



# Relate

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The journal of developments in social services, policy and legislation in Ireland

## Nullity, separation, divorce and dissolution

This issue of *Relate* provides an overview of nullity, separation, divorce and dissolution in Ireland. In 2015 the courts received 1,419 applications for judicial separation, 4,314 applications for divorce and 78 applications for dissolution. Marital breakdown affects all areas of a person's life. Most people regulate matters between them in a legal context under the provisions of the Family Law Acts or the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. There are three methods of regulating matters, a separation agreement, a judicial separation or a divorce or dissolution. A separation agreement is reached through agreement between the parties, whereas a court must grant a judicial separation, divorce or dissolution. Of these, only a decree of divorce or dissolution dissolves a marriage or civil partnership and allows each party to remarry.

### Nullity

Nullity is concerned with whether a marriage is valid. A nullity decree is when the court determines that no marriage ever existed and the parties were never legally married to each other. The Circuit Court has jurisdiction to hear applications for nullity and only a court-ordered nullity has the effect of making a marriage null and void. There are two types of nullity, void and voidable.

### Void marriages

A marriage can be declared void on one of the following three grounds: non-observance of formalities, lack of capacity and lack of consent.

The primary formality required for marriage in Ireland is that the couple give the Registrar of Marriages at least three months' notice in writing of their intention to marry.

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A lack of capacity can arise in a number of ways, for example:

- If either person is already married then they cannot marry someone else
- If the couple are within the prohibited degrees of blood relationships, for example, if they are half-sister or half-brother
- If either person is under the age of 18 (unless a special exemption has been obtained to allow someone marry at the age of 16)

The vast majority of marriages declared void are done so because of a lack of consent. Both people must willingly and voluntarily enter the marriage. The possible reasons for lack of consent include:

- If one of the parties is mentally incapacitated
- If one of the parties is intoxicated at the time of the marriage
- If there is fraud or a mistake
- If there is duress, for example, if one of the parties is put under undue influence from someone else
- If it is a limited purpose marriage, for example, the couple are marrying to obtain citizenship or tax advantages

The validity of marriages is a matter of public policy. Anyone can apply for a decree of nullity on the grounds that the marriage is void, not just the married couple. A marriage can be declared void even after the death of one or both of the parties to the marriage.

## Voidable marriages

A marriage will be declared voidable on the following grounds:

- The impotence of either party
- An inability to enter and sustain a normal marital relationship

Impotence refers to an inability to have sexual intercourse or to consummate the marriage. Where intercourse occurs, even once, the marriage is then consummated and valid. The impotence must still exist at the date of the hearing and must not be reasonably curable.

The inability to enter and sustain a normal marital relationship refers to a lack of capacity to form a caring and considerate relationship with a spouse because of illness, for example, a psychological disorder or severe addiction. The illness must have existed at the beginning and throughout the marriage.

In contrast to void marriages, only the parties to the marriage can apply for nullity on the voidable grounds.

Nullity declares marriages null and void, so no additional orders can be made for financial support or division of the assets of the relationship. When a couple's marriage is annulled and there are children involved, the father remains as a guardian of the children after the annulment. Access, custody and maintenance for the children are regulated as for any other children. Civil partnerships can also be annulled, which means that the civil partnership never existed.

## Separation agreements

If a married couple or civil partners can agree the terms of how they will live separately, they may enter into a separation agreement. Both parties must consent to the terms of the agreement. The separation agreement is a legally binding contract setting out each party's rights and obligations to the other. The terms of the separation agreement are usually reached either through mediation or negotiation through solicitors. If the couple can reach an agreement quickly, a separation agreement is drawn up, which is less expensive and less stressful than going to court.

## Alternative dispute resolution

There are a number of ways in which parties can negotiate the terms of their separation agreement, for example, mediation or collaborative practice (see below).

### *Mediation*

Mediation is a service designed to help couples in Ireland who have decided to separate or divorce, or who have already separated. It helps them to negotiate the terms of their own agreement, while addressing the needs and interests of all involved.

