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Family Law – the case for reform and a review of cohabitation legislation

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Introduction

In this paper I will examine the need to reform the family law system in Ireland and I will also look at the introduction of cohabitation legislation in Ireland in 2011, and how it has impacted family law over the last seven years.

Part I

Family law – the case for reform

Introduction

The current family law system is broken and failing the most vulnerable in our society. This failure is two-fold: there are chronic delays in accessing the courts and the facilities in the actual buildings are Dickensian and not fit for purpose. While we have excellent legislation – a Rolls Royce standard – there is a severe lack of resources to give effect to and implement these laws.

The Family and Child Law Committee of the Law Society has examined the current system and made a number of recommendations to Government, the latest of which involved written and oral submissions to the Joint Oireachtas Committee on Justice and Equality in February of this year.

District Court

The vast majority of family law proceedings take place in the District Court. The introduction of the Child and Family Relationships Act 2015 has put an increased burden on an already over worked District Family Court system by making it necessary to hear the voice of the child in all proceedings involving access, custody and access. No resources have been provided to pay for the experts required to complete the voice of the child reports pursuant to section 32 of the Guardianship of Infants Act, 1964 as inserted by the 2015 Act.

Prior to the 2015 Act custody, guardianship and access disputes could be resolved on the first listing of a case, now the first listing may only deal with the name of the expert to be appointed or whether or not there should be one appointed. If no expert is appointed then further court time may be expended by the Judge fixing a date in the future when he can take time to meet the child or children. Generally cases now require a number of listings before they can be resolved further increasing the workload of the District Court Judges.

Special Division of Family Law Courts

A specialist division of family law courts and judges would assist greatly in dealing with family law cases more efficiently as it would be likely that the same judges would be available to deal with cases which appear regularly before the courts and a greater degree of consistency could be established. It has been noted elsewhere that judges should not be confined to this specialty but should be appointed as 'general' judges who could be assigned to family law but who would not necessarily spend all their judicial career in family law.

More focus should be placed on settling cases earlier on in the process. Very active intervention in family law cases by Judges, not County Registrars, or other officials, with an emphasis on resolution and ADR could result in significant savings of time, resources for all concerned.

The legal aid board appears chronically underfunded and it is not economically possible for solicitors to make a living from the private practitioner scheme which has led to a flight of solicitors from the District Family Court where it operates.

A dedicated family law courts structure throughout the country could remedy many of the problems currently faced, but only if:

a. The family law court system was properly resourced and
b. The family law court system was integrated with ADR and the legal aid board in the court houses, providing facilities not only for the courts but also for ADR and the legal aid board.
c. Proper premises were provided for the family law courts.
d. If it were simply a case of creating a family law division within existing structures then a referendum would not be required. Equally the changes to District and Circuit Court would require some consideration. See also our 2014 submission for alternatives to this model, which might require a constitutional referendum.
e. There is a benefit to making the change as simple as possible to ensure that it takes effect rather than seek to change everything while it remains the same.

The best way of ensuring the voice of the child is heard is through the appointment of an expert by the Court. There is a significant issue regarding efficient use of resources if a judge must personally hear the voice of the child or children.

Legal Aid

One of the great difficulties in the family law system is the lack of resources given to the legal aid board. In order to properly deal with the huge backlog of work and delays in granting legal assistance to clients they require an increase in resources.

Legal aid has not kept abreast of developments in the complexity of the law, the needs of clients or what it now involves to defend and represent a client. The longer the issue of legal aid is ignored – however unpopular it is – the greater we are contributing to the justice gap, one inequality compounding another in many cases.

Rights of Fathers
From a practical viewpoint but without empirical evidence, it appears that fathers who wish to have extensive access with their children face an uphill battle in the Irish courts and will not receive extensive access without the agreement of their spouse or a section 47 or 32 report. Shared parenting ie 50/50 is not widespread currently.

Fathers are being respected but in relation to children they may not always be fairly treated.

Again more fact based research is required. The creation of a specialist family law division may assist in the development of a court policy towards fathers which may be more enlightened than the current position.

