

2011 STEP CONFERENCE

THE ROLE OF AGREEMENTS IN TODAY'S RELATIONSHIPS

27th May 2011

Audrey Byrne
McCann FitzGerald
Solicitors
Riverside One
Sir John Rogerson's Quay
Dublin 2

Index

Section A

Prenuptial agreements

Section B

Pre-registration contracts for civil partners

Section C

Cohabitation agreements

Section A - Prenuptial agreements

1. Legal and taxation considerations

1.1 Introduction

The marriage contract is one of the most important legal contracts that any person can enter into during the course of their lifetime, however many couples know very little of its precise terms. The terms of the contract are not negotiated at arms length between the parties, but rather imposed by the State. There are a number of duties and obligations arising from the marriage contract, some of which are as follows:

- The duty to cohabit
- Duty to establish a home
- Protection of the family home (from a unilateral sale or mortgage by the **owning** spouse). A spouse cannot be removed from a family home unless by separation, divorce or barring order.
- A duty to support each other financially
- Joint guardians of children of the marriage
- Duty to maintain children
- Distribution of estate on death
- Limitation on disposal of assets during the marriage
- The State also gives special protection such as tax relief on income and capital taxes, social welfare payments for married couples.

1.2 Article 41 of the Constitution provides that the family is founded on marriage and gives a special status to the family based on marriage requiring the State to guard it with care. The 15th Amendment of the Constitution introduced divorce, however the Amendment still acknowledges the “*special nature and status of marriage and the special place of family in society*”. The Courts are protective of the status of marriage in modern society.

“Marriage itself remains a solemn contract of partnership entered into between a man and a woman with a special status recognised by the Constitution. It is one that is entered into in principle for life. It is not entered into for a determinate period. The moment a man and woman marry, their bond

*acquires a legal status. "The relationship, once formed, the law steps in and holds the parties to certain obligations and liabilities"*¹.

2. Legal and Taxation Considerations

2.1 Prenuptial Agreements have become increasingly popular with wealthy clients who view it as a 'road map' for their marriage, and put in place structures which allow them to agree their finances in advance. However the status of these agreements in Ireland remains uncertain.

In the United States, prenuptial agreements have been recognised since around 1970, and it is interesting to see that any litigation surrounding them is focused on the procedures adopted in negotiating their contents. The Courts have been willing to review the agreements for substantive fairness, and also review the procedural enquiries concerning whether the agreement was entered into freely, with knowledgeability and in good faith without the exertion of duress or undue influence, and with full and fair disclosure.

The law in most civil law jurisdictions allows pre-marriage contracts in one form or another. In some jurisdictions, pre-marriage contracts are signed to avoid the consequences of the civil code with matrimonial property regime applying.

2.2 Ireland

A Committee was established by the then Minister for Justice, Michael McDowell to investigate prenuptial agreements which was chaired by Inge Clissmann S.C who considered the law in this area. A report² issued by the Committee which effectively recommended that prenuptial agreements be given legal status in a similar vein to a Deed of Separation so long as certain safeguards were put in place. In particular, the Group considered that it would be appropriate that the Family Law Act 1995 and the Family Law (Divorce) Act 1996 be amended to include a definition of a prenuptial agreement, such that an enforceable agreement must be:

- In writing
- Signed and witnessed
- Made after each party has received separate legal advice
- Made with full disclosure of financial information

¹ Murray J. TVT

² Report of the Study Group on Prenuptial Agreements, April 2007

- Made not less than 28 days before the intended marriage

2.3 Therefore, it seems clear that in considering the drafting of a prenuptial agreement, the following principles should be borne in mind:

- a. The document should comply with general contractual principles and there can be no duress or undue influence.
- b. There should be annexed to it perhaps a certificate by both parties' solicitors confirming that independent legal advice has been given.
- c. It should be completed not less than 28 days prior to the date of the marriage.
- d. It would seem sensible in terms of disclosure that the parties at least swear and exchange an Affidavit of Means. Whether it's necessary to engage in full financial disclosure over and above a vouched Affidavit of Means is a matter for debate and practical considerations come in to play.
- e. Proper provision for each of the parties and any existing children should be made.
- f. It seems sensible that they would contain a termination date or a sunset clause and/or a review clause on the happening of certain events.

The recommendations of the Committee have not been adopted, and therefore it is difficult to anticipate how the Irish Courts will deal with prenuptial agreements.

3. **Limited Statutory Form of Prenuptial Agreements and Taxation**

3.1 Already there is a very limited statutory form of prenuptial agreement:

- Section 113 of the Succession Act 1965 states that:

“The legal right of a spouse may be renounced in an anti-nuptial contract made in writing between the parties to an intended marriage, or may be renounced in writing by the spouse after marriage during the lifetime of the testator”.

Maguire, in his commentary on the Succession Act, says that the renunciation could be incorporated into a marriage settlement or in an agreement to enter into a postnuptial settlement. This is commonly done as a clause in a Deed of Separation or a Separation Agreement.