The Family Mediation Service encourages separating couples to co-operate with each other in working out mutually acceptable arrangements on all or any of the following:

- The parenting of any children
- The financial support of a spouse and any children
- The family home and property
- Other problems related to the separation

The role of the mediator is to:

- Work with a couple to help them settle their differences
- Create a climate in which neither party dominates but in which both parties participate fully and in good faith

- Create and maintain an atmosphere of cooperation and responsibility
- Help couples deal with difficult emotional issues that can prevent them from reaching agreement
- Help couples reach an agreement that the couple believe to be fair, equitable and workable

The Family Mediation Service is a free service provided by the Legal Aid Board. For an appointment with the Family Mediation Service, both parties must contact the service and confirm their willingness to attend. Mediation can take between two and six sessions of one hour each. When a couple has reached an agreement, if they have children, a further session is provided where the children are invited in to discuss their new family arrangements.

Most mediations end with a written document that sets out all the details of the couple's agreement. This is taken to a solicitor and drawn into a legal Deed of Separation or Decree of Divorce.

### ***Collaborative practice***

Collaborative practice is a relatively new form of family dispute resolution and is an alternative to mediation. It can be used for separation, divorce and parenting disputes.

Collaborative practice has a number of unique features including:

- The parties and their solicitors make a commitment not to resort to the courts and the solicitors agree not to threaten court proceedings
- The parties agree to be honest and open throughout the process
- The negotiations take place face-to-face with all parties present
- There is a commitment between the parties to try and reach an agreement which is fair to everyone

Each party meets with their own solicitor at the beginning of the process to discuss all aspects of the case. Then a meeting or series of meetings are arranged where the parties, with their solicitors, try to reach agreement. If the process breaks down and an agreement cannot be reached either party may then begin court proceedings. However, neither solicitor can continue to act for either party during those court proceedings.

Collaborative practice can be faster and less acrimonious than court proceedings and the parties have greater control over the process, for example, the pace of negotiations and issues of priority. Any agreement reached through collaborative practice can still be made a rule of court if required by the parties. The Association of Collaborative

Practitioners maintains a register of professionals who specialise in this area. The Legal Aid Board also provides solicitors trained in collaborative practice.

### **The terms of a separation agreement**

A fundamental provision of every separation agreement is that the parties will live apart. The other main areas often covered in a separation agreement include:

- A non-molestation clause which requires that the parties do not interfere with or annoy one another
- Arrangements in relation to custody and access to children, for example, what is in the best interests of the children, dates and times for access, where the children will ordinarily reside, provisions for travelling abroad and so on
- Occupation and ownership of the family or shared home and any other property, for example, who will remain living in the family home, will that home be sold when the youngest child reaches 18, will the party remaining in the house pay a lump sum to the other in exchange for their ownership of the property (see property adjustment orders on page 7)
- Maintenance and any lump sum payments, for example, if one spouse will pay maintenance to the other spouse and for any dependent children if relevant, the amount of maintenance and how frequently it will be paid, or an agreement not to seek spousal maintenance unless the parties' circumstances change. Many separation agreements will contain a clause which allows maintenance to be varied in the future to allow for changes in circumstances.
- Indemnity from the debts of the other spouse or civil partner. This is a common provision and means that neither spouse will be responsible in any way for the future debts of the other from the date of the agreement.
- Spouses can be taxed jointly or as single people following a separation agreement once legally enforceable maintenance payments are being made. Spousal maintenance is deducted from the payer's gross income and income tax must be paid on maintenance by the receiving spouse. The receiving parent is not taxed on maintenance for a child.
- When one spouse dies, the other spouse can waive any entitlement they have to the deceased's assets. However, this does not mean that on divorce, the parties can't seek a portion of the other's estate on their death. Equally, either spouse may apply at divorce or afterwards for an order preventing the other spouse from receiving a share of their estate on death.

The division of a pension cannot be made in a separation agreement and must be done by court order.

