FAMILY

Law guide – Divorce and separation

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Separation

Overview

Marriage is a legally binding contract which, in general terms, attracts the same rule of law as any other type of contract. When a relationship breaks down and negotiations fail to resolve all outstanding issues, the parties involved may have no alternative but to seek the assistance of the courts.

Separation agreements

A separation agreement is a document that may be drawn up and executed by the parties to a marriage, where that marriage has broken down, and where they do not wish to have recourse to the courts for the purpose of agreeing the terms of the breakdown. When the executed separation agreement is made a rule of court, in either the Circuit or High Court, it becomes a formal Deed of separation. For more information on this please see the chapter 'Separation agreements'.

Judicial separation (marriages) or separation (civil partnerships)

The Judicial Separation and Family Law Reform Act, 1998 increased the power of the courts to make ancillary relief orders either before or at the same time as the granting of the decree of judicial separation. In the chapter on 'Judicial separation' we explain how to proceed if you do not wish to finally end your marriage or civil partnership, but still want a formal separation from your spouse or civil partner.

Divorce (marriages) or dissolution (civil partnerships)

By virtue of the Family Law (Divorce) Act, 1996 the courts have the power to grant decrees of divorce and other related orders. The 'Divorce' chapter looks at how to bring your marriage or civil partnership to an end, allowing you to enter into a new one.

Nullity

Where a marriage has been declared null and void, a court is declaring that the couple was never legally married to one another and they are thus legally free to remarry. In this chapter we will provide information on what to do if you believe your marriage or civil partnership was either never valid or has become invalid. There is also information on how to get a court order to confirm that.

Separation agreements

Introduction

If a married couple or civil partners can agree the terms on which they will live separately, they may enter into a *separation agreement*. The essence of a separation agreement is that it is an 'agreement'. Both parties must consent to the terms of the agreement.

The agreement is a legally binding contract setting out each party's rights and obligations to the other. The terms of the agreement are usually reached either through mediation or negotiation through solicitors. If agreement can be reached reasonably quickly between the parties and a separation agreement drawn up, it is cheaper and less stressful than taking a court case. Many couples formalise their separation in this way.

Terms of the separation agreement

A fundamental part of any separation agreement is that the couple will live apart from each other, thereby releasing them of their duties to live together. It is advisable that the separation agreement outlines the date on which the couple started living apart, so this will be clear in the event of either party obtaining a divorce.

Guardianship and Custody of children

Where there are children under the age of 18 years of age, all arrangements regarding the children may be detailed in the separation agreement. It should be noted that a married couple remain joint guardians of their children, and the issue of custody will usually be set out in the separation agreement. Custody is the right of a parent to exercise physical care and control in respect the upbringing of his or her child on a day-to-day basis. The issue of access, which is the right to spend time with the child, should also be included in the agreement.

Maintenance

Maintenance which is paid by one spouse to another, or by one spouse in respect of dependant family members, can be detailed in a clause set out in this regard. The agreement should also contain a reference to when the payment is to be paid, and also the method of payment.

Property

The parties can also set out in the agreement what will happen in relation to any matrimonial property. It is often the case that one of the parties will be allowed to remain in the family home, until the youngest child reaches the age of 18, whereupon the family home will be sold and the proceeds distributed between the parties in an agreed manner.

Succession

The issue of succession rights can also be referred to in an agreement by the inclusion of a clause by the spouses to renounce their respective rights, under the Succession Act, 1965, to a share in the estate of the other. It should be noted that this will not prevent either party from making an application to court following a divorce to have provision made for them out of the deceased spouse's estate.

Pensions

It is very important that neither spouse tries to insert a provision agreeing an adjustment to a pension scheme, of which they are members, into a separation agreement. If either party feels it is necessary than an application on consent would have to be made pursuant to a decree of judicial separation.

Separation agreement made a rule of court

It is possible to have an executed, i.e. signed, separation agreement made a rule of court, in either the Circuit or High Court, provided the agreement contains a provision relating to the payment of one spouse to the other of maintenance payments for his or her own benefit or for the benefit of dependant family members and/or terms relating to the future ownership of, or disposal of an interest in, the family home.

If an agreement is made a rule of court, it affords to the spouse receiving maintenance payments the right to have the maintenance paid through the District Court Clerk's Office with consequent implications for the recovery of maintenance arrears. In addition, the ruling of the agreement also provides the recipient spouse with the remedy of contempt of court where breach of the agreement occurs. This remedy would not be available otherwise.

Judicial separation

Introduction

In a situation where a couple cannot agree the terms by which they will live separately, either party may make an application to the court for a decree of judicial separation. The element of fault may still be relevant in so far as the granting of a decree of judicial separation is concerned, while in relation to the granting of a divorce, this does not apply.

Not all couples applying for a judicial separation before a court are in disagreement and many couples choose this route or the route is chosen for them by their solicitors so that the terms of their agreement can be overseen by the court. So if there is consent and agreement on the terms of settlement these terms can be made into court orders or 'Consent Orders' as they are referred to. Once positive orders are made then they can be enforced by the court if there is a breach of any order. The terms used must be unambiguous and the orders will not provide the same flexibility as is given with a separation agreement where more detail on custody and access and future aspirations can be inserted.

Before the Court can grant a decree of judicial separation, the applicant spouse must prove any of the six grounds which are discussed below.

