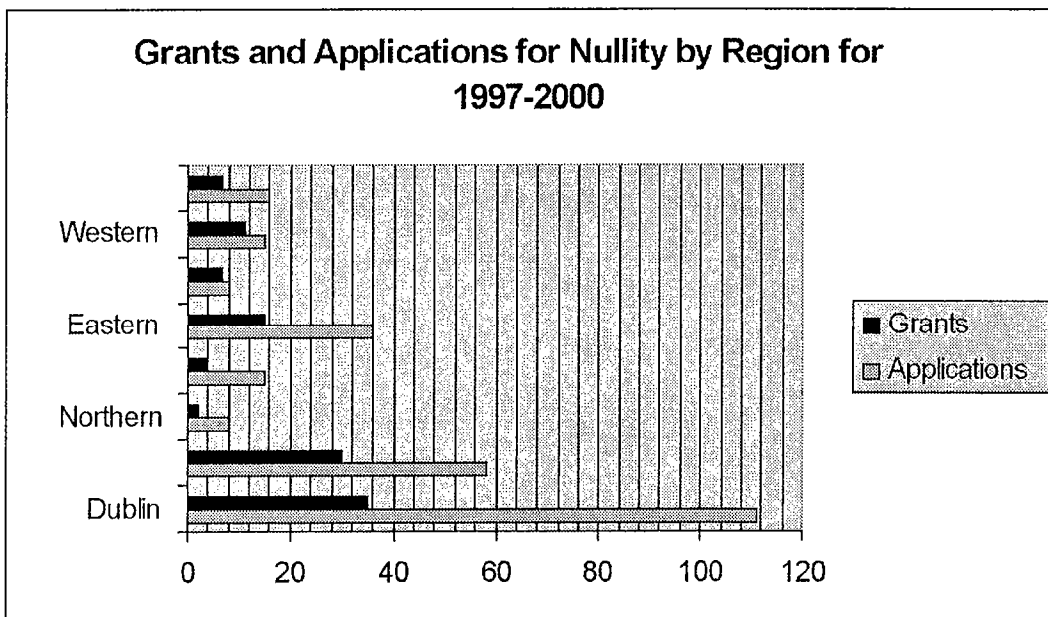


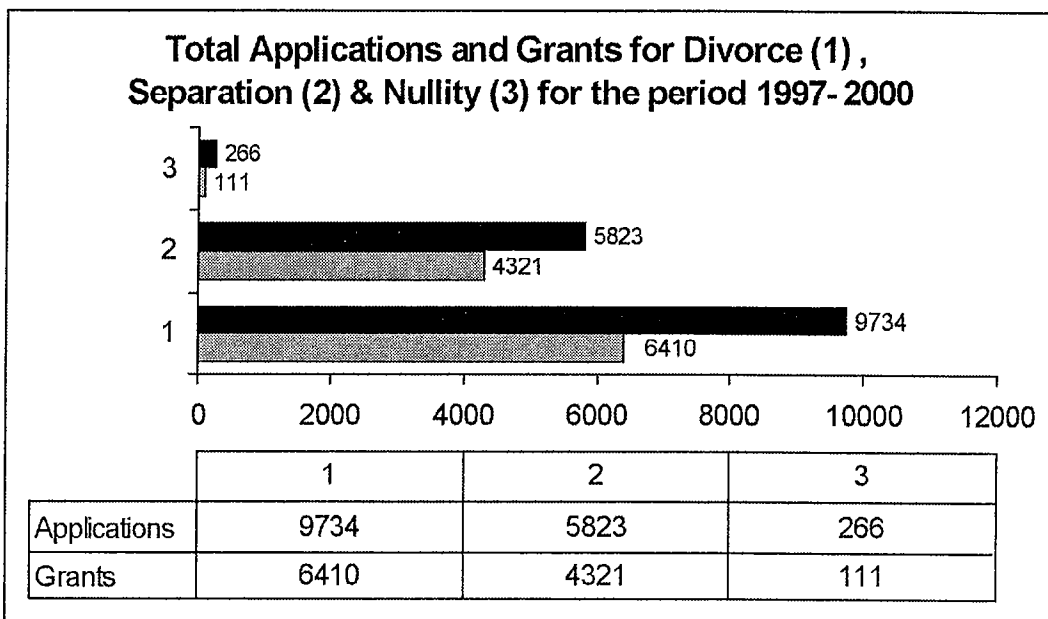
Figure 7 Grants and applications for nullity by region for 1997-2000

It should be borne in mind that the number of decrees granted does not relate directly to the number of petitions in any one year for a number of reasons e.g. some may not be decided in the same year as they are made and some applications may be withdrawn. The information contained in table 2 shown opposite shows that very few nullity cases were rejected by the Circuit Court in the period shown, with the Eastern Circuit Court having the highest level of rejections.

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Figures for petitions withdrawn or struck out were first published as a separate category in 1999. Applications are sometimes withdrawn or compromised by way of counterclaim for separation/divorce. It should also be noted that nullity itself may be sought as a counterclaim to a separation application or divorce application.

Nullity is still a very small proportion in the overall number of applications brought before the Courts, however, as figure 8 clearly shows.



**Figure 8** Total applications and grants for divorce (1), separation (2) and nullity (3) 1997-2000

Unfortunately, the statistical material available cannot tell us the proportion of petitions brought by 'husbands' and 'wives' nor can they tell us the age groups, the social class of the litigants or the number of cases where children were born to the couple. Whilst all of this information is available in the petition, it is not recorded for statistical purposes and so awaits an in-depth demographic study.

Nullity continues to be an issue for the superior courts as can be seen from the reported cases and table 3.

	Divorce Applications	Divorce Orders	Separation Applications	Separation Orders	Nullity Petitions	Nullity Decrees
High Court	102	60	236	148	45	122
Supreme Court	0	0	1	0	0	0

**Table 3** Analysis of High and Supreme Court applications/ petitions orders and decrees for 1997-2000

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Note to Table 3: As can be seen from the above statistical material there is a surplus of 78 in nullity decrees over nullity petitions. However there was a surplus of 78 petitions over decrees for the 1995/1996 period. One must assume a carry-over of a back-log of petitions from previous years to explain the surplus of decrees in the period 1997-2000.

Family law practitioners acknowledge that local practices and customs greatly influence how a family law court operates. Local practices for example may discourage adjournments whether contested or uncontested and regardless of the state of the list. Other court areas may welcome them as unclogging the court's calendar of cases for that Circuit Court session. Practitioners find that practices vary from circuit to circuit. There can also be an element of "justice by geography" in the sense that outcomes to a particular set of facts may differ depending upon which circuit the case is run in. Furthermore the length of time taken to dispose of a case from commencement to trial will very much depend upon the Circuit Court area it is commenced in. Not every circuit has the same number of days allocated to family law cases. Due to delays and lack of hearing days, even urgent interim and interlocutory applications may take months to be given a hearing date. When cases come on for hearing the court may be under considerable pressure of time due to the clogged state of the list. For example uncontested motions and divorces may be listed in one day and disposed of at an alarmingly rapid rate throughout that day. The sheer number of family law litigants present in the courthouse robs them of any benefit from the "in camera" rule. The process of queuing in a large group can be demeaning and stressful. Frequently very urgent contested motions are also brought in, thereby delaying the litigants awaiting their uncontested hearings.