Summary
The family justice system is undoubtedly one of the more 'human sides' to the practice of law - not unlike the issues faced in the health system – we deal with adults and children in need of urgent assistance for important issues in their lives, it is a system that is chronically underfunded, overstretched practitioners, most vulnerable clients and the need for specialised care/facilities?
What is required now is the political will to drive through reforms and to ensure that, together with other agencies, the welfare of families, children and communities are properly served.

Practitioners in the field are committed, but exasperated on a number of fronts, some of which have been outlined.

Part II

Cohabitants – Rights and Obligations

Family law in Ireland changed dramatically on 1 January 2011 with the enactment of cohabitation legislation.

This legislation, with the rather cumbersome title The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (the "2010 Act"), gives wide ranging rights and obligations to cohabiting couples. Prior to the 2010 Act, couples who lived together, even for many years, acquired no rights against each other. For example, there were no automatic property rights, rights of occupation in the property that was their home, financial support or inheritance rights for cohabitants.

The 2010 Act provides a redress scheme for cohabitants when their relationship ends, through death or separation. A cohabitant may apply to court for maintenance, pension adjustment orders, property adjustment orders or a share in the estate (assets) of a cohabitant who has died. In order to avail of the redress scheme it is necessary to meet the following criteria:

1. 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 relationship and who are not related to each other within the prohibited degrees of relationship.

When determining whether two adults are cohabitants the Courts shall take into account all the circumstances of the relationship and in particular will have regard to the following which are set out in Section 172 (2) of the 2010 Act:

(a) The duration of the relationship;

(b) The basis on which the couple live together;

(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 others as a couple.

The meaning of "intimate and committed" is covered in Section 172 (3) which specifies that a relationship does not cease to be intimate and committed merely because it is no longer sexual in nature.

What constitutes living together was considered in the Court of Appeal decision **MW v DC [2017] ICEA 255** and concluded that the legal concept of living together as a couple for the purposes of Section 172 does not require the couple to physically live together at all times in the same shared property:

> *"....notwithstanding that a couple may not be physically living day by day in the same residence, during the two year period immediately prior to the end of the relationship, Section 172 envisages that a court may decide on all the relevant facts that they, nonetheless continued to live together as a couple during that period."*

2 Who is a qualifying cohabitant?

For the purposes of the 2010 Act a cohabitant must be living with their partner as a couple for a period of:

(a) Two years or more where they are the parents of one or more dependent children; and

(b) Five years or more in any other case.

However, even if a cohabitant qualifies under (a) and (b) above, they will not be considered a cohabitant if they are still married to another person and they have not been living apart from his/her spouse for a period of at least four out of the previous five years.

Therefore in order to qualify for the reliefs set out in the 2010 Act it is necessary to establish that the cohabitants have lived together in an intimate and committed relationship for in excess of two years if they are the parents of dependent children and five years in all other circumstances.

There can be difficulties in establishing the duration of the relationship, as very often there is no formal record of the date the parties began cohabiting. If the matter is contested in court, much will depend on the evidence before the court. A court must take into account all the circumstances of the relationship, together with the factors identified in Section 172 of the 2010 Act.

3 Time Limits

The claim for redress must be made within two years of the end of the relationship. This can be problematic, particularly in establishing exactly when the relationship ended.

In the case of entitlements of a cohabitant on the death of their partner, a claim must be initiated within six months after the grant of representation is extracted. There is no provision for the extension of this limitation period, nor is there any provision that a surviving cohabitant must be notified of the making of the grant or the time limit.

4 The Redress Scheme

Once a cohabitant satisfies a court that he or she is financially dependent on the other cohabitant and the financial dependence arises from the relationship or the ending of the relationship a court may, if it is just and equitable to do so in all the circumstances, make certain redress orders as appropriate.

In determining whether or not it is just and equitable to do so, the Court will have regard to the factors set out in Section 173 of the 2010 Act:

(a) The financial circumstances, needs and obligations of each qualified cohabitant existing 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 and the degree of commitment of the parties to one another;

(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.

The court is obliged to make orders only if it would be just and equitable to do so in all the circumstances.

It is important to note that is a requirement to prove financial dependence in cases where the relationship has broken down. There is no such requirement for a cohabitant making an application under Section 194 of the 2010 Act to show that he or she was financially dependent on the deceased.