Grounds for judicial separation

There are six grounds specified in the act upon which the court may grant a decree of judicial separation. It should be noted that any of these grounds must be proved on the balance of probabilities.

The following are the six grounds for the granting of a decree of Judicial separation:

- one party has committed adultery
- one party has behaved in such a way that it would be unreasonable to expect the other spouse to live with them
- one party has deserted the other for a continuous period of at least one year at the date of application
- the parties have lived apart from one another for a continuous period of at least one year up to the time of the application and the other party consents to a decree being granted
- the parties have lived apart from one another for a continuous period of at least three years up to the date of application
- the court considers that a normal marital relationship has not existed between the parties for a period of at least one year at the time of application

Applying for a decree of judicial separation

Proceedings in the Circuit Court are commenced by lodging an original family law civil bill and two copies in the Circuit Court office. The original is retained in the office and the copies are returned to the person making the application (the applicant) to be served on the person against whom the application is being made (the respondent).

The civil bill sets out the main points of the applicant's claim, details of the legislation under which the applicant is making his/her claim and the orders (or reliefs) being sought. The civil bill must be dated and must include the name, address and occupation of the applicant. It must be signed by the applicant's solicitor or, if the applicant does not have a solicitor, by the applicant personally.

In divorce and separation cases, the applicant must file an affidavit of means (where financial relief is sought**)** and an affidavit of welfare (where there are dependent children) together with a certificate to say that alternative dispute resolution has been considered as an option. If the application is on consent the affidavit of means must still be filed but the affidavit of welfare need only be filed where it is applicable. Where the applicant is claiming a pension order a notice to trustees must be filed and served.

Summary of documents required

The following are the documents that must be lodged with the court office:

- a family law civil bill (this document describes you and your spouse, your occupations, where you live, details of children (if any) etc.)
- a sworn affidavit of means (this document is a statement of your assets, your income, debts and liabilities, outgoings and pensions as applicable)
- a sworn statement relating to the welfare of your children
- a document certifying that you have been advised as to the alternatives to a judicial separation

Welfare of children

As we mentioned before, if any of the six grounds described above are proven on the balance of probabilities, the court shall grant a decree of judicial separation on condition that it is satisfied, amongst other matters, that;

(a) the welfare of any dependent children of the marriage is properly catered for, and

(b) both the solicitor for the applicant and the solicitor for the respondent have complied with the obligations imposed on them by the Family Law Act, 1989.

Effect of decree of judicial separation

Where a court grants a decree of judicial separation it means that the parties involved are no longer obliged to live together. Indeed the couple must not continue living together as this would negate the reason for granting the decree in the first place.

The definition of living apart is relatively flexible, however. Thus spouses can live under the same roof but still live apart. The essential test is whether or not 'domestic life' is shared under the same roof as part of a 'household' as opposed to occupying the same physical building.

Divorce

Introduction

Divorce is governed by the Family Law (Divorce) Act, 1996. Where a relationship has irretrievably broken down and there is no reasonable prospect of a reconciliation between the parties, then either of them may apply to the Circuit or High Court for a decree of divorce.

Where both parties are consenting to the divorce and are in agreement in respect of what reliefs (orders) are being sought, it is possible to secure a divorce in a relatively short period of time. The party acting as the 'applicant' files a family civil bill together with their affidavit of means to be issued, i.e. dated and stamped by the court office, and then served on the respondent.

The respondent then files their affidavit of means.

Following this the applicant files a notice of motion to rule along with the executed, i.e. signed, settlement terms with the Circuit Court Office also giving the respondent 14 days notice of this motion.

A date for the hearing is then provided by the office. This is a way of securing a speedy divorce decree with a lot less stress on the parties.

Other documents such as an affidavit of welfare and notice to pension trustees may be required depending on the circumstances.

Grounds for divorce

Before a court will grant a decree of divorce to either spouse, the following grounds (as set out in section 5 (1) of the 1996 act must be met:

- at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least two years during the previous three years
- there is no reasonable prospect of reconciliation between the spouses and
- such provision as the court considers proper having regard to the circumstances exist or will be made for the spouses and any dependent members of the family

Absence of fault

If one takes into consideration the grounds on which judicial separation can be granted, it is surprising that the grounds for divorce in Ireland do not include any reference to the conduct or behaviour of the parties. The idea of who is responsible for the breakup is entirely irrelevant. It may become relevant, however, where the court has to make ancillary relief orders, i.e. orders in relation to maintenance, custody, property, pensions etc.

Definition of 'living apart'

Before a court can grant a decree of divorce the applicant spouse must prove that he or she and their spouse have been 'living apart' for at least two years during the previous three years. What represents a state of living apart is broadly defined and can include a situation where both spouses still live under the same roof. The Family Law Act 2019 states '...spouses who live in the same dwelling as one another shall be considered as living apart from one another if the court is satisfied that, while so living in the same dwelling, the spouses do not live together as a couple in an intimate and committed relationship, and a relationship does not cease to be an intimate relationship merely because it is no longer sexual in nature....'. The two year period, therefore, must have expired prior to the issuing and serving of grounding summons.

It is possible that the spouses involved can be living apart from one another while residing in the same dwelling. It is very important that the applicant spouse can show that they have been leading separate lives while living under the same roof. According to the 1989 Act spouses shall be treated as living apart from each other unless they are living with each other in the same *household* (which is not the same as being in the same house).