Trials are normally listed on separate days in most Circuit Court areas, but it is not uncommon for more cases to be listed than it is humanly possible to actually hear. This can lead to situations where a case is adjourned from session to session until the case is actually heard. It also puts pressure on litigants and practitioners to settle matters. Clients may feel undue pressure in such circumstances, even where the settlement agreed is a realistic one. Where the issues have a continuing dimension, for example in relation to children and maintenance, the matter may come back to court again in a more entrenched manner. The criticisms of the existing court system continue to stem in the main from under-resourcing, both physical and human. The lists are too full and judges are being forced to sit late, give brief or hurried hearings or adjourn cases to the next over-full list. There have been instances of applications for maintenance or relief under the Domestic Violence legislation being brought in the District Court after the commencement of proceedings for separation in the Circuit Court simply because of inordinate delays in securing a hearing in the Circuit Court.



Can there be any doubt that the quality of justice is affected? Reluctantly the committee must conclude that the remarks of the Law Reform Commission in their Consultation Paper on Family Courts in 1994 continue to apply:

“The quality of justice is affected. Judges must work under intolerable pressure of time. Additionally, in the absence of any requirement of special qualifications or experience in judges appointed to hear family law cases, doubts have been expressed about the aptitude of some of them to cope expertly and sensitively with such cases.”

**Special judicial training in family law**

The advent of judicial training or judicial studies with the establishment of the Judicial Studies Institute in 1996 is very much welcomed. Family law is now a very complex area and family law cases differ from most other civil matters in that there is usually a number of issues, great and small, which impact one on the other. Issues may be big because of their financial or emotional value. Awarding assets to one or the other party may affect the ability to pay maintenance and avail of access, for example. Cash flow and tax considerations are also pertinent. The court may well have to hear accountants, auctioneers, psychologists and other professional witness in addition to the litigants themselves. This involves a lot of skills which can only be acquired through experience and training. Because of the large element of judicial discretion in family law matters and the potential for repetitive hearing it is important that the litigants feel that they have been fully heard. The facility to be sensitive to the respective positions of the litigants is extremely important. The California Family Law Bench Manual puts the matter succinctly:

“To put a finer point on it, no other area of the law involves such a complex confluence of a specialised body of statutory and case law, social sciences, equity, all of which are overlaid with the fact that the parties are undergoing one of the most stressful and emotional points in their lives”.

Nullity cases are if anything in a more acute position. They are intensely personal and deeply stressful for litigants. It is vital that they are heard in a sensitive and measured way.

SECTION 5  
**PROPOSALS FOR REFORM**

FOUNDATIONS OF NULLITY:  
RECOMMENDATIONS

1

**Nullity on ground that marriage is voidable**

*The concept of a voidable marriage should be abolished and the grounds which make a marriage voidable, including impotence and the inability to enter and sustain a normal marital relationship, should be abolished. Cases which could be pleaded on those grounds should instead be pleaded under the divorce jurisdiction.*

**Concept of voidable marriage**

It can be argued that the concept of a voidable marriage is useful, in that it reflects the reality of situations which commonly arise. The existing law makes appropriate reliefs available in defined and limited circumstances. Many applicants will prefer to regard their marriages as never having been real, rather than as marriages which were real, but failed. This can be a significant factor particularly in how people perceive themselves, both positively and negatively. There is still a stigma attached to divorce in the minds of some, though that may change in the future in view of the fact that a divorce may be obtained on a no-fault basis only. A person who has entered into a marriage for only a very short while, where the marriage has clearly been a failure from the start, may well wish to seek a declaration of nullity rather than a divorce.<sup>1</sup> In contrast, a person who has entered into a marriage many years before and has children from the union, may prefer a divorce, even though good grounds for nullity exist.<sup>2</sup>

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**Footnotes:**

1 In the Australian case *In re the Marriage of S* (1980) 42 FLR 94, it was important for the applicant, a member of the Coptic Orthodox Church, to get a decree of nullity rather than divorce on religious grounds. Her

application was based on duress.  
2 For example, one wonders about the position of the respondent wife in *BJM v CM* [1996] 2 I.R. 574. Flood J., after the decree of nullity. She lived in a country area, had several children, and

had been married for 23 years. It must have been difficult for her to come to terms with her unmarried status and explain it to her children and neighbours.

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The point is also made that there is no disadvantage to recognizing marriages as being voidable where personal, not policy, issues are at stake. Matters of consent and sexual capacity are very personal and specific to the parties, whereas the formalities of a marriage and marriage within prohibited degrees are policy matters in which the general public has a valid interest. Where the protection of individuals involved in a marriage is concerned, it ought to be left up to the individuals to take steps to avoid or affirm their marriages. The principle is unexceptionable. Problems arise, however, with the practical implications. The proofs needed and the effects of a nullity decree give rise to serious difficulties in their own right.

Against the concept of nullity of a voidable marriage, it can be argued that the respondent spouse in both short and long marriages often has the most to lose, by being stigmatised as somehow inadequate (for example, impotent or unable to enter and sustain a normal marriage relationship). This can be very hurtful. It goes against the current ethos of no-fault separation and divorce legislation to have one party being identified as the one to blame.

Another problem which arises with voidable marriages is the uncertainty as to the status of an arguably voidable marriage which normally requires expensive court proceedings to remove. In particular, the ground of “inability to enter and sustain a normal marital relationship” has been expanded considerably over the past twenty years and has led to situations in which legal advisors cannot advise with certainty as to whether a client is validly married or not.

Further, it can be very awkward to disentangle arrangements which were made on the basis that a marriage existed. The unmarried status of the parties is resumed, but obviously children born during a voidable marriage are also affected, and become children born outside marriage. Financial arrangements will be undone where this is practical, for example, money paid on entering into the marriage will be returned for lack of consideration, if not spent<sup>3</sup> and trusts set up for a marriage will revert to the settlor.<sup>4</sup> Where this is not practical, for example, where a dowry has been spent, the matter is treated as a “concluded transaction” and will not be disturbed. The caselaw referred to in the Law Reform Commission’s report on Nullity and mentioned above in Section 3 gives a flavour of the kind of problems which arise, and the largely pragmatic approach taken by the courts. The approach taken is that as the transactions were valid when they were carried out, and people ordered their lives accordingly, their validity should not be impugned when the basis on which they were made has changed.

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### Footnotes:

3 *P v P* [1916] 2 IR 400

*Menzies* [1922] 2 Ch. 298 (Russel J.)

4 *In re Wombwell's Settlement, Clerke v*

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A further recommendation of this report, that limited ancillary reliefs should be made available on an equitable basis in cases of nullity, will contribute to resolving problems of past transactions. Ancillary reliefs can be used to reorganise any financial arrangements on an equitable basis. Further, the difference between nullity and divorce remedies will be thereby much reduced and abuse of the nullity jurisdiction rendered unprofitable.

We make a recommendation at no. 16 below in relation to the need for the possibility of “clean break” divorce which is discussed at greater length in that section. We see this as being crucial to providing a just remedy for affected cases in the event that nullity is no longer available on grounds which at present make a marriage voidable. Otherwise the position of an applicant spouse could be significantly worsened by the abolition of these grounds.

