

Marital Breakdown

A REVIEW
AND PROPOSED CHANGES



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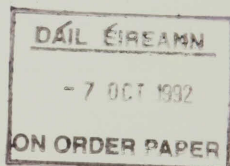
Houses of the Oireachtas

PL 910



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Chapter 1

Introduction

Houses of the Oireachtas

Chapter 1

Introduction

- 1.1 The vast majority of people in Ireland who get married go on to live together in life-long unions. There is, however, the unfortunate reality that a minority of those who marry have their hopes and expectations of a permanent union dashed through the breakdown of their marriages.
- 1.2 A primary concern of the Government must be to do what it can to assist the preservation of stable marriages and the avoidance of marriage breakdown. The Government must also endeavour to ensure that there is in our law and social policies a proper response where marriages break down.
- 1.3 This White Paper reflects the outcome of the inter-departmental review of developments in the area of marital breakdown which was undertaken at the direction of the Government.
- 1.4 A major review in this area was last carried out in 1985 when the Oireachtas Joint Committee on Marriage Breakdown published a comprehensive Report which made extensive recommendations for legislative and other changes. The White Paper sets out the many significant developments which have taken place since that Report was published, placing them in the general context of family law provisions which had already been in place. It goes on to outline the Government's proposals for further legislative — and other — measures in this area. A summary of these proposals is contained in Chapter 2. The Scheme of the Family Law (No. 1) Bill contained in Appendix 1 provides for many of the proposed changes.
- 1.5 The White Paper also discusses various issues which arise in relation to the possibility of divorce being introduced here. In particular, it considers forms which a Constitutional amendment might take should it be decided to hold a referendum on amending the Constitution. In addition, it sets out in the Scheme of the Family Law (No. 2) Bill, contained in Appendix 2, the type of legislation which the Government believes it would be appropriate to enact if a Constitutional amendment — along the lines outlined — were to be passed by the people.
- 1.6 The Government proposes to have a referendum on divorce after a full debate on the complex issues involved and following the enactment of other legislative proposals in the area of family law which are outlined in the White Paper. In the meantime the Government considers that it would be helpful in the context of the debate on divorce, and in advance of finalising its proposals on the matter, to set out forms which a Constitutional amendment in relation to divorce might take. The proposals contained in the Scheme of the Family Law (No. 1) Bill can be proceeded with independently of proposals in relation to divorce.

- 1.7 The public and any interested parties are invited to offer their views as soon as possible on the matters covered in this Paper or on any other matters related to marital breakdown. Comments should be addressed to

**The Minister for Justice,
72/76 St. Stephen's Green,
Dublin 2.**

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kdown.



Chapter 2

Summary of Proposals

Houses of the Oireachtas

Houses of the Oireachtas

Summary Proposals

Chapter 2

Summary of Proposals

Aspects of the law relating to getting married

1. The issue of marriage registration, including the question of replacing the present arrangements with a universal civil registration system, and the merits of a statutory minimum waiting period will be considered as part of the major review being carried out by the Minister for Health of the relevant legislation. (Sections 5.3 and 5.4)

Maintenance

2. Maintenance limits will be kept under regular review and the Government will use the new powers available under the Courts Act, 1991 to make orders increasing these limits. (Section 6.17)
3. Provision is contained in the Scheme of the Family Law (No. 1) Bill to empower the courts when ordering maintenance payments to order at the same time that these be made by attachment of earnings. (Section 6.19)
4. Provision is contained in the Scheme of the Family Law (No. 1) Bill to increase the range of orders which may be made by the District and Circuit Courts in maintenance cases by allowing them to order (a) secured maintenance and (b) lump sum payments. (Section 6.20)
5. Legislation will be introduced which will allow Ireland to ratify a new Convention aimed at facilitating the enforcement of maintenance payments throughout the EC as well as to accede to a related 1956 U.N. Convention providing for a Central Authority system to assist people in obtaining maintenance on a worldwide basis. (Sections 6.25 and 6.26)
6. Legislation will be introduced to extend the scope of the 1968 EC Judgments Convention to Spain and Portugal and give effect to a similar Convention in respect of Member States of the European Free Trade Association. (Section 6.27)