- The Judicial Separation and Family Law Reform Act 1989, the Family Law Act 1995 and the Family Law (Divorce) Act 1996 gives the Court power to vary or extinguish provisions of an antinuptial or postnuptial settlement.

3.2 Tax issues

Obviously with any kind of estate or marriage planning, tax considerations become important. If the prenuptial agreement contemplates a transfer of assets between the parties, it is important that the parties are in fact married before that transfer takes place to avoid any capital taxes arising. There may be opportunities for planning around where assets are held and in what jurisdiction, depending on the circumstances. Once the parties are married, the usual spousal exemptions will apply.

4. Recent Developments

- 4.1 As we have no case law in relation to prenuptial agreements, we look to our closest neighbour for guidance. Obviously the English experience is different in that it does not have the Constitutional protection afforded to marriage that is present in Ireland, however the case law gives some helpful principles.

The old view in England was that prenuptial agreements were contrary to public policy, and as late as 1995 in the case of *F v F*, Mr. Justice Thorpe said:

“In this jurisdiction, prenuptial agreements must be of very limited significance”.

More recent cases have shown the courts have been placing more weight on prenuptial agreements. It is still a fundamental principle of English law, that no agreement can oust the jurisdiction of the court, however it can be one of the factors to be taken into account.

4.2 Case study

There have been some recent high profile cases in England involving prenuptial agreements. We will consider the Supreme Court decision of *Granatino v Radmacher*³ for the purposes of this paper.

³ 2nd July 2009 Court of Appeal

4.2.1 Facts

The parties were married in November 1998 in England. The wife was from a wealthy German family which owned a large paper manufacturing business. The husband was French and had been a successful banker. Upon marriage, he abandoned his career and pursued an academic route.

Prior to the parties' marriage, they entered a prenuptial agreement at the wife's request. The prenuptial agreement was signed in Germany. The terms of the agreement provided that neither party would gain financially from the other in the event of a divorce. The agreement was signed before a notary in Germany with no disclosure of assets and no negotiation of the terms. The husband had been shown it a week before signature. Translation of the document was not provided and no separate legal advice given.

There were ultimately two children of the marriage and the parties separated in 2006. The husband had given up his career and his savings were depleted. He sought to set aside the agreement and looked for financial relief from the wife. The wife was worth approximately €100 million. Her fortune comprised of capital of approximately €54.3 million together with family company shares which provided her with an income of approximately €2 million net per annum. The husband at this stage only earnings of approximately STG€30,000 per annum.

4.2.2 The High Court

At first hearing in the High Court the husband was awarded a lump sum of €5.56 million. Out of this, €2.5 million was attributed for a home for him and the rest was capitalised maintenance. The reasoning of the Court was that the document had not been translated for the husband, there was insufficient time for him to consider its terms or to seek independent legal advice. There had been no disclosure, no negotiation, and no provision had been made for the birth of any children during the marriage. The Court held that it was of note that the agreement had nonetheless been signed in Germany where it would be enforceable, that the husband was French and the agreement would also be enforceable there. As the divorce was taking place in England, the Court had to apply English law.

4.2.3 Court of Appeal

The wife appealed this decision and her appeal was allowed. The Court held that the husband's housing fund of €2.5 million should be available to him through a Trust arrangement only until the youngest child reached the age of 22, and maintenance would be

only payable to him for that period of time (which would be capitalised). The legal principles from the Court of Appeal decision were as follows:

- *'Prenuptial agreements are not binding per say, however subject to proper safeguards, a carefully fashioned contract should be available as an alternative to the stress, anxieties, and expense of litigation'.⁴*
- The previous objection that prenuptial agreements were contrary to public policy is now unrealistic. It was very clear in this instance that the wife would not have consented to marry without the agreement.
- The agreements' various flaws in this case did not detract from its influence upon the court, basically because the husband knew what he was entering into.
- The fact that many EU and other jurisdictions have endorsed prenuptial agreements was a factor taken into account by the Court, in that it felt that English law could not find itself in a position of isolation in today's international world, and the fact that the agreement would have been binding in France or Germany carried decisive weight with the court.

4.2.4 Appeal to the Supreme Court

The husband appealed this decision to the English Supreme Court (Judgement delivered on 20th October 2010). The Appeal was dismissed by a majority of 8 to 1 with the dissenting judgement coming from Lady Hale. The principles enunciated by the Supreme Court were as follows:

1. The parties must enter into an antinuptial agreement voluntarily without undue pressure and be informed of its implications. What must be considered is whether there is any material lack of disclosure, information or advice.
2. The court considered whether the foreign elements of the case enhanced the weight that should be accorded to the agreement. The court held that the fact that the agreement was binding under German law was relevant to the question of whether the parties intended the agreement to be effective at the time was entered into. The court went on to say that it is natural to infer that parties entering into agreements will intend that effect be given to them.
3. A prenuptial agreement may make provisions that conflict with what a court would otherwise consider to be fair. The principle to applied is that a court should give effect to a prenuptial agreement that is freely entered into by each party and with full

⁴ As per Lord Justice Thorpe

appreciation of its implications unless in the particular circumstances it would not be fair to hold the parties to their agreement.