We therefore recommend that

- **the concept of a voidable marriage should be abolished and**
- **legislation should be introduced to provide for “clean break” divorce.**

Voidable marriages as a concept have been abolished in Australia<sup>5</sup> and New Zealand<sup>6</sup> for over twenty years. In both of these jurisdictions, final divorce settlements are possible.

### **Grounds for voidable marriages - impotence**

The idea that the sexual consummation of a marriage was necessary before it became fully valid is very old and goes back to the Bible.<sup>7</sup> Traditionally consummation served to seal not only a personal relationship, but property arrangements, status and kinship also.

In a modern context where such ideas are unrealistic and do not reflect the closer equality of the sexes or general sexual behaviour, non-consummation of a marriage by reason of impotence is at best a crude indicator that one of the fundamental terms of the marriage contract is not in place and that the marriage never got off the ground. Related problems such as inability to have a satisfying sexual relationship, penetration without ejaculation and sterility are not grounds for nullity in themselves, and are treated in law as problems arising in the course of a marriage, which if unresolved give rise to grounds for a decree of separation or divorce. In this context, inability to consummate as a ground for nullity (as opposed to divorce) is an anomaly in the law.

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#### **Footnotes:**

- |   |  |  |   |
|---|--|--|---|
| 5 | By the Family Law Act. 1975. section 51. | ss. 29 to 31.  | and shall cleave unto his wife: and they shall be one flesh”. |
| 6 | By the Family Proceedings Act 1980.      | 7 Genesis 2.24 states: “Therefore shall a man leave his father and his mother. |   |

Inability to consummate a marriage can arise on the side of the husband or the wife. Independent evidence to prove the situation can be very difficult to come by, because of the private nature of the sexual act. Because of this it may be possible for colluding spouses to manipulate the court to obtain a decree. A medical inspector is commonly appointed, which involves one or both of the parties in embarrassing and humiliating investigations. It is accepted in caselaw that impotence may arise in relation to a spouse but not in relation to someone else, often a new partner. It is also accepted in caselaw that while sexual relations may have taken place successfully before marriage, impotence may be newly present after marriage. It is even possible for a child to be born to an unconsummated marriage, if fertilisation has taken place in vitro or without penile penetration. These technicalities can make advising on a case difficult for legal advisors and arriving at a decision a difficult matter for the judge. The law would benefit from simplification.

Difficult questions have also arisen for the courts in distinguishing between physical impotence, psychological impotence (including an invincible repugnance to the sexual act) and wilful refusal to consummate. The last is not a ground for nullity, although in England and Wales the Matrimonial Causes Act 1973 made it so, because of the difficulty in distinguishing between what is genuine impotence and what is wilful refusal. With our increasing knowledge of psycho-sexual matters, it is clear that the boundaries can be very blurred.

Apart from the ordeal of a medical inspection, an inevitable outcome of a nullity decree on this ground is the stigma of impotence attaching to one or both parties. We believe that this should be avoided where possible.

Even with the proposed introduction of possible finality in divorce settlements, there may be some advantages to people in retaining the voidable grounds for nullity. Firstly, the alternative remedy of a decree of divorce may take longer to obtain, as it requires separation of at least four years out of the previous five before proceedings can be instituted. Secondly, it involves the stigma of divorce. This can be significant for some parties who may prefer to consider themselves never truly married as opposed to parties to failed marriages. Thirdly, it *may* also result in possibly ongoing financial obligations between the spouses, to ensure that they both are properly provided for insofar as possible, at the judge's discretion (despite the option of a "clean break"). However, in a recommendation below we suggest that the judge should have discretion to order some *finite* financial relief for a financially weaker spouse in the event of a nullity decree, and we believe that the significance of this obligation will no longer be so great if our recommendation is followed.

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On balance we have come to the conclusion that **the ground of inability to consummate should be abolished**. The remedy for persons with this complaint should more properly lie in the courts' divorce jurisdiction.

### **Grounds for voidable marriages - inability to enter and sustain a normal marital relationship**

The decisions in which this ground for nullity was developed dealt in many cases with unusual and extreme situations. Many of these were based on psychiatric or mental illness or disability, or on an "inherent quality or characteristic of an individual's nature or personality which could not be said to be voluntary or self-induced".<sup>8</sup> Other decisions dealt with temperamental incompatibility, immaturity and the issue of adequate emotional capacity. In cases of no clearly identifiable psychiatric condition or personality disorder, the degree of immaturity or incompatibility was required to be "abnormal" or "gross", and there were clearly difficulties in deciding where to draw the line between "faults and weaknesses of character"<sup>9</sup> and immaturity, irresponsibility or incompatibility of such a degree as would warrant a decree.<sup>10</sup>

In the absence of psychiatric evidence of a party's state of mind at the time of marriage or even afterwards, the court has to embark on a detailed investigation of the background, circumstances and interactions of the marriage in order to judge whether conduct during the marriage can be attributed in retrospect to a personality defect. Even if this is established, it must then be decided whether this defect was serious enough to undermine a person's capacity to form a normal marriage relationship. The inherent difficulty experienced by judges in deciding on facts like these whether a marriage should be annulled or whether it has merely broken down in the ordinary way is mirrored by great uncertainty also for clients and their legal advisors.

We believe that it would be desirable to introduce greater certainty into the law, and that the abolition of this ground would achieve this. We therefore recommend that **the ground of inability to enter and sustain a normal marital relationship should be abolished**. Cases based on this ground which would previously have come within the nullity jurisdiction could now be dealt with under the divorce jurisdiction. Section 5 of the Family Law (Divorce) Act, 1996 enables a court to grant a divorce decree simply on the basis that the parties have lived apart for four out of the previous five years, that there is no prospect of reconciliation between them, and that proper provision exists or will be made for the spouses and dependent members of the family. We see

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#### Footnotes:

8 *UF (orise C) v JC* [1991] 2 IR 330 per Finlay CJ at p. 356

9 *MJ O'D v CD O'D*, unrep., HC. May

1992, O'Hanlon J.

10 For example, see the contrasting decisions made by O'Hanlon J. in *PC v*

*VC* [1990] 2 IR 91 and Lardner J. in *RT v VP (orise VT)* [1990] IR 545, made within weeks of each other.

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every advantage in maintaining the simplicity of such no-fault divorce and would *not* be in favour of transferring a specific ground of “inability to enter and sustain a normal marital relationship” from nullity to the divorce jurisdiction.

As in the case of inability to consummate, this proposed change to divorce as a remedy will delay applications for divorce for the separation period of at least four years. This is not insignificant when people want to build new lives. However, we believe that the advantages of certainty outweigh such a disadvantage.

We recognize that if our recommendations are followed, the financial implications of the divorce legislation will apply to cases of “inability to enter and sustain a normal marriage relationship”, and may not exclude an open-ended financial obligation (despite our recommendation that a “clean break” should be possible). There are two comments to make in relation to this. The first is that we recommend that limited ancillary relief be introduced in nullity cases in any event. The second is that we believe that a similar approach to that of the court in divorce cases can and will be used to achieve awards of ancillary relief which will be reasonable and in accordance with generally held expectations, contrary to the current position where no such relief is available.

An added advantage of our recommendation is that where there are children involved in such marriages, protection of their interests is provided for in the event of separation or divorce and they will not lose their status of being members of a family protected by Article 41 of the Constitution.