The Family Home

7. Legislation is being drafted as a matter of priority to give each spouse a statutory entitlement to an equal share in the ownership of the family home (and the household chattels). (Section 6.31)

Rights of the Child

8. The 1989 U.N. Convention on the Rights of the Child will be ratified shortly. (Section 7.19)

Nullity

9. The possible need for legislation dealing with the grounds for a decree of nullity will be kept under review particularly in the light of further developments in this particular area as well as in the general area of avenues of legal redress open to those whose marriages have broken down. (Section 8.3)
10. Provision is made in the Scheme of the Family Law (No. 1) Bill to empower the Circuit Court to grant nullity decrees. (Section 8.5)
11. Provision is made in the Scheme of the Family Law (No. 1) Bill to empower the Circuit and High Courts to make in certain circumstances financial provision for a party whose marriage has been annulled. (Section 8.6)

Foreign Divorces/decrees

12. The question of ratification of the 1970 Hague Convention on the recognition of foreign divorces and legal separations will be looked at again in the context of whatever proposals are being considered in the light of the response to the White Paper. (Section 8.22)
13. Provision is made in the Scheme of the Family Law (No. 1) Bill to empower the Courts here to make appropriate financial provision for the protection and support of persons with close connections with this country whose marriage has been dissolved or annulled abroad or in respect of which a judicial separation has been granted abroad where the decree of divorce, nullity or judicial separation is entitled to recognition in this country. (Section 8.24)

Declarations of status

14. Provision is made in the Scheme of the Family Law (No. 1) Bill to
 - (a) restate the law which enables a person to apply to the Court for a declaration as to the validity of his or her marriage
 - (b) empower the court to make a declaration that a decree of divorce, nullity or judicial separation obtained abroad is or is not entitled to recognition in the State
 - (c) set out the basis of jurisdiction in the proceedings for such declarations. (Section 8.26)

Legal Aid

15. As and when the availability of financial resources and the overall situation with regard to public finances allows, the Civil Legal Aid Scheme will be developed and expanded through the phased opening of additional Law Centres. Legislation will be introduced to place the Scheme on a statutory basis. (Section 9.9)

Family Law Hearings

16. Special family law courtrooms will be provided in future large scale projects. The more urgent requirement of the provision of decent interview facilities for District Court Clerks to meet family law clients will be given priority as schemes come up. (Section 9.13)
17. The subject of family courts will be further considered when the Law Reform Commission's Report on this matter has been received. (Section 9.15)

Mediation

18. The nature of appropriate long-term mediation services will be determined in the light of a Report from a Review Committee which it has been decided to establish to report on the whole area of mediation. (Section 9.18)

Divorce

19. The Government proposes to proceed with a divorce referendum after a full debate on the complex issues involved and following the enactment of other legislative proposals in the area of family law which are outlined in the White Paper. In the meantime the Government, in the context of the continuing debate on this issue and in advance of finalising its proposals on the matter, sets out in the White Paper forms which a Constitutional amendment in relation to divorce might take. (Sections 11.3 and 11.4)
20. Legislation which would be introduced, if a referendum to allow divorce were to be held and was successful, would provide that property transfer provisions on the lines of those already in force in the case of judicial separation would apply in the case of divorce. (Section 10.17)



Chapter 3

Overview

Houses of the Oireachtas

Houses of the Oireachtas

Chapter 3

Overview

Introduction

- 3.1 The purpose of this Chapter is to give an overview of the many significant developments which have taken place since the Oireachtas Joint Committee on Marriage Breakdown reported in 1985. These developments, which are discussed in greater detail in subsequent Chapters, are set in the context of general family law provisions which had already been in place prior to 1985.
- 3.2 It will be clear from the information contained in this Paper that developments in recent years, taken together with provisions which had already been in place, have brought about a situation where we now have a highly-developed system of family law containing an extensive range of sophisticated and up-to-date provisions to cope with the myriad of issues which can arise in the family law area. That is not to suggest, of course, that further reforms are not desirable and the Government's proposals for change — which are summarised in Chapter 2 — are set out in detail in subsequent Chapters.