Most applications for divorce involve couples living apart in separate homes. Therefore, where one spouse is arguing that they have lived apart from the other, under the same roof, they will have to prove that they have lived separate lives.

Living apart for two years during the previous three years

As mentioned above, one of the conditions that must be satisfied is that the couple must have lived apart from each other for a minimum period of two years during the three years preceding the institution of divorce proceedings. Even if the couple lived together for short periods during this time, this will not prevent either of them being granted a decree of divorce.

No reasonable prospect of reconciliation

Before the courts decide to grant a decree of divorce, they must be satisfied that there is no prospect of the couple saving their marriage. If the court feels that there is still a chance that the couple can reconcile then it may refuse to grant a decree of divorce.

It is not enough though that only of one spouses is willing to reconcile. In fact reference is made in section 8 (1) the 1996 act that the court may adjourn proceedings at any time for the purposes of enabling attempts to be made by the spouses if they both so wish, to effect a reconciliation.

Proper provision for the spouse and dependent family members

Before a decree of divorce can be granted the court must be satisfied that such provision exists or will be made for the spouses and any dependent members of the family.

Dependent family members can include children born to both spouses or either spouse, adopted by both spouses or by one spouse, or to whom either spouse is in loco parentis.

Applying for a decree of divorce

Just as with the procedure for judicial separation proceedings in the Circuit Court are commenced by lodging an original family law civil bill and two copies in the Circuit Court office. The original is retained in the office and the copies are returned to the person making the application (the applicant) to be served on the person against whom the application is being made (the respondent).

The civil bill sets out the main points of the applicant's claim, details of the legislation under which the applicant is making his/her claim and the orders (or reliefs) being sought. The civil bill must be dated and include the name, address and occupation of the applicant. It must be signed by the applicant's solicitor or, if the applicant does not have a solicitor, by the applicant personally.

In divorce and judicial separation cases, the applicant must file an affidavit of means (where financial relief is sought) and an affidavit of welfare (where there are dependent children) together with a certificate to say that alternative dispute resolution has been considered as an option. If the applicant is claiming a pension order a notice to trustees must be served and filed.

Nullity

Introduction

Nullity of marriage is a declaration by a court that your supposed marriage is null and void, and that no valid marriage exists between you and your partner. In other words, it is a declaration that the supposed marriage never happened. Nullity (or annulment) is not the same as divorce. Divorce is a declaration ending a valid marriage. Nullity is a declaration that a valid marriage never existed.

It is important to be aware that a church annulment does not have any legal effect. It does not mean that you may legally remarry or enter into a civil partnership - although it may mean that you can remarry in the eyes of the church.

In nullity law, there are two types of marriages that may be annulled or cancelled. There are *void* marriages and there are *voidable* marriages.

Void marriages

In order to obtain an annulment (nullity) of your alleged marriage, you must make an application (called a 'petition') to the Circuit Court or the High Court.

There are three broad grounds upon which the marriage can be declared void:

- At the time of the marriage ceremony there was a lack of capacity.
- The formal requirements for a marriage ceremony were not followed.
- At the time of the marriage there was a lack of consent (you or your spouse did not give free and fully formed consent to the marriage.

Lack of capacity

For a marriage to be considered valid there are a number of conditions which must be met. A marriage will be declared void and a lack of capacity will exist if:

- either party is already validly married to another person
- they are within the prohibited degrees of relationship
- either party is under 18 years of age

Non observance of formalities

There are many formal requirements for contracting a valid marriage, but where certain formalities are not observed the marriage will be void if the parties knowingly and wilfully contracted the marriage contrary to the requirements.

Lack of consent

When considering whether a marriage is valid or not the courts must establish whether the consent given was real or apparent. There are a number of reasons where the court may infer a lack of consent:

- mental incapacity
- intoxication
- fraud, mistake or misrepresentation
- duress and undue influence
- limited purpose marriages (these are marriages entered into for purposes other than those seen as legitimate)

Voidable marriages

There are two grounds on which a marriage can be declared voidable. The first of these is impotence and the second being the fact that one the spouses was unable to enter into and sustain a normal marital relationship.

Impotence

The first point to note is that impotence in this context refers to the inability to have sexual intercourse rather than the ability to procreate. Intercourse has been described as comprising 'ordinary and complete' sexual intercourse following the solemnisation of the marriage. It can be quite difficult to prove that somebody is impotent, and the impotence must continue to exist at the date of the hearing. It must be shown that full penetration is not possible or only possible in unreasonable conditions.

Inability to enter and sustain normal marital relationship

This ground first came to light in the Irish case R.S.J v J.S.J [1982] where it was held that if a person, through illness lacked the capacity to form a caring or considerate relationship with the spouse, a ground for annulment was established. Further cases have highlighted the need for creation and maintenance of an emotional and psychological relationship.

It should be noted that this inability can be inherent in either or both parties and can exist generally or in relation to each other.

Dissolution order

Introduction

A decree of dissolution allows both parties to a civil partnership to marry or enter into a new civil partnership. If a court is satisfied that the required conditions are met, the court will grant the decree of dissolution, dissolving the civil partnership. When it grants the decree of dissolution, the court may also make orders in relation to the payment of maintenance and lump sums, the transfer of property, the extinguishment of succession rights, pension rights etc.