## 2

### **Incapacity due to prohibited degrees of relationship**

*As recommended by the Law Reform Commission<sup>11</sup>, all restraints of marriage based on affinity should be abolished and legislation should be introduced to render void any marriages between a grand uncle and grand niece, and a grand aunt and grand nephew, a parent and an adoptive child, and between adoptive brothers and sisters. The prohibition against such marriages should apply even where the adoption order for some reason ceases to have effect.*

The Law Reform Commission report on nullity<sup>12</sup> recommended the above changes in the law with which we concur.<sup>13</sup>

## 3

### **Lack of consent – repeal of the Marriage of Lunatics Act 1811**

As recommended by the Law Reform Commission<sup>14</sup>, the Marriage of Lunatics Act, 1811 should be repealed, as being over-inclusive and rendering incapable people who would be capable of marriage (in a lucid period) under the common law.

The Marriage of Lunatics Act, 1811 renders a person incapable of marriage who has been certified as a lunatic and whose person and property is in the care and custody of trustees, even if the marriage was entered into during a lucid interval. Such a person must first be declared to be “of sane mind”. We agree with the recommendation of the Law Reform Commission that **the Marriage of Lunatics Act, 1811 should be repealed, as being over-inclusive and rendering incapable people who would be capable of marriage (in a lucid period) under the common law.**

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**Footnotes:**

11 Report on the Law of Nullity. 1984. LRC 9 - 1984

12 LRC 9 - 1984

13 An order was made on 27th June 2001 by Smyth J. in the High Court that a marriage between the applicant and her

now deceased spouse was valid and its registration was valid, even though her deceased spouse had previously been married to her aunt. Judgment was reserved, and it is possible that when it is delivered that some of the law on this

matter will be found to be unconstitutional. See report in the Irish Times. 28 June 2001.

14 *ibid.*



4

**Lack of consent – protection of incapacitated persons**

*A court should be enabled to appoint a relative, friend or statutory body, on that person's or body's application, to protect the legal interests of a person suffering from an incapacity by challenging the validity of a marriage to which the incapacitated person is a party.*

At common law, a marriage is invalid on the ground of mental incapacity where, at the time of the marriage, either spouse was unable to understand the nature of marriage and its duties and responsibilities.<sup>15</sup> This statement of principle appears to us to be effective, in that it eschews a statutory definition of want of mental capacity based on mental illness. This is desirable as mental illness is not something which can be readily defined, and its diagnosis is prone to vary between mental health experts. The guidelines proposed are based on the actual practical effect of a mental state, and this was the approach taken in *ME v AE* 1987 IR 147.

This statement of principle does not cover the situation where although a mentally incapacitated person may well understand the nature of marriage at the time it is entered into and may be able to consent, he or she may be generally incapable of managing him or herself or his or her affairs, and therefore incapable of discharging the essential obligations of marriage. Such a situation would equate to the current voidable ground of “inability to enter and sustain a normal marital relationship”, discussed above.

In some cases of mental incapacity the union may be advantageous to a mentally incapacitated person. For example, a man of unsound mind may be able to secure the help and companionship of a mentally capable woman who has full knowledge of the circumstances in return for a home and security, and it would not be in the public interest to see such a marriage annulled. In support of this kind of situation, it has been held that “the contract of marriage is a very simple one, which does not require a high degree of intelligence to understand”.<sup>16</sup> In other cases, however, a marriage may be disadvantageous to the mentally incapacitated spouse (for example, as in the New Zealand

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**Footnotes:**

15 *Turner v Meyers*, 1808 1 Hag. Con. 414 at 417, 161 E.R. 600 at 601, per Sir William Scott.

16 *Durham v Durham* (1865) 10 PD 80 at

82; 1 TLR 338. (PDA). per Sir James Hannan P. In *Estate of Park, Park v Park* [1953] 2 All ER 408. 1411 a man was first found (by a jury) not to

possess the mental capacity to make a will, but subsequently found (by a judge) to have sufficient mental capacity to marry.

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case *In the matter of BEW*<sup>17</sup>, an instance of exploitation of a mentally retarded woman). To protect against this, we recommend that **a court should be enabled to appoint a relative, friend or statutory body, on that person's or body's application, to protect the legal interests of a person suffering from an incapacity by challenging the validity of a marriage to which the incapacitated person is a party.**<sup>18</sup> If the incapacitated person is a ward of court, then the court itself can decide to appoint someone to represent the interest of the ward.<sup>19</sup>

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### Footnotes:

17 [1994] NZFLR 730

18 As is the position in the UK under the Mental Health Act 1983, sections 95 and 96 (1) (i), which replaced the more

explicit sections 102 and 103 (h) of the Mental Health Act 1959.

19 This was done in the New Zealand case *In the matter of BEW*, [1994] NZFLR

730, on the application of the barrister appointed to represent the ward in relation to her child.

## EFFECTS OF NULLITY: RECOMMENDATIONS

### 5

#### **Ancillary relief**

*Limited ancillary relief on an equitable basis should be available as part of nullity decrees. Financial provision by way of ancillary relief should be finite, and should have the objective of enabling the financially weaker spouse to attain financial independence where possible. It should be based on criteria similar to those used in the divorce legislation, subject to the finite nature of any award.*

The law is pragmatic in relation to concluded transactions once a marriage has been declared void. We believe that it should be equally pragmatic in relation to the after-effects of a decree of nullity. As the law stands at present, once a decree of nullity has been handed down no financial or proprietary relief may be granted in consequence of or ancillary to such a decree. This is because the effect of the nullity is that no marriage ever existed and thus the parties are deemed to owe each other none of the obligations normally imposed by marriage. Matrimonial obligations and entitlements lapse. Maintenance to a spouse is no longer payable, housing no longer needs to be provided or shared and succession and pension rights cease. That is not to say that a party may not subsequently plead, for instance, that he or she is owed money for financial contributions made towards the purchase of property in the other party's name. Such rights and entitlements as the parties possess, however, are those not arising from the relationship of marriage but from standard rules of law and equity as applied to all persons whether married or unmarried.

When first published, the Family Law Bill, 1994 (which eventually became the Family Law Act, 1995)<sup>20</sup> proposed that the various ancillary orders then available in judicial separation cases and now available in proceedings for divorce would also be available where a declaration of nullity has been handed down. At a late stage in its progress through the Dáil Éireann these proposals were dropped from the Bill. At the Report stage of the Bill in Dáil, the Minister for Equality and

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**Footnotes:**

<sup>20</sup> No. 26 of 1996.

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Law Reform, citing fears that it may be unconstitutional to recognise obligations between persons who, after all, were never strictly married, proceeded to exclude nullity from the remit of the Bill's ancillary provisions.<sup>21</sup> While the Minister still considered the provisions 'welcome and overdue' there was nevertheless "a possibility that those powers could be open to challenge on the basis of constitutionality." While the Minister referred to the possibility of subsequent legislation being introduced to deal with the issue, to date no such proposal has come before either House of the *Oireachtas*.

We believe that such ancillary relief should apply, with certain conditions, to parties whose marriages are found to be null and void. This would not necessarily be inconsistent with the principle that the parties to an annulled marriage should not be treated as if they had been validly married. The basis of relief where ancillary orders are issued under the Act of 1995 is not merely that the parties are or were married to each other. The mere fact of marriage, although at present necessary for relief, is not in itself a *sufficient* ground for relief under that Act. A variety of factors are taken into account, from present needs and resources to financial and practical contributions made during the relationship in question. These factors relate more to the substance of the relationship than to its form. It is suggested that the option of limited ancillary relief in cases where a decree has been handed down need not upset the conclusion that there was in fact no marriage. Relief may instead be given on the basis that the parties, wrongly assuming themselves to be married, may have acted in a manner prejudicial to their financial or proprietary status.