Certain aspects of the law relating to getting married

- 3.3 In general, the minimum legal age of marriage is 16 years. A person younger than 16 who wishes to marry must obtain the consent of the High Court. While a person between the ages of 16 and 21 is required to obtain parental consent to marrying, the absence of consent will not render a marriage which had been solemnised null and void. Where a marriage takes place in a Register Office it is registered there and then. Where a marriage takes place at a religious ceremony it is normally registered at the local Registrar's Office subsequently. Someone wishing to get married in a civil ceremony must give notice to the Registrar; the marriage usually takes place a matter of weeks later. While there is no requirement in civil law for a minimum period of notice for church marriages, the Catholic Church authorities, for example, usually impose a period of 3 months between the giving of notice and the marriage taking place.

Protection and financial support

Safety and welfare

- 3.4 Under the provisions of the *Family Law (Protection of Spouses and Children) Act, 1981* a Court may issue a *barring order* to prevent one of the spouses entering the family home where the Court considers this necessary in the interests of the safety or welfare of the other spouse or a child of the spouses or either of the spouses. As an interim measure a Court can make a *protection order* which prohibits a spouse from threatening violence against "or molesting or putting in fear" the other spouse or a child. These provisions up-dated the original statutory provision on barring orders contained in section 22

(repealed by the 1981 Act) of the *Family Law (Maintenance of Spouses and Children) Act, 1976*.

- 3.5 The *Criminal Law (Rape) (Amendment) Act, 1990* makes marital rape a crime which is subject to the same maximum penalty — life imprisonment — as applies in any other instance of rape. The *Criminal Evidence Act, 1991* contains provisions intended to make it easier for children and persons with mental handicap to give evidence in cases of physical or sexual abuse; the Act also contains provisions in relation to the competence and compellability of spouses to give evidence.

Maintenance

- 3.6 Where a spouse fails to maintain the other spouse or any dependent children an application can be made to Court for a *maintenance order* under the *Family Law (Maintenance of Spouses and Children) Act, 1976*. The Act also provides for procedures in relation to the enforcement of maintenance orders. Since the coming into effect of the *Status of Children Act, 1987* proceedings for maintenance of a child of unmarried parents are similar to an application for maintenance of a dependent child of a family.
- 3.7 The *Courts Act, 1991* provides for an increase in the weekly amounts that may be awarded by the District Court for the maintenance of a dependent spouse or child (an increase from £100 to £200 in the case of a spouse; from £30 to £60 in the case of a child). Heretofore, legislation was required if these limits were to be increased but the Act allows them to be increased by Government Order (in line with future increases in the cost of living and subject to the approval of the Oireachtas). There is no limit on the maintenance amounts which can be ordered by the Circuit Court.
- 3.8 Since 1974 there has been an agreement between Ireland and the United Kingdom for the reciprocal recognition and enforcement of maintenance orders (*Maintenance Orders Act, 1974*); and since 1988 maintenance orders given in Ireland can be more or less automatically enforced in 9 of the other EC Member States (*The Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988*).

The Family Home

- 3.9 The *Married Women's Status Act, 1957* enables a spouse who has contributed either directly or indirectly to the acquisition of a house owned by the other spouse to apply to court for a declaration of a beneficial interest in the house. If an application is successful a share in the house is recognised and quantified.
- 3.10 The *Family Home Protection Act, 1976* contains a number of safeguards in relation to the family home and its contents, the main feature of which is that a spouse may not sell or mortgage the family home without the prior written consent of the other spouse.
- 3.11 The *Bankruptcy Act, 1988* includes special provisions in relation to safeguarding the family home in the event of the bankruptcy of either or both spouses.