The fact that the parties must have been living separate lives for two years before an application for a dissolution is made, means that separating civil partners may enter into a separation agreement to regulate matters between them before they seek a dissolution.

In any application for a decree of dissolution, the court can review any previous arrangements made by the parties such as a separation agreement, particularly if the circumstances of either party has changed.

When a decree of dissolution is granted, it cannot be reversed. Either party can apply to court to have any orders made under the decree - such as maintenance - reviewed by the court.

Grounds for granting a dissolution order

Before a court can grant a dissolution, the following conditions must be met:

- The parties must have been living apart from one another for a period amounting to two out of the previous three years before the application is made.
- Proper arrangements, particularly financial, must have been made or will be made for the civil partners.

If these conditions are met, either party to a civil partnership may apply to court for a decree of dissolution.

As the first civil partnerships were only registered in 2011, the earliest anyone will be able to apply for a dissolution decree is 2013 and the procedure will be similar to applying for a divorce decree.

When applying for a dissolution you are required to submit two documents to the Circuit Court:

- an application form (known as a family law civil bill). This document describes both you and your civil partner, your occupations and where you live. It also sets out when you registered your civil partnership, for how long you have been living apart and the names and birth dates of your children etc.

- a sworn statement of means. This document sets out your assets, your income, your debts and liabilities, your outgoings and pensions as applicable.

There is no requirement to submit a sworn statement relating to the welfare of your children or a document certifying that you have been advised of the alternatives to dissolution, as is required in divorce applications.

When all of the necessary documents have been filed, you will be given a date for the court hearing. The hearing will be held in private and you will need to show the court that you meet the requirements of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. If the court is satisfied that you have grounds for a dissolution, it will grant a decree of dissolution.

Ancillary orders (reliefs)

Introduction

Under the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996 the courts have the power to make additional orders, called ancillary orders or reliefs, in both judicial separation and divorce proceedings. The main purpose of these orders is that the dependent spouse and children will be provided for following the breakdown of the marriage. The family law courts can make orders in relation to a number of issues including custody and access, property, maintenance and succession rights.

It should also be noted that the courts have the power to make preliminary orders before the full hearing of a judicial separation or divorce application. Such orders may be necessary in emergency situations and where the full hearing of the application will not be heard for some time.

Custody and access order

Where there are children of the marriage, the question of who will have custody will often form part of an application for divorce or judicial separation. These issues may be dealt with by the court by way of preliminary orders pursuant to the 1995 Act, s 6 and the 1996 Act, s 11. If no orders are made prior to the hearing of the action, then the court may make orders pertaining to the welfare of the children pursuant to the 1995 Act, s 10 (1) (f) and the 1996 Act, s 15 (1) (f), and in both cases orders will be made pursuant to the provisions of the Guardianship of Infants Act, 1964, s 11.

In the case of Judicial separation, the court may make such an order at the time, or after the decree of judicial separation has been granted. In the case of the divorce, the 1996 Act s 15 (1) specifies that an application may be made to the court in relation to any of the issues set out in s 15 at any time after the decree of divorce has been granted.

Domestic violence orders

An applicant for relief in relation to domestic violence may make application to the court in that regard as a preliminary issue, again pursuant to the 1995 Act, s 6, on judicial separation, and s 11 of the 1996 Act in relation to divorce. In both cases, applications may be made for a safety order, a barring order, an interim barring order, or a protection order.

On the hearing of an application for a judicial separation or divorce, the court may make orders pursuant to the Domestic Violence Act, 1996 or the Domestic Violence (Amendment) Act, 2002, under the 1995 Act, s 10 (1) (d) and under the 1996 Act, s 15 (1) (d).

Relief pursuant to the Domestic Violence Act, 1996 or the Domestic Violence (Amendment) Act, 2002 may be sought on judicial separation or divorce, either on behalf of the applicant, or on behalf of a dependent family member. Such orders may be made where the court is of the opinion that there are reasonable grounds for believing that the safety or welfare of the applicant, or any dependent child, requires such orders to be made.

Maintenance Pending Suit Order

Where an application is made to court for the grant of a decree of judicial separation or divorce, the court may make an order for maintenance pending suit. This means they can require either spouse to make to the other spouse temporary maintenance payments for his or her support. It may also require the spouse to make periodical payments for the benefit of any dependent family members.

Periodical Payments Order

Where the court thinks fit a periodical payments order can be made, either in respect of the other spouse or in respect of a dependent family member. It is one of three different maintenance orders that can be made under the Family Law Act, 1995. (S 8 (1) (a) of the 1995 Act or S 13 (1) (a) of the 1996 Act)

Secured Periodical Payments Order

A secured periodical payments order can be made, again either in respect of the other spouse, or in respect of a dependent family member. The court must consider whether an application can be made to secure the maintenance against one of the spouse's assets e.g. the property or lands of a spouse. (S 8 (1) (b) of the 1995 Act or S 13 (1) (b) of the 1996 Act)

Lump Sum Order

The court can direct that a lump sum payment order be made, again either in respect of the other spouse, or dependent family member. The advantage of this type of order is that it gives the applicant spouse a certain degree of certainty that she will be paid maintenance. The courts will often make this type of order where it is considered that periodical payments might not be made. (S 8 (1) (c) of the 1995 Act or S 13 (1) (c) of the 1996 Act)

Variation orders

The Family Law Act, 1995 and the Family Law (Divorce) Act, 1996 allow for any of the maintenance orders mentioned above to be varied or discharged, on application to the court by a number of parties. Either of the spouses may apply for variation or discharge, or if either of the spouses has died, another person who has sufficient interest in the matter may also apply. The court, if it considers proper to do so, will have regard to any change in the circumstances of the parties, and to any new evidence that can be adduced.