4. A prenuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family but respect should be given to individual autonomy and to the reasonable desire to make provision.

The court applied these principles and concluded that there were no factors which rendered it unfair to hold the husband to the agreement. The court found that he was extremely able and that his own needs would be indirectly met from the generous relief to cater for the two children. The court held that there was no compensation factor, as the husband's decision to abandon his career was not motivated by the demands of his family, but rather reflected his own preference. Fairness did not entitle him to a portion of his wife's wealth which she had received from her family independently of the marriage.

Lady Hale (dissenting) stated that marriage still possesses an unavoidable minimum standard which includes a couple's mutual duty to support one another and their children. The issue in this case was how far individuals should be free to rewrite that essential feature of the marital relationship as they chose. The law of marital agreements, she found, was ripe for systematic review and reform. She held that the facts of this particular case obscure the fact that the object of a prenuptial agreement is usually to deny the economically weaker spouse (usually the wife) with a provision she would otherwise be entitled to. She found that the guiding principle should be fairness in light of the actual and foreseeable circumstances at the time. Lady Hale would have given the husband his English home for life rather than for the duration of the dependency of the children.

4.3 Conclusion

The decision should not be taken as a positive affirmation of one sided prenuptial agreements. If an agreement is to be given weight, it should be properly understood and freely signed and there should be some equality of bargaining power. It would seem to me that the principles applying to a dependant wife and to an independent city banker will be very different. Each prenuptial agreement will have to be considered on its own facts and merits. Obviously, from an Irish perspective there are Constitutional provisions which protect the family. Our legislative framework is different to that of the UK in terms of the protection afforded to dependant spouses which will also influence how we draft Irish agreements.

5. **Advantages / Disadvantages**

5.1 Possible advantages of the prenuptial agreement:

- It enables the individuals to protect a family business or specific asset against the possibility of claims by a spouse.
- It can be an important element in estate planning, especially for parties who have children from a prior marriage.
- Negotiation of fair prenuptial agreements forces couples to grapple with issues which may be a source of disagreement after the marriage and provide a system of communication.
- Prenuptial agreements can often assist a family acceptance of second marriages and may avoid some of the nastier aspects of a divorce or the manoeuvring over assets and disclosure.

5.2 Disadvantages of prenuptial agreements

- They can be seen as contrary to the spirit of marriage or public policy.
- It is assumed that they would disadvantage the financially weaker party (usually the wife).
- It may encourage property owning spouses to abandon their marriage partners without due consideration.
- Negotiations preceding any prenuptial agreements are often treated with scepticism, and there has been often an inequality in the bargaining position of those parties.
- Social/public policy considerations v adult autonomy.

6. **Drafting considerations**

6.1 Recitals:

- a). The deed must be made in contemplation of and is conditioned upon the intended marriage of X and Y. It should also state that the marriage should take place within a specified period of time (usually 12 months).

- b). It should be recorded that the parties wish to enter an agreement setting out their wishes and intentions regarding finances and property during their marriage and in the event of separation/divorce or death.
- c). A statement to the effect that they have each acquired all of his or her separate property independently of and without any contribution from the other is usual.
- d). The parties desire to retain their separate property whether now owned or required later free from any claim of the other is stated.
- e). An intention that the agreement is legally binding should be stated and binding upon their heirs and personal representatives.
- f). It should be recorded that they have each received independent legal and (if necessary) accountancy advice prior to the execution, and it should also be declared that the parties have fully and frankly disclosed to each other their means and other relevant circumstances.
- g). It may be helpful to provide for a definitions section.

6.2 The contents of the agreement

- a). The deed shall become operative upon the celebration of a valid marriage between X and Y.
- b). All assets held by X and Y in each others respective names prior to the marriage shall remain in their respective absolute beneficial ownership following the marriage.
- c). All assets acquired during the marriage by X and Y by way of gift or inheritance shall remain in their respective absolute beneficial ownership following the marriage.
- d). Neither party will make any claim during the marriage to the property in the separate absolute beneficial ownership of the other, and both agree to release all rights or claims in respect of such property which they may acquire by reason of the marriage.