Succession Rights

- 3.12 The *Succession Act, 1965* governs succession rights in relation to the estate of a deceased spouse. Where a spouse dies not having made a will and there are no children, the surviving spouse has a right to all of the deceased's estate. Where there are children and

a spouse dies not having made a will, the surviving spouse has a right to two-thirds of the estate and the children to one-third. Where a spouse dies having made a will and there are no children, the surviving spouse has a legal right to one-half of the estate. Where there are children and a spouse dies having made a will, the surviving spouse has a legal right to one-third of the estate. A surviving spouse is free to choose between a legal right share on the one hand and a devise or bequest to him or her on the other. While a child does not have an automatic right to part of the estate where a parent dies having made a will, a court may make an order for whatever provision for the child from the estate it thinks fit where the court is of the opinion that the person who made the will has “failed in his moral duty to make proper provision for the child”.

- 3.13 The *Status of Children Act, 1987* provides that children born outside marriage have the same succession rights as those born within marriage.

The position of children

Custody/access

- 3.14 Under *Section 11 of the Guardianship of Infants Act, 1964* a Court may make orders in relation to the custody of and the right of access to a child. In considering such questions the Court must regard the welfare of the child as the first and paramount consideration.

Status

- 3.15 The *Status of Children Act, 1987* removed discrimination in the law between children born within and outside marriage. As already mentioned, children born outside marriage now have the same succession rights as those born within marriage and the Act also improves the position of such children in relation to maintenance. Formerly, the father of a child born outside marriage could become the child's guardian only by marrying the mother; now the father can apply to a Court to be made a guardian of the child and the court will decide on the application treating the welfare of the child as the first and paramount consideration. The Act includes provisions relating to procedures for registering the father's name on the register of births, declarations as to the identity of parents and presumptions in relation to the paternity of a child.

Other provisions

- 3.16 The *Adoption Act, 1988* permits the adoption of children whose parents are deemed by the courts to have failed in their constitutional duty to care for them. Previously, to be eligible for adoption the child had to be an orphan or have been born outside marriage. The *Adoption Act, 1991* contains provisions in relation to the recognition of foreign adoptions and the categories of persons eligible to adopt. The *Child Care Act, 1991* updated the law in relation to the care of children, particularly children who have been assaulted, ill-treated, neglected or sexually abused or who are at risk. The *Child Abduction and Enforcement of Custody Orders Act, 1991* gives the force of law here to international conventions designed to deal with the problems that arise when a child is abducted — usually by a parent — across international frontiers in defiance of a Court order or against the wishes of the other parent.

Nullity/Separation/Foreign divorces

Nullity

- 3.17 The effect of a decree of nullity, which may be granted by the High Court, is that a marriage is regarded as never having taken place. The grounds on which a marriage might be declared to be a nullity must be present at the time of the marriage itself. The courts have no power at present to make financial provision in favour of a person whose marriage has been annulled. There have been a number of significant developments in recent years in court judgments in nullity cases which have tended to clarify the law and extend the grounds on which a marriage will be declared null and void.

Separation agreements

- 3.18 Couples who agree to separate and who can reach agreement in relation to issues such as the custody of and access to children and property/financial arrangements can enter into a *separation agreement*. This sets out their agreement to separate and the terms governing their separation. A common feature of such agreements would be the relinquishment of succession rights by both spouses. In general, the provisions of separation agreements are regarded as legally enforceable — they can be submitted for approval to the court and made a rule of court under the provisions of section 8 of the *Family Law (Maintenance of Spouses and Children) Act, 1976* — but there are exceptions: for example, a provision in an agreement which purported to deny or limit the right of a spouse to apply for maintenance under the 1976 Act is void under the terms of that Act. The *Judicial Separation and Family Law Reform Act, 1989*, which is discussed in the following paragraphs, requires a solicitor to discuss with a person applying for a judicial separation the possibility of engaging in mediation to help effect a separation on an agreed basis and this reflects the view that it is socially desirable for couples who decide to separate to make arrangements between themselves on the terms of their separation rather than relying on a Court to do it for them.