Financial Compensation Order

There is provision in both Acts which allows the court to make orders in respect of life assurance for dependent spouses and children. When a decree of judicial separation is granted, the court may make a financial compensation order requiring either or both of the spouses to do one or more of the following:

- effect a life insurance policy for the benefit of the applicant, or any other dependent family member specified in the order
- assign such a policy in whole or in part to the other spouse or dependent family member
- continue to discharge the premiums due on a particular policy

The court must consider whether the financial security of either of the spouses or any dependent family member requires the making of such an order or whether they can be compensated by such an order for the loss of benefit because of the judicial separation.

Pension Adjustment Order

Pensions are regarded in the same way as any other asset. If it is required that a pension benefit be adjusted, an application must be made to the court for a decree of judicial separation (or divorce). It is not sufficient to include it in a deed of separation.

Either party may apply for a pension adjustment order, either for his or her own benefit or for the benefit of a dependent family member. A third party may also apply for the benefit of a dependent family member.

Adjustments to pensions on divorce

S 17 of the Family Law (Divorce) Act, 1996 sets out the law relating to the regulating of pensions as an ancillary relief on divorce. An order may be sought, by either an applicant spouse, or by a person acting on behalf of a dependent family member.

A pension adjustment order may be obtained either at the time the decree of divorce is granted, or in the case of an application to adjust a retirement benefit, at any time during the lifetime of the spouse who is a member of the pension scheme in question.

Orders in respect of the family home

Disputes in relation to the family home often form a significant of every application for judicial separation or divorce. The family home can be owned by one or both of the parties or can be rented by way of tenancy with a local authority or privately.

An application for a property adjustment order must be made during the lifetime of the other spouse, but can be made at any time after the granting of either a decree of judicial separation or divorce. However, if either spouse remarries, no property adjustment order may be made in favour of the married spouse.

Under s 9 of the Family Law Act, 1995 the court can make property adjustment orders as follows:

- the court may direct that property be transferred from one spouse to another, or to any dependent family member, or to a specified person for the benefit of such a member

- the court can direct a settlement of any property for the benefit of either spouse, or for a dependent family member
- the court can direct an order which varies a previously agreed settlement of property
- the court can direct an extinguishment or reduction of any interest held by either spouse under any such settlement

It should be noted that property adjustment orders can be made in favour of all kinds of property, both real and personal e.g. stocks, shares, art, livestock, business and investments.

Where either spouse is making an application concerning the family home it is important that they have the correct folio number in the case of a registered property, as incorrect folio numbers can create a delay. The names on the folio must also be the same as the names of the parties. If the names are different then you should explain why. When the names on the court order do not match the names on the folio the orders are returned from The Property Registration Authority. This usually happens when the wife used her maiden name when purchasing the property, but her married name is on the civil bill.

If the property is unregistered you should provide the description of the property as required by the Property Registration Authority.

Orders regarding succession rights

In considering whether the succession rights of spouses (under the Succession Act 1965) should be extinguished, the court must be satisfied that 'adequate and reasonable' financial provision exists or can be made by way of other maintenance orders. The court must also be satisfied that proper provision is made for the spouse concerned 'having regard to all the circumstances' and that the order made is in the 'in the interests of justice'. It is unlikely that a court will make an order extinguishing inheritance rights where such an order would jeopardise the spouse's future financial security.

With divorce the situation is different. Because the spouses have lost their status as spouses, there is no longer any need to have a provision equivalent to s 14 of the 1995 Act because neither of the spouses is automatically entitled to a share in the estate of his or her divorced spouse as a legal right or on intestacy upon the latter's death.

Blocking order

The Family Law Divorce Act, 1996 provides that if one of the spouses in respect of whom a decree of divorce has been granted dies, the former spouse may make an application to the court to have provision made for himself or herself out of the estate of the deceased spouse.

The act also makes provision for the granting of what is known as a 'blocking order'. This means that either spouse could make an application preventing the other spouse from

enforcing the provisions of s 18 (1), post-divorce. The court will only make an order if it considers it just to do so.

Reviewable disposition order

If the court is satisfied that the other party concerned, with the intention of defeating a claim for relief, proposes to make any disposition of or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for the purpose of restraining that other spouse or other person from doing so or otherwise for protecting the claim.

Relief order for foreign divorce

A foreign divorce may be valid in the Republic of Ireland. The rules for the recognition are extremely complicated. Just as in the case of Irish divorce, the parties to a recognised foreign divorce cease to be each other's spouses. If one of them dies, the surviving ex-spouse, who has not remarried, may be entitled to apply to the Irish courts, not more than six months after representation is first granted under the Succession Act 1965 in respect of the estate of the deceased ex-spouse, for provision out of the estate of the deceased ex-spouse under s 25 of the 1995 Act. The court will order such provision in limited circumstances.

Domestic violence

Overview

Domestic violence is where one person tries to control and assert power over another their partner in an intimate relationship. It can be physical abuse, emotional abuse or sexual abuse. In the majority of cases it is perpetrated by men, but women can also be guilty of domestic violence.