- e). The parties should have full control over their separate legal property wherever located, and have rights to sell, lease, mortgage or otherwise dispose of the property and to receive all rents and incomes therefrom.
- f). The family home should be dealt with separately. It can be registered in joint names, as joint tenants, or as tenants in common, and having regard to the contribution made by each party.
- g). There should be a clause in relation to chattels.
- h). There should be a clause in relation to indemnity in respect of debts and liabilities.
- i). Separate clauses in relation to what should happen in the event of a dissolution or annulment of the marriage. This will usually state that all property in the separate absolute beneficial ownership of the parties shall remain in the respective absolute ownership of them free from any claim from the other.
- j). It would also state that in the event of a dissolution or separation that provision would be made in the way detailed thereunder, and then specific provision should be inserted as to what should happen in the event of a separation or divorce.
- k). Provisions can be inserted stating that provision is made for the spouse, that no further claim would be made in respect of anything arising from their marriage other than in respect of a child of the marriage.
- l). There is usually a clause to the effect nothing in the deed shall preclude the parties from voluntarily making lifetime gifts to the other, or from voluntarily making provision for the other by way of will, codicil, trust or otherwise, and that any such provision is not to be construed as a waiver of any of the provisions of the deed.
- m). The invalidity or enforceability of any provision of the deed will not affect the validity or enforceability of any other provision of the deed.
- n). The terms of the deed will continue in force notwithstanding the dissolution or annulment of the parties marriage.

- o). It is usual to insert a review clause, particularly where there are young children or where it is a first marriage. The review can take place when certain events occur, e.g. the birth of a child, the disablement of the parties, unemployment, or so many years lapsing from the date of a deed.
- p). It is recommended that a sunset clause is put into a deed that it will terminate unless renewed after a period of time.

7. Conclusion

Even if there is a doubt as to the enforceability of prenuptial agreements in Ireland, they have become increasingly relevant. This is particularly so in cases where there are international elements and the choice of applicable law becomes extremely important.

The clear identification of who is bringing what into the marriage can be useful for record purposes. A discussion by a couple embarking upon marriage about their legal rights and responsibilities may encourage them to consider the consequences of their actions prior to walking down the aisle. My experience of prenuptial agreements has been mixed. I have often acted for the financially weaker party who is in a weak bargaining position and the process can be difficult for the couple, particularly when negotiations are close to the wedding day.

Parents who wish to provide for their children by way of trust should do so in favour of the child only rather than as a trust in favour of the child and the spouse as this may be construed as an antinuptial or postnuptial settlement.

Assets can be identified in a prenuptial agreement over which it is agreed that no claim will be made without prejudice to the value of the assets involved. For example, a future spouse may agree not to make a claim against shares in a family business owned or to be inherited by the other spouse, but without prejudice to making a claim against the value of those assets or focusing the claim on other assets.

Warning:

“Like wills, premarital agreements are unexploded time bombs ticking away in your closed file storage room”.

Experience in the United States has shown that increasingly, high profile matrimonial lawyers are refusing to write prenuptial agreements due to the risks involved, but certainly will not do so in proximity to the wedding date. The reasons are that the financial returns are small and the negligence exposure enormous.

Section B - Pre-registration contracts for civil partners

1.1 Introduction

What does civil registration mean? The registration of a civil partnership will bring with it all of the rights and responsibilities of marriage which include the right and responsibility of the couple to live together in their shared home, the right and responsibility to support and maintain each other financially and all of the ancillary rights that flow from that in terms of enforcement, attachment of earnings and inheritance. Therefore in many respects, the same principles will apply to pre-registration of civil partnership agreements as will apply to prenuptial agreements.

1.2 Legal issues and taxation issues

1.2.1 The Registration of Civil Partnership and Certain Rights and Obligations of Co-habitants Act 2010 introduced to Ireland for the first time a system of registration of civil partnership for gay and lesbian couples, and marked a watershed in Irish law. Prior to its enactment, gay and lesbian couples who lived together were treated as co-habitees and strangers in law. Significant taxation and financial consequences arose on the breakdown of a relationship or on death. Many of these issues have been addressed in the context of the Act however we are still waiting for the taxation provisions to be introduced. It is widely anticipated that same sex couples will have the same treatment for tax purposes as married couples.

1.2.2 Registration of civil partnership

A couple can only be civilly partnered to each other if they comply with the following conditions:

- They are both over the age of 18;
- They both have sufficient mental capacity;
- They must be of the same sex;
- They must not be close relatives;
- Neither party may be married or in another civil partnership;
- They must give 3 months' notice as to their intention to the Registrar;
- At least 5 days in advance of the ceremony the couple must make the usual declaration of no impediments;
- The civil partnership must be performed by a properly appointed registrar;
- There must be at least two witnesses;
- The ceremony must take place in public.

It can be seen that the registration of a civil partnership is a very serious undertaking where a solemn legal commitment is given which will potentially last a lifetime. There was a perception that a civil partnership could be registered by simply filling in a form however this is not the case. It should also be pointed out that the civil partnership is only available to same sex couples. Heterosexual couples have the option of marriage.