5 Entitlements while living

In a situation where the relationship has broken down and the cohabitants are both still alive, the court has the power under the redress scheme to make the following orders:

(a) Property Adjustment Order

These provisions are similar to the property adjustment orders set out in the judicial separation and divorce legislation. However Section 174 (2) states that "Before making an order under this section, the court shall have regard to whether in all the circumstances it would be practicable for the financial needs of the qualified cohabitant to be met by an order made under Section 175 (maintenance section) or Section 187 (pension adjustment section), having regard to all the circumstances, including the likelihood of a future change in circumstances of either of the qualified cohabitants".

(b) Compensatory Maintenance Order

This covers both periodical payments and lump sum payments. The periodic payments can be for life but cease on the death of the first qualified cohabitant to die. The periodical payments can be secured by way of a court order, including an attachment of earnings order.

(c) Pension Adjustment Order

This is similar to the provisions set out in the judicial separation and divorce legislation.

While the redress scheme is similar to the ancillary relief that can be granted on separation or divorce, it is more limited. In addition, 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. In contrast with the judicial separation and divorce, the redress scheme does **not** take into account:

1. The standard of living of the cohabitants;
2. The age of the cohabitants; and
3. The accommodation needs of the cohabitants.

It should also be noted that a court must take into account the needs of a spouse of a cohabitant who may very well have a prior and significant claim on the assets and wealth of the cohabitant, including their pension.

It is generally held that that rights of a cohabitant are less than those of a spouse.

6 Entitlements in death

When considering whether to make an order for provision out of the estate of a deceased cohabitant, a court must have regard to the following:

1. The factors set out in Section 173 (3) (See above)
2. Whether a property, maintenance or pension adjustment order was already made in favour of the applicant;
3. Whether a devise or bequest was made by the deceased in favour of the applicant and;
4. The interests of the beneficiaries of the estate,

Once these issues have been considered, the court has discretion as to the extent of the provision that it may make to the surviving qualified cohabitant. It will consider the rights of any other person who may have an interest in the matter. If the court is satisfied that proper provision was not made for the applicant during the life time of the deceased for any reason other than conduct by the applicant that in the opinion of the court, it would in all the circumstances be unjust to disregard.

When making provision for the surviving cohabitant, the court cannot exceed a share greater than what a spouse or civil partner would be entitled to. Accordingly, the extent of the share available will depend on whether a deceased died testate or intestate.

Where a deceased is married at the date of death, an application brought by a cohabitant cannot affect the legal right share of the spouse. No provision can be made for a qualified cohabitant from the legal right share of a spouse. However no similar restriction is imposed on the legal right share of a surviving civil partner.

7 Caselaw

The leading case is DC v DR [2015] IEHC 309 in which Baker J gives a very detailed judgment on the 2010 Act arising from an application by the Plaintiff for financial provision out of the estate of a deceased cohabitant. The deceased died intestate in August 2014. She was survived by her three brothers who were the only next of kin. The personal representatives of her estate denied that the plaintiff was a cohabitant and denied that provision should be made for him out of her estate. They claimed that the parties were merely good friends and not cohabitants.

The deceased had never married, had no children and was 69 when she died. The plaintiff was party to a previous marriage that had been annulled, he had no children. The plaintiff was 64 at the time of the application and was a farmer and horse trainer. The couple met in 1994 when the deceased was living with her mother in her mother's home. The plaintiff's evidence was that he and the deceased became intimate in 1995 and the relation was a committed one when the mother of the deceased died in 1996. Between then and 2004, when his own mother died, he said he spent two or three nights a week with the deceased at her home and when his own mother died he moved into the house with the deceased and resided there since. The Plaintiff said the intimate and committed relationship continued until the death of the deceased. The couple shared an interest in horses.

The plaintiff was wealthy in his own right, having inherited 112 acres of land in 1982 and derived a small income from his horse training activities and farming. He did not own a house.

The defendants denied that the couple were ever sexually intimate and they asserted that the relationship was one of close friendship only.

The deceased inherited lands from her mother in 1996. These lands were re-zoned and became very valuable, realising a net sum after tax of €3 million. The plaintiff said this had the effect that their lifestyle as a couple changed. They bought a bigger car, spent large sums of money refurnishing the deceased's old family home, enjoyed a good social life, went on frequent holidays, ate out, were members of a leisure club and golf club.