Physical abuse

Physical abuse is perhaps the most common form of abuse. It can result in physical injury and in some cases it can be life threatening. It doesn't always leave visible marks or scars. Examples of physical abuse include being pushed, punched, bitten or severely beaten.

Emotional abuse

Emotional abuse is a method of establishing a power imbalance within a relationship. It is often unseen or intangible to those outside the relationship. It can be as damaging as physical abuse. It can involve threats of physical and sexual abuse. Some examples of emotional abuse include being put down, being constantly criticised, being constantly controlled and monitored by the use of technology.

Sexual abuse

Sexual abuse is more likely to occur where there is an element of control or abuse in an intimate relationship. In the majority of cases it will be women who are subjected to this type of abuse by their partners. Sexual abuse includes being repeatedly raped and beaten, being raped in front of their children, being asked to perform unwanted acts of a sexual nature.

Protection available for victims of sexual abuse

The Domestic Violence Act, 1996 provides for the protection, safety and welfare of married couples, cohabiting couples, parents, children and anybody else in a domestic relationship. Where an incident of domestic abuse has been reported Gardaí have the power to arrest and prosecute a violent family member for perpetrating such an act.

Under the Domestic Violence Act the following orders may be obtained;

- Barring Order
- Safety Order
- Protection Order

Barring Order

This order requires the violent person to leave the family home until the order expires or is set aside. The District Court may grant a barring order for up to three years and an application can be made for an extension. There is no time limit on such an order if made by the Circuit Court.

Once a Barring Order is granted, the offender must;

- leave the home
- not use, or threaten to use violence against the applicant
- not molest the applicant or put them in fear
- not be in the area where the applicant lives

Interim Barring Order

This is a temporary barring order. It is intended to last until the barring order application is heard in court and a decision made. The court must be satisfied that there are reasonable grounds for believing that there is immediate risk of significant harm to the applicant or any dependent person if the order is not made immediately and the granting of a protection order would not be sufficient to protect the applicant or any dependent person.

Safety Order

This order prevents the wrongdoer from committing any further violence, or threatening violence, against the applicant. The respondent is not required to leave the home. If the applicant and alleged offender are not living together, the court can order the alleged offender not to watch or be near the applicant's home.

Who can apply?

- the spouse of a respondent, irrespective of how long they have lived together
- an unmarried partner, who has lived with the respondent for six of the previous twelve months
- a parent can apply for an order against a child who is not a dependent (an adult child)
- a person of full age who lives with the respondent in a relationship, the basis of which is primarily non contractual

If the relationship is not based on marriage the court will consider the following;

- the length of time the people involve lived together
- the type of duties carried out by either person for the other
- if any payment was made by one person to the other for living expenses
- other matters the court considers appropriate in the circumstances

Safety Orders will be granted where the court considers there are reasonable grounds for believing that the safety and welfare of the applicant are at risk.

Duration of a Safety Order

An order made by a District Court can last up to five years. Before this order expires, an application can be made to have it extended for a further five years or for a shorter period as the court sees fit.

Protection Order

This is a temporary safety order. It gives protection to the applicant until the court decides on a safety or barring order application. It is intended to last until the case is heard and a decision made. It does not oblige the respondent to leave the family home.

Children

Introduction

The breakdown of any relationship can be a very difficult time for all the parties involved. It is particularly distressing when there are children involved. There will be many issues to consider such as guardianship, custody and access and financial provision. The courts, at all times, will put the best interests of the child first before making any decision regarding them.

Guardianship

Guardianship means the rights and duties of parents in respect of the upbringing of their children. A guardian has the right to make all major decisions affecting the child's upbringing, including choice of school, medical treatment, religious matters, health requirements and decisions about leaving the country. Guardians are responsible for the welfare of the child. Welfare includes the moral, intellectual and physical wellbeing of the child and where there is property held on behalf of the child, it includes the proper administration of such property.

Who can be a guardian?

The natural mother of a child is automatically a guardian of the child. Whether the father of a child is an automatic guardian depends on his relationship with the mother.

The married mother and father of a child are the most common guardians and they are so entitled by virtue of section 6(1) of the Guardianship of Infants Act, 1964. However, for the father to have guardianship status, the parties must be married at the time of the birth of the child. Alternatively, he can acquire guardianship status if the parties marry after the birth of the child.

Unmarried fathers

The position of unmarried fathers is not as straightforward as that of the married father. The unmarried father, although the natural father of the child, is not automatically a guardian. However, he can apply to the court under section 6A of the Guardianship of Infants Act, 1964 (as inserted by section 12 of the Status of Children Act, 1987) to be appointed guardian.

If the mother agrees to the father becoming a guardian there is no need to go to court. In this case both parents must complete a statutory declaration in the presence of a Peace Commissioner (Guardianship of Children (Statutory Declaration) Regulations, 1998 (S.I. No. 5 of 1998). This declaration states the name of both parents, that they are unmarried and that they agree to the father being appointed as a joint guardian. They then become joint guardians of the child. The declaration also states that the parents have agreed arrangements regarding custody and access. Where there is more than one child, a separate declaration must be made for each child.

If the mother does not agree to the father becoming the child's guardian, then the father can apply to the court to be appointed as a joint guardian. This is possible, whether or not his name is on the child's birth certificate.