1.2.3 Rights and duties arising from a civil partnership

The Act affords the same of rights and duties of civil partners as those of married couples. While the rights and duties of marriage are not specifically set out in any single piece of legislation they include the following and the same will apply to civil partners:

- The couple will live together in their shared home;
- A non-owning civil partner will have the same rights in the home as a non-owning married spouse i.e. the right to give their consent in writing to any sale, disposal or mortgage of the property. The Family Home Protection Act is now known as the Family and Shared Home Protection Acts 1976 – 2010;
- Civil partners have the duty to support and maintain each other financially. The focus of this responsibility is on the economically stronger partner. The economically dependent person will be able to seek support by way of maintenance either during the course of the partnership or on dissolution.
- Civil partners will be entitled to all of the protection which presently applies to spouses under the Domestic Violence Act.
- Inheritance rights – the Succession Act 1965 has been amended to include civil partners, who have identical succession and inheritance rights as those presently enjoyed by spouses. Civil partners are entitled to legal right share and also rights under intestacy;
- Pensions – the Act provides that where a contingent or survivor’s benefit or pension is provided by an employer or by a pension scheme for the spouse of a person equivalent benefits must be provided for a registered civil partner.

1.2.4 Relationship breakdown

In the event of a breakdown of the relationship between registered civil partners, either party can apply to court for a dissolution. The court can grant dissolution if they are satisfied that the parties have lived separate and apart for 2 out of the previous 3 years. The court is under

an obligation to make proper financial provision for the parties having regard to all of the circumstances. Civil partners do not have a Constitutional status in the same way as married couples do, and therefore Constitutional considerations with regard to pre-registration of a civil partnership agreements are not relevant in terms of enforcement.

1.2.5 Dissolution of the civil partnership

The court has the power to make financial provision for the parties in similar vein to that of separated spouses. The main remedies available are as follows:

- Maintenance by way of periodical payments;
- Lump sum payment;
- Property adjustment order;
- Financial compensation orders;
- Pension adjustment orders.

1.2.6 In making its assessment the court can take into account a number of factors such as the earning capacity of each, the property or other financial resources that each partner brings and the financial needs and obligations and responsibilities of each, the standard of living enjoyed by the parties prior to the proceedings, their ages, the duration of the partnership and the length of time they have lived together, any physical or mental disability and the contributions made to the welfare of the civil partners, amongst various other matters. The court is given a very wide discretion in determining what is proper provision in all of the circumstances. The court will have regard to the terms of any separation agreement entered into between the civil partners prior to the application for dissolution. It can be seen that it may be prudent for couples to enter pre-registration agreements to protect assets/wealth.

2. **Relevant Statutory Provisions**

2.1 Section 76 of the Act provides that the registration of a civil partnership will automatically revoke an existing will. However wills can be made in contemplation of the registration of a civil partnership.

2.1 Pre-registration contracts – there is no specific mention in the Act on whether pre-registration contracts are enforceable so all of the issues that have been debated in relation to pre-nuptial agreements apply also to pre-registration contracts. Having said that, section 80 of the Act

provides that intending partners can waive and renounce their entitlements under the Succession Act similar to section 113 applying to spouses.

- 2.2 The section that deals with property adjustment orders (section 115) specifically refers to the court having power on the making of a granting of a decree of dissolution of civil partnership to make an order varying any ante-registration or post-registration settlement made by a civil partner.

3. **Transfer of property**

Any couple who will register their civil partnership have probably been living together for a long time and it may be that their home is registered in the full name of one partner. Previously the cost of transferring the property into joint names will have been significant in terms of stamp duty however such stamp duty should now be avoided. The Act creates a similar section to section 14 of the Family Home Protection Act encouraging partners to create a joint tenancy of their shared home which will be exempt from stamp duty and also from registration fees. Couples may contemplate a transfer of other property into joint names or into the sole name of one post registration of a civil partnership and this should probably be done in the context of an agreement between them which will set out the nature and extent of their obligations in relation to the particular property.

4. **Drafting guidelines and recommendations for prenuptial or preregistration agreements of Civil Partnerships**

In order to make the prenuptial/preregistration agreement as effective as possible, the following guidelines should be followed:

- a) The agreement should be executed one month prior to the wedding date/civil partnership registration. This minimises any risk of undue influence or force. This means that negotiations will need to take place at least a month in advance of that to allow adequate financial disclosure to be exchanged and for the parties to have meaningful discussions.
- b) Each party should be independently legally advised.
- c) It may be necessary for each party to get independent accountancy advice also.