Judicial separation

- 3.19 The *Judicial Separation and Family Law Reform Act, 1989* abolished the action for divorce *a mensa et thoro* and replaced it with a new action for *judicial separation* which can be obtained on wider grounds and with better provision for financial relief for spouses and dependent children.
- 3.20 The old remedy of a divorce *a mensa et thoro* could be applied for by a spouse on the (fault-based) grounds only of adultery, cruelty or unnatural practices on the part of the other spouse. A spouse may apply for a judicial separation on (one or more of) the grounds of adultery; unreasonable behaviour; desertion for one year; separation for one year where the other spouse consents to a decree being granted; separation for 3 years; absence of a normal marital relationship for a period of at least one year immediately preceding the application.
- 3.21 The Act contains extensive provisions in relation to financial/property orders in favour of spouses and dependent children. These include powers to order maintenance; secured maintenance; lump sums; transfer of property, including the family home, between spouses (and dependent children), and that a spouse may occupy the family home for life.

On the granting of a decree of judicial separation, or at any time afterwards, on

application to it, the court is empowered in certain circumstances to extinguish the succession rights of a spouse.

- 3.22 While the legal effect of a decree of judicial separation is that it is no longer obligatory for the spouses to cohabit, a judicial separation does not legally end the marriage and, accordingly, does not permit remarriage.

Domicile and Foreign divorces

- 3.23 The *Domicile and Recognition of Foreign Divorces Act, 1986* changed the law in relation to the recognition here of divorces obtained abroad (domicile is a legal concept used to determine which country's law it is appropriate to apply to establish a person's status in law e.g. whether a person is married or not, and is dealt with further in Chapter 8). Before the 1986 Act came into force a woman was regarded as acquiring, on marriage, the domicile of her husband; now a married woman's domicile is established in the same way as anyone else's. Also, before the 1986 Act came into force, a foreign divorce would be recognised here generally only if both spouses were domiciled in the foreign jurisdiction when the divorce proceedings were commenced there; now for a divorce to be recognised here only one of the spouses need have been domiciled in the foreign jurisdiction which granted the divorce. A person who obtains a foreign decree of divorce which is recognised in Ireland is, of course, free to remarry here.

Other measures/social policies

Miscellaneous legal provisions

- 3.24 The *Family Law Act, 1988* abolished the (obsolete) action for restitution of conjugal rights. The *Finance Act, 1990* provides for exemption from stamp duty of any instrument whereby any property is transferred between spouses. Previously only transfers of the family home into the joint ownership of both spouses were free of stamp duty (section 14 of the *Family Home Protection Act, 1976*).

Legal Aid

- 3.25 The Scheme of Civil Legal Aid and Advice — which is administered (on a non-statutory basis) by the Legal Aid Board — is designed to make the services of solicitors and, if necessary, barristers available to persons of modest means at relatively little cost. About 85% to 90% of the Board's caseload is in the family law area. The operation of the Scheme has expanded significantly in recent years with the provision of extra funding to enable new law centres to be established together with an increase in the number of part-time law centres or clinic services.
- 3.26 Ireland has ratified the *European (Council of Europe) Agreement on the Transmission of Applications for Legal Aid* the provisions of which came into force on 16 December, 1988. In practical terms the Agreement represents a considerable improvement for people in Ireland who wish to pursue legal action in other countries by means of legal aid.

Family law hearings

- 3.27 Separate courtrooms specially designed for family law hearings have been provided for High, Circuit and District Court hearings in Dublin. Outside Dublin family law cases are heard in ordinary courtrooms *in camera*, special rooms or the Judge's Chambers.

- 3.28 The *Judicial Separation and Family Law Reform Act, 1989* provides that family law proceedings in all courts shall be as informal as practicable consistent with the administration of justice. In particular, the wearing of wigs and gowns by judges and lawyers is disallowed in family law cases.