Evidence was also given in the weeks leading up to the deceased's death that the deceased suggested that they should marry. A priest gave evidence to the court that the deceased told him that she wanted to marry the plaintiff. The court found that the couple had discussed marriage with each other over a number of years and the fact they had such discussions was an indicator of the strength and nature of their bond.

The plaintiff gave evidence that he shared a bedroom with the deceased, had their meals together and socialised together.

The defendant called evidence of various witnesses, who while they acknowledged the deceased and plaintiff were friends, they disputed the intimate nature of the relationship. The deceased's surviving brothers gave evidence and said they were not aware the plaintiff was living with the deceased and that she never mentioned it.

The degree to which they presented themselves as a couple was also relevant. The court held that it was not necessary to establish that the adults made public expressions of physical affection.

The court also looked at whether the parties were financially dependent or interdependent. The court found that there was little financial interdependence in the early years of the relationship. The court found however, that once the deceased had become a woman of means, and began to pay for the cost of holidays, cars meals out, etc, that amounted to financial interdependence.

It was argued that as the Plaintiff had reasonable means of his own (circa land worth €1.5 million), he did not require provision. It was also argued that if it was a marriage separation case it might be argued that one-third of the estate was more than adequate.

In considering conduct in this case, the court held that it was not only misconduct which could be considered under this heading, but also conduct that was beneficial. In this case the manner in which the plaintiff cared for the deceased in her last illness was taken into account.

In considering the interests of others, it is the financial interests of other beneficiaries that the court is to take into account. This is not confined to the financial interest of a spouse or civil partner or children, who did not feature in this case. The other beneficiaries in this case were the brothers of the deceased, and the court held that as they had also inherited from their mother in the same way as the deceased, they were not in financial difficulties. It was a matter for the court to balance their needs with those of the plaintiff.

The court held in making provision for a cohabitee, the court had to have regard to the position of marriage under the constitution, and the fact that the legislature did not make automatic provision for the surviving cohabitee.

It is of interest that the court held that the legislation does not allow the court to formulate a rule of thumb in making proper provision in such cases. It is a matter of applying the statutory provisions and factors to the facts of each case.

Baker J held that the "net estate" is defined in the 2010 Act and it is established after provision is made for any surviving spouse or civil partner. She held on the facts of the case, that it was not necessary to deduct any costs of sale or tax, because her order made provision by a distribution in species of the assets. She directed that the two investment properties be transferred to the plaintiff. The former family home and land was to go to the other beneficiaries, the deceased's brothers. According to the judgment that represented a split of 45% of the assets in favour of the plaintiff. This was not greater than what the plaintiff might have been entitled to if he had been married to the deceased as his legal right share would have been half of the estate if the deceased died testate.

There is a paucity of caselaw in this area of family law, with few written judgments. This case is an essential read for any family law practitioner advising a cohabitant.

8 Cohabitants' Agreements

The 2010 Act provides for cohabitants' agreements to allow couples to regulate their financial affairs, during the relationship, and crucially when the relationship ends either through breakdown or death. A cohabitation agreement is the equivalent of a pre-nuptial agreement for cohabitants. It is interesting to note that the 2010 Act allows for the establishment of Cohabitation Agreements, which is in stark contrast to married couples.

A cohabitant agreement is only valid if the cohabitants:

1. Have each received independent legal advice before entering into it; or

2. Have received legal advice together and have waived in writing their right to independent legal advice; and
3. The agreement is in writing and both cohabitants; and
4. The general law of contract is complied with.

The aim of the this provision is to encourage couples who do not want to marry to take responsibility for their own arrangements while living together and what is to happen in the event that the relationship ends either by breakdown or death.

A cohabitants' agreement can deal comprehensively with how a couple intends to arrange and organise the financial aspects of their relationship. It also allows the parties to opt out of the redress scheme outlined above. However there is a caveat in Section 202 (4) of the 2010 Act which provides that a court may vary or set aside a cohabitants' agreement in exceptional circumstances, where its enforceability would cause a serious injustice.

Care should be taken when drafting such agreements. Notwithstanding the legislation allowing for the parties to receive legal advice together, it would be prudent to advise each party to obtain independent legal advice. The Family Law Committee is currently updating the precedent cohabitants' agreement which should be available shortly.