We therefore recommend that **limited ancillary relief on an equitable basis should be available as part of nullity decrees.**

We believe that notwithstanding the constitutional issues thrown up by this recommendation, a strong case can be made for the constitutionality of such provisions. The *Oireachtas* is charged with legislating for the common good, and in doing so must balance the rights of different parties. It was held in *TF v Ireland*<sup>22</sup> that legislation may only be impugned on the grounds that the balance of the legislation is so contrary to reason and fairness as to constitute an unjust attack on some person's constitutional rights. It was further held that none of the personal rights of the citizen was unlimited, and that the decision of the *Oireachtas* on the reconciliation of the exercise of personal

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### Footnotes:

21 448 *Dáil Debates* col. 865ff.

22 *TF v Ireland* [1995] 1 IR 321

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rights with the common good should prevail unless it was oppressive to some or all of the citizens, or unless there was no reasonable proportion between the benefit which the legislation would confer on the citizens or a substantial body of them, and the interference with the personal rights of the citizen.

We believe that the Oireachtas may make reforms in the law to enable a court to make discretionary orders in relation to maintenance, property and other financial matters in nullity cases, and that this need not be seen as oppressive or disproportionate in the circumstances.

There are a few instances in which provision already exists for the recognition of family-type claims which are not based on marriage. For example, the Status of Children Act 1987<sup>23</sup> provides that the married or unmarried status of the parents of a child makes no difference to the child's relationship with them, or other relationships. There are instances of the law recognizing the rights of a child to whom an adult stands *in loco parentis*, in relation to that adult's property, and benefiting accordingly under the tax and inheritance laws. One example of this is the presumption of advancement, which applies to children to whom the donor stands *in loco parentis*. Cohabitees are now entitled to limited tax relief on the inheritance of a home from a partner<sup>24</sup> and the social welfare legislation recognizes cohabitees.

However, recognition of the substance of the relationship, even though it may not have been a valid marriage, does not imply that the new reality, the non-existence of a marriage, should not also be recognized. While common sense and fairness demand that there should be the possibility of some financial adjustment when a void marriage comes to an end, it also makes sense to recognize the reality that it exists no longer, and that there should be a clean break in financial as well as legal terms. We therefore believe that while there should be scope for adjustments of capital and the option of maintenance being payable to the financially weaker party, this should not be open ended but should be limited to a period of, say, three years, or five years in exceptional circumstances, and should be aimed at making the financially weaker party as independent as possible in that time. By this we mean that the weaker spouse should be given the possibility of using the transition time of three, or exceptionally, up to five years to seek employment or to undertake a course of training with the objective of obtaining employment and thereby becoming financially self-reliant.

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**Footnotes:**

23 S. 3(1)

24 Finance Act 2000, s. 151

We therefore recommend that a court, in granting discretionary ancillary relief, should have the wide range of orders set out in the Family Law (Divorce) Act 1996 available to it. We recommend that similar criteria to those set out in section 20 of the Family Law (Divorce) Act, 1996 be used by the courts, adapted as follows:

- provision for the future financial needs, obligations and responsibilities of either spouse must be limited to three years from the decree or declaration of nullity, or up to five years in exceptional circumstances;
- in making any orders for ancillary relief the court should have the objective of enabling the financially weaker spouse to become financially independent as far as this is possible within that time.

### **Family home**

#### **6**

*In relation to the family home, a court should have discretion to permit a previous “spouse” (a party to a void marriage) to continue in residence in the family home until property adjustment or other financial orders are carried into effect, and their consequences realised, for example, partition of the property and sale.*

#### **7**

*The courts should be enabled to order that a right of residence in the family home should continue for a specified time.*

#### **8**

*Either party to a void marriage should have the right to apply to the court to prevent the other party from reducing the value of the home or making it uninhabitable, pending the cessation of a right of residence, or the carrying into effect of orders relating to the property and determining the right of one of the parties therein.*

9

*Section 61 (5) of the Bankruptcy Act, 1988 should be amended to include a spouse of a marriage in respect of which a declaration of nullity has been made, for such period as the court thinks fit but not to exceed the period for which the spouse continues to have a right of residence or beneficial interest in the home.*

The Family Home Protection Act, 1976 gives a spouse important rights which include:

- the right of a spouse to live in the home
- the right of a spouse to veto the sale of the home or any interest in it
- the right of the spouse to seek an order prevent the other spouse from engaging in such conduct as may lead to the loss of any interest in the family home or may render it unsuitable for habitation as a family home with the intention of depriving the applicant spouse or a dependent child of the family of his residence in the family home.

Section 61 (5) of the Bankruptcy Act, 1988 affords discretionary protection to a spouse in relation to the family home.

We have already recommended that the court should have power to make property adjustment orders and other financial provisions at the court's discretion, subject to the criteria set out in the divorce legislation. This would enable a beneficial interest in the family home to be vested in a spouse on a declaration of nullity, subject to criteria similar to those set out in the divorce legislation. We recommend that **the court should have discretion to preserve the right of a previous "spouse" (party to a void marriage) to continue in residence in the family home until property adjustment or other financial orders are carried into effect, and their consequences realised, for example, partition of the property and sale.**

We also recommend that **the court be enabled to order that a right of residence should continue for a specified time.** Such an order might be made, for example, if the annulled marriage was of long duration, there were still dependent children, and the resources of the family were not sufficient to fund a suitable second home. In such a case, a right of residence could be preserved until the youngest child ceases to be a dependent. If a right of residence is not preserved on a decree of nullity being made, this is a factor which the court should take into account on deciding any award of ancillary relief.

We recommend that **either party to a void marriage have the right to apply to the court to prevent the other party from reducing the value of the home or making it uninhabitable, pending the cessation of a right of residence, or the carrying into effect of orders relating to the property and determining the right of one of the parties therein.**

We also recommend that the potential protection afforded by section 61 (5) of the Bankruptcy Act, 1988 should not be lost to a spouse of an annulled marriage, at least while still in occupation of the family home. If such a spouse is considered by the court to merit a right to continue in residence, for whatever reason, other laws should be adapted to accommodate such an order. **Section 61 (5) of the Bankruptcy Act, 1988 should be amended to include a spouse of a marriage in respect of which a declaration of nullity has been made, for such period as the court thinks fit but not to exceed the period for which the spouse continues to have a right of residence or beneficial interest in the home.** Section 61 (5) is in any event a discretionary remedy, and as such can be applied in a way that reflects the merits of a case.