- d) Any provision in the event of separation or divorce/dissolution in the agreement should be adequate in the context of the assets available to the parties. Obviously discounts can be applied in terms of a short marriage/partnership, or if there are no children. However, it seems likely that prenuptial agreements which attempt to make minimum provision for a spouse, particularly after the birth of children will have little chance of standing up, particularly if there is a difference in bargaining capacity between the parties given the Constitutional protection afforded to families. This can usually arise where one party is coming to the marriage with very little, and the other is extremely wealthy and typically involves a dependant wife who is being asked to give up rights which she would otherwise have. The situation may be different for Civil partners who have no Constitutional status.
- e) It is also important to consider that the longer the marriage/partnership goes on, the greater the provision may be necessary for the financially dependant spouse/partner. The main purpose of the prenuptial agreement is usually to protect certain assets, and in addition, to avoid lengthy and expensive litigation in the event of a separation or divorce. Therefore, if adequate provision is made for a spouse/civil partner, this will act as an incentive for them not attack the deed.
- f) It is sensible to build in a review clause on the birth of a child for example, or in a fundamental change of circumstances. This shows that the agreement is reasonable and adequately thought through and not meant as a 'strait jacket' on the parties.
- g) It is usual to put a sunset clause into an agreement, for example, to expire on its 10th anniversary unless automatically reviewed. Again, the longer a marriage or partnership goes on, the less impact an old agreement will have in a divorce or dissolution situation. It is sensible to do this as it is very difficult to anticipate at the outset of a marriage what twists and turns life will take, and there may be necessary adjustments to an agreement along the way.
- h) Prenuptial agreements can be a part of sensible tax and estate planning, however they in themselves must be sensible and should not ring fence or exclude a spouse/partner from having adequate provision made for them, bearing in mind all of the circumstances.

Section C - Cohabitation Agreements

Legal issues and taxation issues

1.1 Introduction

Prior to the enactment of the 2010 Act, it was thought that co-habitation agreements were unconstitutional arising from High Court decision of *Ennis -v- Butterly*⁵. The Law Reform Commission considered this area in detail and in its report on the Rights and Duties of Cohabitants, it recommended that they be encouraged to enter into arrangements and agreements between them setting out their rights and responsibilities arising from the relationship.

There are a great variety of people who live together but they can probably be grouped together in the following categories:-

1. The casual cohabitants who drift into living with their partner;
2. Living together as a forerunner to marriage;
3. The conscientious objectors to marriage;
4. Separated and divorced persons who do not want to commit again;
5. Those who live together because they could not marry (pre divorce);
6. Those who believe that they are married to each other after a foreign divorce;
7. Same sex couples who at present cannot marry.

1.2 Who is a cohabitant?

A cohabitant is one of two adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.

In determining whether or not two adults are cohabitants the Court shall take into account all the circumstances of the relationship and in particular shall have regard to the following:-

- a) The duration of the relationship;
- b) The basis on which the couple live together;

⁵ 1996 1 IR426.

- c) The degree of financial dependence and any agreements in respect of their finances;
- d) The degree and nature of any financial arrangements including any joint purchase of real or personal property;
- e) Whether there are one or more dependent children;
- f) Whether one of the adults cares or supports the children of the other; and
- g) The degree to which the adults present themselves to other as a couple.

The interesting ingredients of the definition are that the couple must “live together” so it is more than a casual dating relationship. But does it mean live exclusively and full time? Questions may arise as to when the “living together” started or indeed ended. What does “intimate and committed” mean? Section 172(3) specifically says that a relationship does not cease to be intimate and committed merely because it is no longer sexual in nature. Does this mean it must, at some stage, have been so?

1.3 Who is a qualifying cohabitant?

For the purposes of the Act a qualifying cohabitant means a cohabitant referred to above who has been living with their partner as a couple for a period:-

- (a) of two years or more in the case where they are parents of one or more dependent children and;
- (b) of five years or more in any other case.

A couple who would otherwise be a qualifying cohabiting couple will not be so qualified if:-

- (a) One or both of the adults is or was at any time during the relationship concerned an adult who was married to someone else and;
- (b) At the date the relationship concerned ends each adult who is or was married has not lived apart from his or her spouse for a period or periods of at least four years during the previous five.

1.4 Under the cohabitant’s section of the Act there are two distinct parts:-

- a) The validity of certain agreements between them and;
- b) The Redress scheme.

2. **Cohabitants Contracts**

2.1 The Act provides that notwithstanding any enactment or rule of law cohabitants may enter into a cohabitant's agreement to provide for financial matters during the relationship or when the relationship ends whether through death or otherwise.

A cohabitant's agreement will only be valid if the cohabitants:-

- Have each received independent legal advice before entering into it or;
- Have received legal advice together and have waived in writing their right to independent legal advice and;
- The agreement is in writing and signed by both cohabitants and;
- The general law of contract is complied with.

This is an encouragement to couples who do not want to marry or register a civil partnership to take responsibility for their own arrangements while living together and what is to happen in the event that the relationship ends either by death or breakdown. Such an agreement might deal with who is paying the mortgage and utilities attached to the home, whether one party can buy out the other in the event of a breakdown and/or whether it passes automatically to the other on death.

2.2 **The Act specifically allows cohabitants to opt out of the redress scheme which is referred to below.**

The Court also has power to vary or set aside a cohabitant's agreement in exceptional circumstances where its enforceability would cause serious injustice.