## The formalities of a separation agreement

The document drawn up and signed by both parties on agreement is called a Deed of Separation and is a legally binding written contract. It can be made into a *rule of court*, which ensures that all the terms agreed in the document can be legally enforced where they are covered by appropriate legislation. This can be particularly important where an agreement contains a maintenance clause or a property clause. If either party does not follow the agreement after it is made an order, this can be treated as contempt of court, which is a criminal offence.

A separation agreement is treated like a contract so the couple cannot seek a judicial separation once they have entered a valid separation agreement. This prevents them from utilising some of the judicial separation provisions, for example, pension adjustment orders (see page 8).

People who have reached a separation agreement can obtain a divorce or dissolution once they have met the formal requirements for a divorce or dissolution, for example, they need to be living apart for a specific amount of time (see below). When parties to a separation agreement look for a divorce or dissolution, the court may change the agreement or make additional provision for either spouse based on their circumstances at the time of the divorce or dissolution. The court will look at the terms of the separation agreement but will also want to ensure that "proper provision" is made for both parties in the future.

## Judicial separation

When a couple cannot agree the terms by which they will live separately, an application to the courts for a decree of judicial separation can be made by either party under the Family Law Act 1995.

### Statutory requirements for judicial separation

In order to grant a decree of judicial separation the court must be satisfied on all of the following:

- That grounds for the application exist
- That the couple has been advised about counselling and mediation
- That proper provision has been made for the welfare of each spouse and any dependant children

Before applying for judicial separation, a solicitor must advise their client of the reconciliation and mediation options available to help the parties reach a negotiated separation agreement. Part of the initial document filed in court for a

judicial separation is a solicitor's certificate stating that these options have been discussed with the applying spouse. The court will not be able to grant judicial separation unless it is satisfied that any dependent children have been properly provided for under the terms of the separation. Where there is a valid separation agreement in force, the parties cannot obtain a decree of judicial separation.

An application for judicial separation must be based on at least one of the following six grounds:

- One of the parties has committed adultery and the other spouse is making the application – proof of the adultery may be required if it is not admitted
- One party has behaved in such a way that it would be unreasonable to expect the other spouse to continue to live with them, for example, behaviour by one spouse against the other which is cruel, both mentally and physically, and which renders it impossible to continue the marriage
- One party has deserted the other for at least a year at the time of the application and the non-deserting spouse makes the application. The desertion must be continuous and can include *constructive desertion* where one spouse is forced to leave due to the behaviour of the other.
- The parties have lived apart for one year at the time of the application and both parties agree to the decree being granted
- The parties have lived apart for at least three years at the time of the application, whether or not both parties agree to the decree being granted
- The court considers that a normal marital relationship has broken down and not existed between the spouses for at least one year before the date of the application for the decree

Most decrees for judicial separation are granted on the last ground, as neither party has to be shown as being at fault. Where the grounds of adultery or cruelty are relied upon, the applicant does not have to wait a year before making the application.

### The court procedure for judicial separation

When you are applying for a judicial separation your solicitor will submit four main documents to the Circuit Court:

- An application form (known as a family law civil bill). This document describes you and your spouse, your occupations and where you live. It also sets out when you married, for how long you have been living apart and the names and birth dates of your children.
- A sworn statement of means. This document sets out your assets, your income, your debts and liabilities and

your outgoings. This statement of means is accompanied by documents proving the contents of the statement, for example, payslips, P60s, tax returns and proof of outgoings.

- A sworn statement relating to the welfare of your children. This document sets out the personal details of the children of the marriage. It describes where they live and with whom. It also describes their education, health, childcare arrangements and maintenance and access arrangements.
- A document certifying that you have been advised of the alternatives to judicial separation. This document is sworn by a solicitor and it certifies that you have discussed the options of reconciliation, mediation and separation agreements.