Counselling/mediation

- 3.29 Grants are paid, under the auspices of the Health Boards, to a number of voluntary organisations providing marriage guidance services.
- 3.30 In 1986 a *Family Mediation Scheme* was established on a pilot basis under the auspices of the Department of Justice. The Scheme is intended to provide a service to assist a husband and wife whose marriage has broken down to reach a voluntary agreement (without the need for a Court to become involved) about issues such as arrangements for children, property, the family home, maintenance and succession rights.

Other measures

- 3.31 Developments in the area of housing, education, taxation and social welfare are discussed in Chapter 9 of this Paper.

Divorce

- 3.32 Article 41.3.2° of the Constitution of Ireland states that no law shall be enacted providing for the grant of a dissolution of marriage. It was the view of the majority of members of the Oireachtas Joint Committee on Marriage Breakdown that a referendum should be held on divorce. In 1986 a Government Bill containing proposals to repeal the Constitutional ban on divorce and to replace it with a provision enabling divorce in certain circumstances was passed, unopposed, by both Houses of the Oireachtas. In the subsequent referendum the proposal to amend the Constitution was defeated, 63% of those who voted having voted against it.
- 3.33 The main avenues of legal redress open at present to those whose marriages have broken down have been outlined in this Overview and are dealt with in greater detail in subsequent Chapters. Under these provisions spouses may separate for the rest of their lives; arrangements can be made for financial and property provisions for dependent spouses and children; decisions can be made about custody of — and access to — children; in certain circumstances succession rights of spouses can be extinguished. However, except in cases where a civil decree of nullity has been granted or a foreign divorce has been obtained which is recognised here, spouses whose marriages have broken down are not free to marry again.
- 3.34 In the absence of the possibility of remarriage some people whose marriages have broken down go on to form “second unions” outside marriage. Neither party to a “second union” enjoys the same legal protection available to parties to a marriage but the children of these unions have been given full legal protection by the *Status of Children Act, 1987*.
- 3.35 The introduction of divorce here would transform the existing position to the extent that it would permit — in whatever circumstances allowed by an amendment to the Constitution and subsequent legislation — spouses to have marriages which have broken down brought to a legal end, leaving them free to marry again.



Chapter 4

Extent of Marital Breakdown

Houses of the Oireachtas

Chapter 4

Extent of Marital Breakdown

Introduction

- 4.1 This Chapter sets out statistical information from various sources which gives some indication of the extent of marital breakdown in Ireland.
- 4.2 Perhaps the most reliable overall indicators are contained in the 1986 Census of Population of Ireland which was the first in which information on the marital status of people who had ever been married was collected on the basis of their *de facto* situation rather than the actual legal status of their marriages. Some 37,245 persons came into the "separated" category. This comprised 14,638 males and 22,607 females which represented 2.2% and 3.3% respectively of the total ever-married (excluding widowed).
- 4.3 More details in relation to the Census figures as well as statistics in relation to Labour Force surveys, social welfare payments and court proceedings are set out in subsequent sections of this Chapter. (While comprehensive results of the 1991 Census of Population are not yet available, the population estimates included with the 1991 Labour Force Survey show a total "separated" figure of 46,700).

Census Information

- 4.4 According to the 1986 Census of Information there were 988,280 *single* persons aged 15 years or over; 1,304,095 persons were *married*, including remarried; 186,322 persons were *widowed*; and there were 37,245 persons returned as "*separated*" under the following headings:

<i>Separated Category</i>	<i>Males</i>	<i>Females</i>	<i>Total Persons</i>
Deserted	2,584	9,038	11,622
Marriage Annulled	443	540	983
Legally Separated	3,299	3,888	7,187
Other Separated	6,090	6,972	13,062
Divorced in another country	2,222	2,169	4,391
Total	14,638	22,607	37,245

Some 57% of the total separated were aged 25-44 years, while 32% were aged 45-64 years.

Labour Force Surveys

- 4.5 Labour Force Surveys include statistics of labour force participation rates of persons aged 15 years or over classified by marital status. The following are the numbers of separated persons and their labour force participation rates during 1986 and 1991:

Separated (including divorced)	1986	In labour force	1991	In labour force
	000's	000's	000's	000's
Male	9.7	8.0	17.1	12.9
Female	19.3	7.1	29.6	11.5
Totals	28.9	15.1	46.7	24.4

Details for the period 1986 to 1991 are contained in Appendix 3.1.