## 10

### **Taxation**

*The reliefs available to married couples under Capital Acquisitions Tax, stamp duty and Capital Gains Tax on inter-couple transfers should be extended for a limited period such as one year after a decree of nullity, to enable any orders in relation to transfers of property to be implemented as though the parties were actually married.*

It is currently the practice of the Revenue Commissioners to give effect to changed status from the date of a decree of nullity. For the same reasons that we recommend powers for the courts to grant ancillary relief, we propose that **the reliefs available to married couples under Capital Acquisitions Tax, stamp duty and Capital Gains Tax on inter-couple transfers should be extended for a limited period such as one year after a decree of nullity, to enable any orders in relation to transfers of property to be implemented as though the parties were still married.** By permitting the implementation of ancillary relief orders without penalty, it would allow for a more orderly settlement of a couple's affairs than making arrangements on the basis of an imminent nullity decree which may not even be granted (a practice which occurs



at present). Agreements reached under this kind of pressure may result in settlements which unduly favour the financially stronger party, or otherwise do not do justice as between the parties and their family.

## 11

### **Maintenance pending suit**

*The discretionary award of maintenance pending suit should be available to either party to a potentially void marriage.*

Currently only the “wife” is entitled to claim maintenance pending suit in a nullity case. The Constitution as interpreted by the Courts treats all citizens equally. Family law legislation also treats spouses as equals. Maintenance for a spouse of either sex is available under the Family Law (Maintenance of Spouses and Children) Act, 1976, in the absence of “proper” maintenance being paid. A spouse in need of maintenance, who is pleading the nullity of a marriage, may not wish to use this provision, however, and thereby appear to approbate the marriage.

Children already have an entitlement to maintenance under the Family Law (Maintenance of Spouses and Children) Act 1976 and section 11 of the Guardianship of Infants Act, 1964.

We therefore recommend that **the discretionary award of maintenance pending suit should be available to either party to a potentially void marriage.**

## 12

### **Domestic Violence Act 1996**

*The definition of “spouse” in the Domestic Violence Act, 1996 should be amended to include a party to a void or annulled marriage.*

As already noted in Section 3 above, widening the definition of “spouse” to include an ex-spouse of a void or annulled marriage would address the shortcomings of the legislation for parties to void marriages, without compromising the general approach of the legislation, which makes a deliberate

distinction between married couples, and co-habitees and co-residents. We therefore recommend that **the definition of “spouse” in the Domestic Violence Act, 1996 should be amended to include a party to a void or annulled marriage.**

## 13

### **Fatal Injuries and civil compensation for dependants**

*A dependent party to a void marriage should be included in the list of persons who can claim compensation as a dependant in relation to financial loss under the Civil Liability Act, 1961, as amended.*

Under the present law, once a marriage is annulled a previous spouse has no standing as a relation or dependent if the other spouse is fatally injured. **A dependent party to a void marriage should be included in the list of persons who can claim compensation as a dependant in relation to financial loss under the Civil Liability Act, 1961 as amended.** In view of the numbers concerned, such a change would have minimal impact on those, including insurance companies, paying compensation.

In relation to mental distress, we believe that, as with divorce, there should be no entitlement to compensation. This may be hard in some circumstances, but it only underlines an incontrovertible fact: that the marriage exists no longer.

AMENDMENTS TO  
MARRIAGE LEGISLATION:  
RECOMMENDATIONS

14

**Separate civil ceremony**

*A separate civil ceremony should be required to effect a valid marriage.  
Religious ceremonies should no longer include an element giving effect  
to a civil law marriage.*

Confusion on the part of members of the public has arisen in the past and continues to arise in the difference between civil and religious marriage. It has resulted in people believing themselves to be no longer married on the strength of church annulments, and free to enter into second marriages which are of course valid in the eyes of the church, but not in the eyes of the state, with all the consequent confusion and expense in regularising the position.<sup>25</sup> To reinforce and regularise the distinction in the public mind it is proposed that **a separate civil ceremony should be required to effect a valid marriage in every case. Religious ceremonies should no longer include an element giving effect to a civil law marriage.** This means that religious ceremonies alone would no longer be sufficient to effect valid marriages, although of course people would be free to marry in religious ceremonies which would have purely religious significance.<sup>26</sup>

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**Footnotes:**

25 For example, the Family Home Protection Act, 1976 applies only to spouses who are married under civil law. In the case of a church annulment and subsequent invalid re-marriage, the appropriate declaration cannot be sworn by the new "spouse" on the sale of the family home and the previous spouse may be in a position to veto the sale.

26 The compromise recommendation of the Joint Oireachtas Committee on

Marriage Breakdown, March 1985, was to the effect that the legal nature of a marriage contract and its consequences should be made clear to the parties at the time of the ceremony. They felt that a requirement for a separate civil ceremony in every case "would create considerable administrative and financial difficulties for all concerned". The Second Commission on the Status of Women

in their report of January 1993 recommended (a) that there should be a form of civil marriage common to all; and (b) the introduction of a system which requires the attendance of the civil registrar at all legal marriage ceremonies, with attention being drawn during the ceremony to her/his presence and its significance.

## 15

### **Incapacity due to previous marriage or previous marriage ceremony**

*Any person who wishes to marry must notify the Registrar of any previous ceremony of marriage to which he or she has been a party (even if it is void) and must satisfy the Registrar as to his or her eligibility to contract the proposed marriage. Failure to comply with this requirement should be an offence.*

As the law stands, it is a good defence to a charge of bigamy to prove that the prior marriage is void, even though no decree or declaration to that effect has been made by a court of law. The current position whereby a void marriage can be disregarded without any formality can lead to uncertainty, confusion and in the case of remarriage, a charge of the crime of bigamy. A person's married status is important in relation to many aspects of life including taxation, social welfare, inheritance, pension entitlements, insurance and property, and there are opportunities for abuse.

For the avoidance of doubt, and to ensure that the information held in the Register of Births, Deaths and Marriages is as accurate as possible, we recommend that **any person who wishes to marry should be required to notify the Registrar of any previous ceremony of marriage to which he or she has been a party (even if it is void) and should be required to satisfy the Registrar as to his or her eligibility to contract a marriage. Failure to comply with this requirement should be an offence.**

The planned computerization<sup>27</sup> of the Births, Deaths and Marriages Register will make it more likely in the future that previous marriages in the State will be picked up by the Registrar's Office, when an application is made for a certificate of registration. It will of course not ensure that foreign marriages come to the Registrar's attention.

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**Footnotes:**

27 The target implementation date is March 2002.

## 16

### **“Clean break” divorce**

*Legislation should be introduced to allow for “clean break” divorce.*

If our recommendation on the abolition of the concept of a voidable marriage is followed, one of the consequences will be that persons availing of the alternative divorce remedy will no longer be able to benefit from a “clean break”, that is, a final financial settlement.<sup>28</sup> We refer to our previous section on the abolition of voidable marriages in this regard. We therefore propose that **legislation should be introduced to allow for “clean break” divorce.**

The judge hearing such a divorce application would of course continue to have wide discretion in the financial orders which are made. But we believe that the judge must have the option to make final orders to meet the requirements of specific cases.

It seems to us unjust that a potential lifelong obligation should survive a marriage, often brief, which obviously was doomed from the start. We therefore recognize the need to provide for a “clean break” under these and similar circumstances.