Once the application is validly filed with the court and a defence has been filed by the other party, the matter will automatically be subject to the “case progression” system. The purpose of this system is to ensure that all documentation is submitted and the relevant documents and information are exchanged between the parties in good time before a full hearing of the case before a judge. The County Registrar is responsible for hearing case progression sessions. As in all family law matters, cases are heard in private and the public is not admitted to the courtroom.

## The effect of a decree of judicial separation

A decree of judicial separation confirms that the couple is no longer obliged to live together as a married couple. The court may also make orders in relation to custody and access to children, the payment of maintenance and lump sums, the transfer of property and the extinguishment of succession rights. An order regarding any pensions of the marriage can be made as part of the judicial separation decree. A decree of judicial separation does not give parties the right to remarry.

## Legal aid

Legal aid may be granted for both parties to a family dispute. If you think you are eligible for legal aid, you can attend at your local legal aid office where your means will be assessed under the criteria for entitlement. The primary test for eligibility is that your annual disposable income is less than €18,000 per year; disposable income is the money you have left after you have paid for your rent or mortgage and other necessities including utilities, food and clothes. If a person in receipt of legal aid is awarded money or property at the conclusion of the judicial separation proceedings, the Legal Aid Board may recoup its costs from this award. In addition, you have to pay a “statutory charge” at the beginning of the process. The level of this charge is based on your means

assessment.

It is unusual for legal costs to be awarded to one party against the other in a family dispute and generally both parties pay their own costs.

## Divorce

A decree of divorce dissolves a marriage and allows both parties to remarry. Parties can apply for a divorce under the Family Law (Divorce) Act 1996.

## Requirements for divorce

Before a court can grant a decree of divorce, the following conditions must be met:

- The parties must have been living apart from one another for a period amounting to four out of the previous five years
- There must be no reasonable prospect of reconciliation
- “Proper provision” must have been made or will be made for the spouse and any dependent members of the family

There is no question of fault in divorce proceedings and the responsibility for the breakdown of the marriage is irrelevant to the granting of the divorce decree.

Living apart is given a unique definition by the courts where parties can be “living apart” and still reside in the same dwelling. In those circumstances evidence is required to show that the parties lead separate lives, for example, sleeping apart, organising their finances separately, and caring for children separately. The provision that the couple must live apart for four out of the previous five years is to allow parties to attempt reconciliation, during which time they may live together for a short period.

If there is any prospect of the parties reconciling the court will adjourn proceedings to allow for this to take place. Any communications between the parties during this period of reconciliation cannot be used in court as evidence afterwards.

“Proper provision” is determined by the court after looking at the parties’ circumstances, their means and the needs of any dependent children. Proper provision is determined on a case by case basis and there is no set definition.

## The court procedure for divorce

When applying for a divorce you must submit four documents to the court. These documents include an application form (known as a family law civil bill), a sworn statement of means, a sworn statement about the welfare of

your children and a document certifying that you have been advised of the alternatives to divorce. These documents are similar to those submitted for an application for judicial separation and are explained more fully in the judicial separation section (see page 4). The only difference is that the civil bill will request a divorce rather than a judicial separation. When all of the necessary documents have been filed with the court, 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 for divorce (see above).

## The effect of a divorce decree

Where a court grants a decree of divorce it may also make orders in relation to the custody of and access to children, the payment of maintenance and lump sums, the transfer of property, the extinguishment of succession rights and pension rights.

Parties must have been living separate lives for a number of years before an application for a divorce is made. Many separating couples obtain a separation agreement or a judicial separation to regulate matters between them before they seek a divorce, but this is not a requirement for divorce. In any application for a decree of divorce, the court can alter any previous arrangements made by the parties, such as a separation agreement, particularly if the parties' circumstances have changed.

When a decree of divorce is granted, it cannot be reversed. Either party can apply to court to have any orders made under the decree reviewed by the court, for example, maintenance.