Social Welfare Payments

4.6 Recipients under Deserted Wife's Scheme 1986 and 1990:

Year	Deserted wife's benefit	Deserted wife's allowance	Lone Parents allowance	Totals
1986	6,165	4,445		10,610
1990	10,462	1,793	3,717	15,972

Lone Parent's Allowance is payable to persons bringing up children on their own including persons who are unmarried or widowed. The latter groups have been excluded and the figure given (3,717) is the number of women with children who were deserted or separated. (There were also 342 deserted or separated men receiving these allowances because they were bringing up children).

The total (15,972) is the number of women who have been deserted or separated with or without children who are receiving social welfare payments.

Court Proceedings

- 4.7 Details of family law proceedings before all courts in 1986 and 1990 are given below. Details of such proceedings before each court (District, Circuit and High Court) for 1986 to 1990 are contained in Appendix 3.2. A survey of applications under the Judicial Separation and Family Law Reform Act, 1989 is contained in Appendix 3.3.

Family Law Proceedings 1986 and 1990

	1986		1990	
	Applications	Orders/Decrees	Applications	Orders/Decrees
<i>All Courts</i>				
Maintenance	2,261	1,248	2,600	1,093
Barring Orders	3,609	1,604	3,633	1,433
Guardianship	1,184	857	2,351	1,518
Divorce <i>a mensa et thoro</i>	209	58	68	43
Judicial Separation*	—	—	355	157
FHPA 1976**	150	84	135	94
MW SA 1957***	187	69	141	69

*Judicial Separation and Family Law Reform Act, 1989 came into operation on 19/10/89 (judicial separation replaced the action for divorce *a mensa et thoro*).

**Family Home Protection Act, 1976.

***Married Women's Status Act, 1957.

Other Statistical Information

- 4.8 The Report on the Financial Consequences of Marital Breakdown published by the Combat Poverty Agency presented the results of surveys of applications for maintenance in the District Court and deserted wife's allowance and benefit. Details of the survey are at Appendix 3.4.

General

- 4.9 The 1986 Census revealed a total of some 37,000 persons whose marriages have for one reason or another broken down and the most recent population estimate included in the 1991 Labour Force Survey suggested a figure of about 47,000. However, as a measure of actual marital breakdown in the State or as a basis for estimating the number of persons who might be expected to avail themselves of divorce, if such were available in the State, the figures may understate the position. Firstly, there are marriages which have broken down but the spouses may not have separated. Secondly, the figures do not reflect cases where marriages have broken down in this country and where the spouses have gone through divorce proceedings abroad and subsequently remarried. Finally there may have been a reluctance on the part of certain separated spouses to include themselves in that category whether because they did not want to admit to being separated or for some other reason.

Rela



Chapter 5

Aspects of the Law Relating to Getting Married

Houses of the Oireachtas

Chapter 5

Aspects of the Law Relating to Getting Married

Introduction

- 5.1 This Chapter discusses certain aspects of the law governing marriage itself. The review which has been taking place in this area has identified four aspects of the law as requiring particular consideration: minimum age, registration, notice of intention to marry and the consent of parents/guardians to marriage.

Minimum Age

- 5.2 The minimum legal age for marriage is 16 years. If a person below that age wishes to marry he or she must obtain the permission of the High Court, otherwise the marriage is absolutely null and void.

Arguments have been advanced in the past in favour of increasing the minimum age for marriage — in particular it has been argued that there is a correlation between early marriage and subsequent marriage breakdown. In considering this matter it is necessary to bear in mind the significant downward trend in early-age marriages since the late 1970s. The number of marriages involving persons aged under eighteen years declined from 2.0 per cent of all marriages in 1978 to less than 0.3 per cent in 1988. The proportion of persons marrying at under twenty-one years has fallen even more significantly, from 17.6 per cent to just 6 per cent of all marriages between 1978 and 1988. As to the High Court's power under section 1 of the *Marriage Act, 1972* to approve proposed marriages where either party is aged under sixteen years, the number of applications has been extremely small. No successful application has been made since 1983 and the only one made since then (in 1989) was refused.