Custody

Custody is the right of a parent to exercise physical care and control in respect of the upbringing of his or her child on a day-to-day basis. The married parents of a child are automatically joint guardians and custodians of their child.

Where divorce proceedings have been initiated, both parents can apply for joint custody. The courts however may not always award joint custody and may award sole custody to one party. It may be the case that there are high levels of conflict between the parents and granting joint custody would not be in the child's best interest.

It is possible for a child's father to apply for sole custody of his child. However, there would have to be compelling reasons for removing a child from the custody of her/his mother.

Who else can apply for custody?

It is also possible for people other than the parents to apply for custody, where the child is not in the custody of his/her parents. The grandparents or relatives or Health Service Executive can apply for custody following an application for guardianship. A person who is a guardian and who does not have custody (jointly or otherwise) or from whom custody of the child has been taken can apply for custody order under section 11 of the Guardianship of Infants Act 1964 (as amended).

Making an application

Most applications for custody are made in the District Court. You can engage a solicitor to make an application on your behalf or you can make the application yourself. You may be entitled to legal aid.

If you choose not to engage a solicitor you will need to contact the District Court office in the area where you or the respondent live. You must complete and lodge the relevant court forms in the court office. Court staff will identify the forms you need to make your application but cannot tell you what to put in the forms.

Notice of the application must be served on the respondent at least fourteen days or, in the case of proceedings certified as urgent, at least two days, before the date of the court hearing. After service, the notice, together with a statutory declaration as to service, must be lodged with the District Court clerk at least two days before the court hearing. You must also attend in court on the day to make your application.

Where the District Court makes an order under the Act, the court clerk will give, or send by ordinary post, a copy of the order to each person in whose favour or against whom the order was made.

Sometimes applications for custody and access form part of other proceedings for example, judicial separation or divorce in the Circuit Court or the High Court. In such cases the appropriate court to deal with an application for custody and/or access is the court dealing with the other proceedings. This includes applications to vary or discharge previous custody and/or access orders.

Access

Access is contact between a child and its parent or other relative with whom the child does not live. It can be physical in the sense of the child seeing their parent or relative in person or it can be by means of a letter, telephone or other form of electronic communication. It can also mean having the right to visit and spend time with a child and to take them out for an agreed length of time.

When parents of a child separate they can make informal arrangements so that the other parent can have access to their child on a regular basis without having to go to court.

Where the parents cannot agree to an informal arrangement, either parent can ask the court to decide which parent will have custody of the child and what access the other parent will have.

It is important to remember that the court will always take into consideration the best interests of the child when making any access order. Either parent can apply to court to vary the access order if this is in the best interests of the child.

Maintenance

Introduction

The Family Law (Maintenance of Spouses and Children) Act, 1976 governs the grant of maintenance orders for the benefit of spouses and dependent children of the family. With this type of order the court directs one spouse to make periodic payments to the other of such amount and frequency as it thinks appropriate.

Dependent child of the family

At this stage it is important to note that the definition of a dependent child of the family goes beyond that of a child of the marriage. It is defined as meaning any dependent child:

- of both spouses, or adopted by both spouses under the Adoption Acts, or on relation to whom both spouses are in loco parentis; or

- of either spouse, or adopted by either spouse under the Adoption Acts, or in relation to whom either spouse is in loco parentis, where the other spouse, being aware that he or she is not the parent of the child, has treated the child as a member of the family

Duty to provide maintenance

Both parents have a responsibility to support their children financially. This applies to all parents, whether married, separated, living together or if they have never lived together. The parent with custody of the children has to take care of them and look after their day-to-day needs. The parent who does not have custody usually has to pay money to the parent with custody. This is to help cover the costs of taking care of the children.

Assessing the amount of maintenance

Firstly the spouse making the application will have to establish that the other spouse failed to make proper provision for them. The court will then have to consider what represents proper maintenance in the circumstances. In doing so the court will look at the following criteria;

- the income, earning capacity, property and other financial resources of the spouse and any dependent children of the family
- the financial and other responsibilities of (a) the spouses towards each other and any dependent children of the family and (b) each spouse as a parent towards any other dependent children, and the needs of any such children, including the need for care and attention
- the conduct of each of the spouses

The court will seek to find a balance between the needs of the applicant spouse and the resources of the respondent spouse. It will look at any income the respondent is receiving and balance that with all expenses and outgoings he or she may have. Essentially the aim of the court is to make sure that proper provision is made in the circumstances.

Types of maintenance order

Periodical Payments Order

This type of order gives the court the power to request either spouse to make regular payments in respect of the other spouse, or dependent family member, under the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996. Typically the court would request either of the spouses to make weekly or monthly payments to the other spouse/dependent family member.

Secured Periodical Payments Order

A secured periodical payments order can be made, again either in respect of the other spouse, or in respect of a dependent family member again under both of the Acts mentioned above. The court must consider whether an application can be made to secure the maintenance against one of the spouse's assets e.g. the property or lands of a spouse.

Lump Sum Order

A lump sum payment order can be made, again either in respect of the other spouse, or dependent family member, under both of the Acts mentioned above. The advantage of this type of order is that it gives the applicant spouse a certain degree of certainty that she will be paid maintenance. The courts will often make this type of order where it is considered that periodical payments might not be made.

Applying for maintenance

Most applications for maintenance are made in the District Court. It is possible engage a solicitor to make an application on your behalf or you can make the application yourself. You may also be entitled to legal aid.