2.3 **The Redress Scheme**

2.3.1 If a qualified cohabitant satisfies the court that he or she is financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship the Court may, if it is satisfied that it is just and equitable to do so in all the circumstances make certain redress Orders as appropriate. It is important to be aware of the provisions of the redress scheme when advising about the 'opt out' provisions.

2.3.2 In determining whether or not it is just and equitable to make such redress Orders in all the circumstances the Court shall have regard to the factors set out in S.173:-

- (a) The financial circumstances, needs and obligations of each qualified cohabitant now or likely to arise in the future;
- (b) The rights and entitlements of any spouse or former spouse;
- (c) The rights and entitlements of any civil partner or former civil partner;
- (d) The rights and entitlements of any dependent child or of any child of a previous relationship;
- (e) The duration of the parties' relationship, the basis on which the parties entered the relationship and the degree of commitment of the parties to one another;
- (f) The contributions that each made to the welfare of the cohabitants or either of them including any contribution made to the income and earning capacity of the other;
- (g) Any contributions made by either of them in looking after the home;
- (h) The effect on the earning capacity of each cohabitant of the responsibility assumed by each of them;
- (i) The extent to which the earning capacity of one may have been impaired by reason of having relinquished or foregone opportunity to look after the home;
- (j) Any physical or mental disability of the qualified cohabitant and;
- (k) The conduct of each of the cohabitants if conduct is such as it would be unjust to disregard it.

There is an over-arching requirement that the Court will make orders only if just and equitable in all the circumstances. Also the Court shall not make an order which would affect any right of a spouse.

2.3.3 The Court has power under the redress scheme to make:-

- Property Adjustment Orders;
The provisions here are identical to the property adjustment order sections on separation and divorce.
- Compensatory Maintenance Orders;
Although called "compensatory" maintenance, it covers periodical payments and lump sum payments and the periodical payments can be for life and the attachment of earnings mechanism is also available to cohabitants.
- Pension Adjustment Orders;

- Application for provision from the estate of a deceased co-habitant:
The provision that the court may make shall not exceed the share that a spouse or a civil partner would have been entitled to. Provision made during the life time of the deceased will also be taken into account.

The claim for redress must be made within two years of the end of the relationship.

While the redress scheme is similar to the ancillary relief that can be granted on separation and divorce or civil partnership dissolution, it is more limited. While the factors to be taken into account are also similar it is likely that financial redress will be less for a cohabitant than for a spouse in similar circumstances.

2.4 Practical considerations

Few clients are likely to actually ask about cohabitants agreements. We should identify circumstances and at least flag with clients that perhaps a cohabitation agreement is appropriate in their circumstances. Some examples of the cases and inquiries that we have had to date are:

- A couple who have a foreign cohabitant's agreement already and want to know its status in Ireland.
- A client who recently divorced and who I found out was living with a partner in her home for a number of years.
- A woman who is just starting a cohabitation with a divorced man.
- A woman whose cohabitating relationship is over but whom I advised some months ago to stay within the relationship until the terms of the Act commenced.
- A same sex couple who due to a change of circumstance want to revise their Wills.

3. Drafting considerations

3.1 Information required from the clients

- A detailed personal history to include their age, background, family circumstances, whether married, separated, divorced, civilly partnered here or abroad, whether any partnerships had been dissolved etc. You also need to know does the client have a spouse or a civil partner to whom their own an obligation and also whether they have

children and whether they are dependent or no longer dependent but whom they continue to owe an obligation, particularly on death.

- A detailed history of the current relationship and details of the other party.
- Details of the financial circumstances and assets owned by the couple together and details of how the finances are organised within the relationship and between them.
- Details of assets acquired before the relationship and how they were acquired.
- Understanding of what the clients may want to achieve in a cohabitants agreement and how they want to achieve it.
- Clarity on who pays the mortgage, rent, household bills etc.
- Clarity on whether one party can buy out the interest of the other in the home they live in if relationship ends.
- Clarity as to what is to happen on death.
- What are the client's instructions on the "opt out" provisions of section 202 of the 2010 Act.

3.2 What can be excluded or included from the agreement?

3.2.1 A cohabitant's agreement is a legal document, the terms of which may be litigated so the contents of the agreement should be confined to serious financial issues. Section 202 refers to an *"agreement to provide for financial matters...."*

3.2.2 A co-habitants agreement should not deal with:

- Household arrangements, chores, who can stay and for how long.
- Intimate or sexual matters, birth control.
- What happens if one party is unfaithful or a commitment to be faithful.
- Trivia - (who is to put out the bins, etc).

3.2.3 A cohabitant's agreement should include:

- Details of who is paying what within the home, rent, mortgage and the intentions of the parties in that regard.
- Details of how the property should be owned as joint tenants or as tenants in common.
- What is to happen if the relationship ends as a result of breakdown.
- What is to happen if the relationship ends on death of one of the parties.
- Details of what is to happen if the couple have a child together.
- Debts and who should be responsible for them.
- Practical issues such as joint bank a/c's, credit cards, life assurance.