## Foreign marriages and divorce

If parties married abroad and hold a foreign marriage certificate, they can still apply for a divorce in Ireland if:

- Either spouse is domiciled in Ireland on the date the divorce application is made, or
- Either spouse has ordinarily resided continuously in Ireland for a year on the date the application is made

Since 1 March 2005, divorces granted in other European states (apart from Denmark) are recognised in Ireland as a matter of EU law. Foreign divorces, apart from those granted in Europe, will be recognised in Ireland once one of the parties was domiciled within the jurisdiction of the court which granted the divorce.

## Dissolution of a civil partnership

A civil partnership is ended where the parties obtain a decree

of dissolution from the courts under the Civil Partners and Certain Rights and Obligations of Cohabitants Act 2010.

## Requirements for dissolution

Before a court can grant a decree of dissolution the court must be satisfied that:

- The parties have been living apart for at least two of the proceeding three years
- "Proper provision" arrangements have been made or will be made

Parties to a dissolution must live separate lives for two years before an application for a dissolution is made, so separating civil partners often enter into a separation agreement to regulate matters between them before they seek a dissolution. This procedure is the same as for a traditional separation agreement (see page 2).

If there is any prospect of the parties reconciling or reaching agreement on the terms of the dissolution, the court will adjourn proceedings to allow for this to take place. Any communication between the parties during this period of reconciliation cannot be used in court as evidence afterwards.

## The court procedure for a decree of dissolution

When applying for a dissolution, three documents must be submitted to the court. These documents include an application form (known as a family law civil bill), a sworn statement of means and a sworn statement relating to the welfare of any dependent children. These documents are similar to those submitted for divorce and judicial separation and are explained more fully in the judicial separation section (see page 4). The only difference is that for divorce and judicial separation you must submit a document certifying that you have been advised of the alternatives to divorce or judicial separation, while this is not required for a dissolution of a civil partnership.

When all the necessary documents have been filed you will be given a date for the court hearing. Preliminary orders can be made before the hearing happens to ensure proper provision is in place during the process.

## The effect of a decree of dissolution

The effect of a decree of dissolution is that the civil partnership is at an end and the parties are free to marry. When the court grants a decree of dissolution it may also make orders in relation to maintenance and lump sums, the transfer of property, the extinguishment of succession rights and pension rights.

In any application for a decree of dissolution the court can alter any previous arrangements made by the parties, such as a separation agreement, particularly if the circumstances of either party have 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 reviewed, for example, maintenance.

## Issues to be agreed or decided on

There are many factors which couples must consider during a separation, divorce or dissolution. In all cases the guiding principle should be to ensure that proper provision is made for both parties and any dependent children. In the case of judicial separation, divorce and dissolution the court can make preliminary orders before a full hearing of the matter, to ensure proper provision is made for the parties during the court process.

The most common issues relate to:

- Custody of and access to children
- Maintenance and lump sum payments
- Ownership of the family or shared home
- Ownership of property and assets such as shares
- Pension rights
- Succession rights

## Children

Parties should do what is in the best interests of any children involved. The best interests of the children are judged by looking at all aspects of the family, including:

- The children having a meaningful relationship with both parents
- The physical, psychological and emotional needs of the children
- The history of the children's upbringing, including the nature of the relationship between each child and each parent
- If the children are old enough to have their views heard, this may also be taken into consideration

## Custody

Custody refers to the day-to-day care, residency and upbringing of dependent children, that is, children under the age of 18 or under 23 if attending full-time education. In cases of judicial separation or divorce, one parent is usually granted custody. The children reside permanently with one parent and the other parent has access to them at agreed times, which can include overnight access. It is possible for parents to continue to have joint custody of their children after separation or divorce and for the children to spend

an equal amount of time with each parent, if the parents can agree and arrange this, and it is in the best interests of the children.

## Access

Access refers to the right of the children to see the non-custodial parent. It can include having the children for set hours, overnight or on weekends. It also includes the right for the parent and child to go on holidays together.