If you choose not to engage a solicitor you will need to contact the District Court office in the area where you live to issue a maintenance summons. Court staff cannot tell you how to complete the summons.

The summons must be served on the respondent at least fourteen days or, where service is by registered prepaid post, at least twenty-one days, before the date of the court hearing. After service, the original summons, together with a statutory declaration as to service, with proof of postage attached, must be lodged with the District Court clerk at least two days before the date of the court hearing. You must also attend in court on the day to make your application.

Sometimes applications for maintenance form part of other proceedings for example, judicial separation/ divorce /dissolution in the Circuit Court or the High Court. In such cases the appropriate court to deal with an application for maintenance is the court dealing with (or that dealt with) the judicial separation/divorce/dissolution proceedings. This includes applications to discharge or vary the maintenance order. Maintenance applications can also be brought under the Guardianship of Infants Acts, 1964 - 1997 as part of custody, access, maintenance or other applications.

Maintenance limits

The District Court can make orders up to €500 per week per spouse with a maximum of €150 a week per child. The maximum that the District Court can order a spouse/civil partner to pay for the other spouse is €500 per week.

The Circuit Family Court can also grant orders and has an unlimited jurisdiction. However, where the Circuit Family Court is hearing an appeal from the District Court, it is limited to the jurisdiction of the District Court.

Varying the maintenance order

It is possible that the circumstances of either spouse may have changed following the granting of a maintenance order. In that case, either party may make an application to the court to have the amount increased or decreased. The person making the application must furnish evidence to the court showing that the circumstances have indeed changed.

A maintenance order can run from the date on which the order was applied for, but more usually it only takes effect from the date of the court order. From that point on, where maintenance is not paid or only partly or sometimes paid, the unpaid amount is known as ‘arrears of maintenance’.

Breach of maintenance order

Non-payment of a maintenance order is a criminal offence and may result in a prison sentence or a fine because the person that breaches the order is also in contempt of court.

Where a maintenance debtor is unable to pay maintenance it is unlikely that the court will impose a prison sentence. However, where he or she refuses to pay it then a prison sentence may be imposed.

Where maintenance is not paid

There are a number of options open to the maintenance creditor where the maintenance debtor is refusing to pay maintenance.

If the maintenance debtor is in employment or is a private pension you can apply to court for an attachment of earnings order. This type of order requires the employer or pension provider to deduct the maintenance payments from the employees’ salary, social welfare payment or pension payment.

Where the maintenance debtor is self-employed or you do not want to apply for an attachment of earnings order, then you can apply for an enforcement summons. This compels the person to attend court on a specific date or risk imprisonment for contempt of court.

Pensions on divorce and separation

Introduction

The pension entitlements of you and your spouse arising from occupational or personal pension arrangements may be affected by separation or divorce. If you or your spouse have been in a pension arrangement for some time, pensions could be a very significant part of your family assets. If you have children or other dependents, you should also consider what would happen were you or your ex-spouse to die. Pension rights cannot be shared out without a court order. You should bear in mind that you and your dependents may have benefit entitlements from both your own arrangement, and your spouse's arrangement.

Effect of legislation

The Family Law Act, 1995 and the Family Law (Divorce) Act, 1996 obliges the courts to take the value of benefit pensions into account in arriving at a financial settlement following the granting of a decree of judicial separation or divorce. The legislation does not apply to separation agreements not involving the court (it should be noted that separation agreements which are not made by court cannot split pension benefits).

What is a pension adjustment order?

A Pension Adjustment Order directs the trustees (or administrators) of a pension scheme of which one spouse is a member (the member spouse), to pay to the other spouse (the non-member spouse) part of the pension benefits accrued to the member spouse. The Order can be made over any benefits accrued from the date the member spouse joined the scheme (even if this predates the marriage of the spouses) up to the date of the making of the Order by the Court, but not beyond that date.

Retirement benefits

Retirement benefits include benefits payable to the member of the pension scheme, or to others, at, or following, retirement or earlier withdrawal from service except death in service benefits. They include retirement pensions, retirement lump sums or gratuities: benefits (such as dependents pensions) payable following the members' death in retirement and periodic increases on all pensions whilst in payment. The definition of retirement benefit includes:

- benefits arising from previous employment which has not yet commenced
- retirement pensions which are in course of payment
- benefits arising from a current employment which all commence from a future date

An order in relation to retirement benefits may be made in favour of either the non-member spouse or a person representing a dependent child. The order is served on the trustees of the pension scheme and requires that they pay a specified part of the retirement benefits earned by the member in question to the member named in the order.

Contingent benefits

Contingent benefits are the benefits payable if a scheme member dies during employment (or self-employment) to which the scheme relates. In a company pension scheme, contingent benefits are generally referred to as 'death in service' benefits. This definition includes lump sum benefit and pensions payable to dependents.

As with the retirement benefit, an order in relation to contingent benefits may be made in favour of the non-member spouse and or person representing a dependent child.

Nominal pension adjustment orders

The issue of how to ensure that neither spouse has any interest in the pension scheme of the other often arises on divorce and separation. This cannot be achieved by waiver or disclaimer, but only by a form of pension adjustment order. An example would be where a wife wants her husband to have no interest in her pension scheme, they can agree to a nominal pension adjustment order being made.