3.3 In relation to children, it is probably only possible to include a general intention because the jurisdiction of the Court can not be ousted. An agreement could however state that it is the intention of the parties that the Father would be appointed a Guardian, that the documents to this effect would be signed promptly and that they intend to share parenting responsibilities together. The main point of discussion which will depend on the facts and circumstances of each individual case, is to whether or not the couple want to opt out of the redress scheme contained in section 202(3) of the 2010 Act.

4. **Financial disclosure**

If the purpose of the agreement is to simply ensure that the opt out provisions of Section 202(3) applies then there seems little logic to both parties making financial disclosure. If on the other hand, part of the agreement is to ensure that the other does not make a claim against a specific property which may be owned by one or other of the couple and acquired by them prior to the relationship, then itemising those assets would be prudent.

5. **What formalities must be observed**

5.1 Section 202(1) specifically states that

“notwithstanding any enactment or rule of law, cohabitants may enter into a cohabitants agreement to provide for financial matters during the relationship or when the relationship ends, whether through death or otherwise.”

Section 202(2) states:

“a cohabitant’s agreement is valid only if-

- a. The cohabitants - (i) have each received independent legal advice before entering into it or (ii) have received legal advice together and have waived in writing the right to independent legal advice.
- b. The agreement is in writing and signed by both cohabitants and
- c. The general law of contract is complied with.”

An agreement that meets the other criteria of this section shall be deemed to be a cohabitant’s agreement under this section, even if entered into before the cohabitation has commenced.

5.2 A difficult decision for practitioners will be whether they can advise the clients jointly or whether they must always send one party to another solicitor for independent legal advice.

There may be an issue of costs from the client's perspective. A possible solution is that client's could separately or together be given the information about the cohabitants section of the 2010 Act and then they can decide whether or not they wish to incur the costs of having separate legal representation in respect of their interests.

6. **Clauses**

6.1 The recitals should state that the parties are living together/intend to live together (see section 202 (5)) and intend to live together in an intimate and committed relationship.

6.2 The agreement itself should state that the parties have got independent legal advice or that they have received advice together and waived their entitlement to independent legal advice. The opt out clause, if agreed, should state specifically that *"neither cohabitant may apply for an Order for Redress pursuant to Section 173 of the 2010 Act or an Order for Provision from the estate of the other under Section 194 of the Act"*.

6.3 There are a number of possible triggers which can cause a variation or review of the terms of an agreement which should be provided for, e.g.

- The birth of a child or children together.
- Approaching the 5 year anniversary.
- Other significant events such as health, or a fundamental change in the financial circumstances of either.

The birth of a child will have fundamental effect on a cohabitating relationship as it brings down the qualifying period of living together from 5 years to only 2 years.

Approaching the 5 year anniversary of the living together in the event that there are no children, should also trigger a review.

6.4 Section 202 of the 2010 Act says that the general law of contract applies. An agreement therefore should have the usual clauses in relation to severance etc.

6.5 It is probably also wise to have a clause stating that the agreement together with any schedules that may be annexed constitutes the entire agreement and understanding between the parties. It should state that there are no representations, promises, covenants or undertakings whether written or oral other than those expressly set out in the agreement.

- 6.6 It is probably wise to specifically state that the operation of the agreement is for the period that the couple intend to live together prior to marriage or the registration of a civil partnership, as there is no particular statement in the legislation that marriage or civil partnership registration automatically revokes any cohabitation agreement.
- 6.7 The agreement might state that in the event that gifts are made between the couple or provision put in place during the lifetime of the parties and the continuance of their relationship, either as lifetime gifts or under a Will or Codicil or Trust that these shall not be construed as varying the terms of the agreement.
- 6.8 A confidentiality clause both in terms of the content of the agreement or the living arrangements themselves should be included.
- 6.9 There should also be clear provision for termination of the agreement and that this is an identifiable event, e.g. death, marriage, written notification, etc.

7. **Conclusion**

- 7.1 Cohabitation agreements are different to pre-nuptial agreements and have their own legal considerations. From a taxation perspective, cohabitants are likely to be treated differently to civil partners. The Law Reform Commission recommended no change or concession to Income Tax or Capital Gains Tax for cohabitants, and limited relief on stamp duty. It recommended that for Capital Acquisitions Tax purposes, threshold A apply. Therefore there may be limitations on what cohabitants will achieve by agreement due to tax constraints.
- 7.2 It is difficult to anticipate all the circumstances practitioners are likely to come across. The client must be made aware of section 202(4) which gives the Court power to set aside an agreement in exceptional circumstances where its enforceability would cause serious injustice.

Audrey Byrne
McCann FitzGerald