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**Footnotes:**

28 S.22 of the Family Law (Divorce) Act  
1996

## JURISDICTION AND ORGANISATION OF COURTS, PROCEDURES AND SERVICES: RECOMMENDATIONS

### **Family Courts, training for judges, the *in camera* rule and reasoned judgments**

#### 17

*Specialised regional family courts, and judges trained in family law, should be provided to hear nullity applications as part of their caseload.*

*Decisions should be reasoned, and written judgments should be delivered in all substantive cases so that a jurisprudence is developed.*

#### 18

*The *in camera* rule should be adapted, if necessary, to allow reporting of court proceedings, subject to the protection of the parties' privacy and their consent, in accordance with our constitutional and international obligations.*

The Denham Commission<sup>29</sup> in its sixth and final report in 1998 made detailed recommendations in relation to the setting up of specialised family courts, special training of judges, publication of reasoned judgments and the waiver of the *in camera* rule to allow reporting of judgments with the consent of the parties, while respecting their right to privacy.

We endorse these recommendations and advocate their urgent implementation. A family court recorder has been appointed on a pilot basis by the Courts Service, and it is expected that she will be able to start reporting family cases in the Michaelmas term of 2001. Some concerns have been expressed that the *in camera* rule will not permit reporting in family cases, even with the parties' consent. If this is found to be so, we recommend that **the *in camera* rule should be adapted, if**

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**Footnotes:**

29 Working Group on a Courts Commission, sixth report November 1998

necessary, to allow reporting of court proceedings, subject to the protection of the parties' privacy and their consent, in accordance with our constitutional and international obligations.

We recommend that specialised regional family courts, and judges trained in family law, should be provided to hear nullity applications as part of their caseload. Decisions should be reasoned, and written judgments should be delivered in all substantive cases so that a jurisprudence is developed. The report of this Committee on Domestic Violence also addressed this question, which view the Committee reiterates in the context of nullity law.

## 19

### **Integration of proceedings**

*A court dealing with a nullity application should also have jurisdiction, without the need to issue additional proceedings, to deal with related matters.*

We recommend that a court dealing with a nullity application should also have jurisdiction, without the need to issue additional proceedings, to deal with related matters, including guardianship, custody, access and maintenance in relation to children, ownership of or title to property under section 36 of the Family Law Act, 1995, an order for sale and division of proceeds of sale, financial provision for the previous spouse including the making of a periodical payment order, lump sum order, property adjustment order and/or financial compensation order, any application for a grant of judicial separation or divorce in respect of the same marriage, and any issues of domestic violence including applications for barring orders. This was proposed in the Family Law Bill, 1994 (part of which became the Family Law Act, 1995) which was not enacted because of constitutional reservations at the time. Any decision in relation to separation or divorce should not of course be made until the question of the validity of the marriage is decided.

Pending the hearing of nullity proceedings, jurisdiction should be vested in the court to make preliminary orders for custody of and access to children and their maintenance, and, as recommended above, maintenance pending suit for the financially dependent spouse, be it husband or wife.

## 20

### **Children – Guardian *ad Litem***

*In nullity cases where children are involved, their interests should be represented by a Guardian ad Litem.*

The common law system of adjudication is typified by an adversarial approach to judicial proceedings. The net effect of this perspective is that the parties are viewed as competing against each other for the Court's favour. The judge, furthermore, is limited in the inquiries he or she may initiate. In the classical adversarial model, it is the legal representatives of the parties rather than the Court that dictates the direction and tenor of the proceedings. Of particular concern is the fate of the child in the adversarial model of proceedings.

In the past very little consideration was given to the proposition that the child him or herself should be represented in Court. Recent innovations have, however, tended to exhibit a will for reform in this regard. Ireland has bound itself under several international agreements to increase the child's role in proceedings. For example, Ireland ratified the UN Convention on the Rights of the Child 1989 without reservation on 21 September 1992. This Convention gives recognition to children's rights in its widest sense. In fact, Article 3 of the Convention states, *inter alia*,:

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. State parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”

While this article demands only that the children's interests be “a” primary consideration, not “the” primary consideration, it must also be read alongside the series of explicit rights which the Convention protects. These include:

- “the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents”<sup>30</sup>;

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Footnotes:

30 Article 7



## *Nullity of marriage: The case for reform*

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- “the right of the child to preserve his or her identity, including nationality”<sup>31</sup>;
- “the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”<sup>32</sup>;
- “the right (of a child who has the capacity to form his or her own views) to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”<sup>33</sup>;
- “the right to freedom of expression”<sup>34</sup>;
- “the right to the protection of the law against arbitrary or unlawful interference with the child’s privacy, family home or correspondence and unlawful attacks on the child’s honour and reputation”<sup>35</sup>;
- “the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development”<sup>36</sup>; and
- “the right of the child to education”<sup>37</sup>.

Taking cognisance of these rights, it can be seen that the UN Convention on the Rights of the Child 1989 is soundly based on a defensible concept of children’s rights. The law in this jurisdiction, however, falls far short of such a concept.

Ireland has also signed the European Convention on the Exercise of Children’s Rights 1996. This Convention focuses predominantly on procedural rather than substantive rights, the emphasis being on such matters as the right of children to participation in, and information about cases that concern their welfare. For example, Article 5 of the 1996 Convention provides:

“Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority offering them, in particular:

- a the right to apply to be assisted by an appropriate person of their choice in order to help them express their views;
- b the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer;
- c the right to appoint their own representative;

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### Footnotes:

30 Article 7

31 Article 8

32 Article 9 (3)

33 Article 12

34 Article 13

35 Article 16

36 Article 27

37 Article 28

d the right to exercise some or all of the rights of parties to such proceedings.”

Clearly, the foregoing provisions are aimed primarily at children of sufficient age and maturity to understand the matters under scrutiny. That said, in nullity cases, a child should have the assistance of a person to help give expression to his or her views.

Of special significance in discussing our international obligations are the relevant provisions of the European Convention on Human Rights and Fundamental Freedoms, the incorporation of which into Irish law is to be effected by way of statute. It will then be possible to take proceedings in the Irish Courts alleging a breach of the Convention. There is little doubt that inconsistencies will arise between, on the one hand, Irish child law and practice and, on the other, the standards required by the Convention.

The Convention has enormous potential to protect and promote children’s rights. Articles 6 and 8 of the Convention afford certain procedural safeguards applicable in court proceedings in a contracting state. The child’s right to participate in legal proceedings is one of those procedural safeguards, a conclusion underlined by the recent decision of the European Court of Human Rights in *T v UK* and *V v UK*<sup>38</sup>. The provision of separate and impartial representation to children was, in those cases, deemed to be essential to the conduct of certain criminal proceedings in respect of children.

Considering the far-reaching nature of nullity as it affects children, a similar approach should be adopted in nullity proceedings.

This can be achieved by ensuring that children are given the opportunity of being heard in all judicial and administrative proceedings affecting them, either directly, or through a representative, having regard to their age and understanding.

The concept of using a guardian *ad litem* to represent a child’s wishes and feelings is already established. Section 11 of the Children Act, 1997 inserts a new section 28 of the Guardianship of Children Act, 1964, which has not yet been brought into effect by Ministerial order. It provides for the appointment of a guardian *ad litem* in certain private law proceedings.

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**Footnotes:**

38 December 16, 1999 (Application no. 24888/94)

## *Nullity of marriage: The case for reform*

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We propose that this example should be extended to nullity proceedings. The power to do so already exists at common law.<sup>39</sup> We therefore recommend that **in nullity cases where children are involved, their interests should be represented by a guardian *ad litem***. The guardian's job will be to ascertain the child's feelings and wishes in relation to the specific court proceedings and possible alternative outcomes, and to assess or cause to be assessed what outcome would best suit the child's interests in the circumstances of the nullity application and any other proceedings concerning him or her before the court.