Parents may informally agree the arrangements for custody and access to children between themselves, even during judicial separation proceedings. The courts generally encourage parties to agree on certain aspects of custody and access informally, provided proper provision is being made at all times. In the event that agreement cannot be reached, either parent can make an application to the court to decide which parent will have custody of the children and what access the non-custodial parent will have. Access by the non-custodial parent will only be denied if the court believes it is not in the best interests of the children.

## Maintenance

There is no standard or usual amount of maintenance for spouses or children. There is a legal responsibility on parents, whether married or unmarried, to maintain dependent children and on spouses and civil partners to maintain each other in accordance with their respective means. The duty on spouses to maintain one another is only extinguished on the death or remarriage of the spouse who is receiving maintenance. When making orders regarding family finances the courts do not consider the conduct of the parties during the relationship unless it would be manifestly unjust not to do so.

Maintenance can be paid periodically (weekly or monthly) or in a lump sum. Paying maintenance does not give a parent access or guardianship rights to a dependent child.

In cases where a parent, spouse or civil partner fails to pay maintenance as agreed or ordered, an "attachment of earnings" order can be sought from the court. If this is granted, maintenance payments are deducted by the payer's employer from their wages. If the payer is self-employed, an enforcement summons can be applied for. The District Court office can also order that maintenance payments are paid; they will also maintain an objective record of the payments made. Failure to comply with a court order is a criminal offence.

## Property adjustment order

If agreement cannot be reached as to who will occupy

The Citizens Information Board provides independent information, advice and advocacy on public and social services through [citizensinformation.ie](http://citizensinformation.ie), the Citizens Information Phone Service and the network of Citizens Information Services. It is responsible for the Money Advice and Budgeting Service and provides advocacy services for people with disabilities.

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and own the family or shared home, or if it should be sold, the court can make an order in relation to this. An order in relation to a family or shared home is usually applied for when applying for a decree of judicial separation, divorce or dissolution and is referred to as a *property adjustment order*. In making a property adjustment order, a court will consider all of the family's circumstances and will take into account the welfare of a dependent spouse or civil partner and any dependent children. The court will generally make one of the following orders:

- The property is transferred from one spouse to the other
- The property is held for the benefit of either spouse or a dependent family member
- A previously agreed settlement of the property is varied
- The extinguishment or reduction of the ownership held by either spouse, for example, an exclusion order requiring one party to leave the family home
- The sale or future sale of the property so the proceeds may be divided between the parties

In cases of married couples with children, the spouse that lives with the children will often be given the right to live in the family home until the youngest child reaches the age of 18 (or 23 if in continuous full-time education). There is similar protection for dependent children of civil partners. If either spouse remarries subsequent to a divorce or dissolution, they cannot then seek a property adjustment order.

## Pension adjustment orders

A pension is often the second most valuable asset separating couples have, after the family or shared home. Pensions cannot be dealt with under a separation agreement unless there is to be no change to the pension of one of the parties. The court can order that a pension be divided into whatever shares it considers appropriate. Such an order is known as a *pension adjustment order*. For example, if one spouse or civil partner has a substantial pension and the other spouse, who worked in the home, has no pension, the court can order that part of the spouse's pension be paid to the other spouse or to a dependent child.

The court, if requested, can also order that part of the pension fund is split and placed into another pension fund in the name of the other spouse or civil partner. Where the court does not make a pension adjustment order, it will take into account the value of the pension and reflect this when making other

financial orders. The court can make such an order when granting a decree of judicial separation, divorce or dissolution, or either spouse can apply to court for such an order once a decree has been granted. If a spouse or civil partner refuses to disclose the details of their pension, the other spouse or civil partner can seek this information directly from the trustees of the pension scheme.

When a pension adjustment order is granted by the court it is served on the trustees of the pension scheme, who make the necessary adjustments to the pension. The trustees are not entitled to alter the terms of the trust and make provision for a person who is outside the scope of the scheme, even if the member requests them to do so. Terms contained in a separation agreement in relation to pensions may not be enforceable against the trustees or be legally binding.

The information in *Relate* is intended as a general guide only and is not a legal interpretation

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