Children should be notified in an appropriate manner of nullity proceedings affecting their parents' marriage and related custody and access proceedings, and consultation and representation arranged. If children are over the age of majority on the commencement of nullity proceedings, they also have a right to be informed and decide whether they wish to intervene.

In relation to the function, role and loyalties of a guardian *ad litem*, as well as to his or her qualifications, professional guidelines and assessment of performance, we refer to the report and recommendations of the Guardian *Ad Litem* Group.<sup>40</sup>

Where the parties to nullity proceedings are liable for their own costs, the additional costs of representation for their children should be met by them. But in cases where the parents do not have the means to pay their own or their childrens' costs, this circumstance should not prevent appropriate representation being made available to the children, funded by the State. In this connection, we refer again to the recommendations of the Guardian *Ad Litem* Group for central funding for independent and recognised guardians *ad litem*.

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### Footnotes:

39 For example, *Plummer v Plummer* [1917] P. 163, CA, where a child was given leave to intervene to appeal against a nullity decree affecting her

parents' marriage, a guardian *ad litem* was appointed to represent her and the decree was rescinded on appeal.  
40 Giving Children a Voice - The case for

the independent representation of children. A report by the Guardian Ad Litem Group, May 2001. (Available from the Law Society).

## 21

### **Constitutional imperative to protect the institution of marriage**

*The courts should be clearly empowered to appoint the Attorney General in the role of a legitimus contradictor to argue in support of the validity of a marriage where the constitutional imperative to protect the institution of marriage requires it, or an uncontested nullity is being sought.*

The possibility of collusion and improper co-operation in nullity cases, or even the omission of the respondent to defend the case, have led to the suggestion that any undefended marriage should be defended by someone specially appointed.<sup>41</sup> It is obviously undesirable that a court should be manipulated to dispense with a marriage which no longer suits the parties, thereby undermining the public interest in the integrity of marriage.

The position of Article 41 of the Constitution must also be considered. It states:

3.1 The state pledges to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

In that context, it has been suggested that the state has a special duty to defend the integrity of marriage and the interests of the children, and should supply a *legitimus contradictor* to defend any marriage which is not being adequately defended by the respondent.

Section 29 (4) and (5) of the Family Law Act, 1995 provides for the giving of notice to the Attorney General and his being joined as a party to the proceedings, and the court may request him or her "to argue any question arising in the proceedings specified by the court". This mechanism is now available to be used by a court to ensure that the case for a decree of nullity in a specific application is opposed, provided the application is made under section 29.

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**Footnotes:**

<sup>41</sup> For example, *In O'R v B* [1995] 2 ILRM 57 at 75 Kinlen J. advocated a *legitimus contradictor* in nullity cases if one of

the parties was not represented, a view shared by Budd J. in *McG v F*, unrep. HC. 28 January 2000.

There are often no advantages to appointing someone to defend a marriage: it will involve added costs, it will not provide additional evidence, and it will not necessarily add anything to the arguments already available or known to the court. Now that divorce is available in this jurisdiction, even with a time delay of four years, a declaration of nullity is no longer the only way of escaping from an unwanted marriage. We suggest that the likelihood of abuse of the nullity jurisdiction should be reduced by this development, and that the courts, particularly if our recommendation in relation to family courts and special training for judges is accepted, are equal to the task of defending the public interest in the integrity of marriage without the assistance of *legitimus contradictors* or intervention by the Attorney General. However, for cases which require it, **we propose that the courts should be clearly empowered to appoint the Attorney General as a *legitimus contradictor* to argue in support of the validity of a marriage where the constitutional imperative to protect the institution of marriage requires it, or an uncontested nullity is being sought.**

## 22

### **Updating the Register of Births, Deaths and Marriages**

*Section 30 (4) of the Family Law Act, 1995, which provides that notification of a declaration under section 29 shall be given by the registrar of a court to an tArd Chlaraitheoir, should be implemented in practice and also that other decrees of nullity (not granted under section 29 of the 1995 Act) should be reported on a regular basis to the Registrar's Office by the registrar of the relevant court where each order of nullity is made. We recommend that the Registrar be required to note declarations or decrees of nullity on the Register, against the corresponding marriages, once the appeal period is past.*

Section 30 (4) of the Family Law Act 1995 provides that the registrar of a court which has made a declaration of nullity under section 29 of the same Act shall notify the Chief Registrar of Births, Deaths and Marriages of that fact. The Act does not provide what the Chief Registrar should do with this information. In practice, such notifications are not taking place on a regular basis, and only a handful are made each year. It is the practice of the Chief Registrar not to "note" them on the Register, unless there is a court order to that effect or he is requested to do so by one of the

parties. The reason for this is that the enabling legislation does not provide for him to do so. It is the duty of the Registrar and his office to maintain the Register of Births, Deaths and Marriages accurately, but not to vouch the truth of what the records say. When so much is dependent on information coming from individuals, he cannot guarantee the truth of the information he is given to register, only that the registration was made in those terms.

To further contribute to the accuracy of the information held on the Register of Births, Deaths and Marriages we therefore recommend that **section 30 (4) of the Family Law Act 1995 should be implemented in practice and also that other decrees of nullity (not granted under section 29 of the 1995 Act) should be reported on a regular basis to the Registrar's Office by the registrar of the relevant court where each order of nullity is made. The Registrar's Office should be required to note declarations or decrees of nullity on the Register of Births, Deaths and Marriages, against the corresponding marriages, once any appeal period is past.**

## 23

### **Modernisation of civil registration**

*The recommendations of the report by the Department of Social, Community and Family Affairs entitled "Bringing Civil Registration into the 21<sup>st</sup> Century", published in May 2001, should be implemented.*

The records of decrees and declarations of nullity are not at present centrally held, but can be obtained from the court office of the court where the decree was granted. As mentioned above, section 30 (4) of the Family Law Act, 1995 requires that any nullity declarations made under section 29 of the same Act are to be notified by the court registrar to An tArd Chlaraitheoir. This does not cover decrees of nullity not granted under section 29. The government intends a major reform of the registration of births, deaths and marriages, and other publicly held data. A report on this subject "Bringing Civil Registration into the 21<sup>st</sup> Century" was published by the Department of Social, Community and Family Affairs in May 2001, and it recommends comprehensive reforms to the registration system, including a central register of all divorce and nullity decrees, accessible through the proposed new civil registration computer system. Such a

development would be highly desirable and we add our voice to those recommending its timely implementation<sup>42</sup>. **The recommendations of the report of the Department of Social, Community and Family Affairs, entitled “Bringing Civil Registration into the 21<sup>st</sup> Century”, published in May 2001, should be implemented.**

## 24

### **Statutory basis for law of nullity**

*The law of nullity should be codified.*

To assist practitioners, judges and the public alike, it is recommended that **the law of nullity should be codified.**

## 25

### **Collection of statistics**

*The system of collection and collation of statistics currently operated by the Courts Service should be expanded and reviewed on a regular basis.*

Finally, to enable proper planning and improved services, we recommend that **the system of collection and collation of statistics currently operated by the Courts Service should be expanded and reviewed on a regular basis.**

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**Footnotes:**

42 Enabling registration has been drafted and the first phase of this programme is targeted to be operational in March

2002, subject to the legislation being passed.