Given that this decline in early-age marriages has occurred naturally it may be that imposing a minimum age by law would not be of any significant advantage at this stage. No proposals are being made in this area at present but the Government intends to keep the matter under review particularly in the light of the responses to the White Paper.

Registration

- 5.3 The existing arrangements for the registration of marriages, which date back to the last century, can, in practice, give rise to some significant difficulties. In particular, there are problems where the requirements for a marriage to be valid differ under Church and Civil Law.

The present system for the registration of marriages operates on a denominational basis. The manner in which a marriage is registered depends on where it was solemnised. If it was solemnised in a Register Office the marriage is registered there and then. In this type of ceremony the parties are required to make a declaration that they are free to marry.

The marriage rites of certain specified Religions are also legally recognized as having civil effect. The prescribed formalities vary with the Religions in question.

Depending on the particular mode, registration may be effected at the place of celebration of the marriage by the relevant member of the religious body specified by law, at such a location by the civil registrar, or subsequent to the marriage ceremony by the civil registrar on receipt of the necessary information by way of a prescribed statutory form. A prior declaration of freedom to marry is sometimes required.

The problems for a civil registration system which is designed to dovetail with religious marriage rites is that it may be ineffective in preventing the registration of marriages where one or both of the parties, though free to marry by the norms of the relevant religion, are unfree to marry in civil law.

The Minister for Health has commenced a major review of the legislation relating to the registration of births, deaths and marriages in Ireland. **The issue of marriage registration, including the question of replacing the present arrangements with a universal civil registration system, which would, so far as is practicable, standardise the legal formalities and registration requirements for marriage will be examined in the context of this review.**

Notice

- 5.4 Legal requirements in respect of some marriages, including marriages in a register office and certain marriages celebrated by religious rites, effectively impose a waiting period on couples. However such periods are of minimal duration, designed to allow time for objections to the proposed marriage to be aired and investigated, rather than to ensure that sufficient time elapses for the couple to decide whether or not they are truly prepared for the momentous undertaking which marriage is. In this connection the Catholic Church authorities, for example, usually impose a minimum waiting period of three months and require the couple to attend a pre-marital course.

On the face of it the balance of the argument would seem to favour having a statutory minimum waiting period before marriage (as was suggested by the Oireachtas Joint Committee on Marriage Breakdown which recommended a compulsory waiting period of three months). The need for legislative change in this area will be considered further in the context of the review of marriage registration laws already referred to.

Consent of Parents/Guardians to Marriage

- 5.5 Section 7 of the *Marriage Act, 1972* requires persons aged under twenty-one years to obtain the consent of their parents (or guardians) before marrying. However, failure to observe this requirement does not invalidate a marriage that proceeds without it.

Both the Law Reform Commission in its Report on the Age of Majority, the Age for Marriage and some connected subjects (LRC5 — 1983) and the Oireachtas Joint Committee on Marriage Breakdown (1985) recommended that the consent of parents/guardians should be a precondition for the validity of a marriage under the free age.

There are, however, doubts about the practicality of this approach; it could prove very difficult to enforce. Any such consent requirement could be circumvented by couples marrying outside Ireland. In addition, it could lead to an increase in the number of co-habiting couples in cases where parental consent was not forthcoming. In the circumstances no proposals are being put forward for changes in this area.



Chapter 6

Protection and Financial Support

Chapter 6

Protection and Financial Support

Introduction

- 6.1 This Chapter deals with existing legal provisions in relation to protection of, and financial support (including property arrangements) for, dependent spouses and children and sets out the Government's proposals for further reform in this area. (Particular provisions which arise in the context of cases of nullity and judicial separation are dealt with as part of Chapter 8).

Safety and Welfare

Barring/Protection Orders

- 6.2 Where difficulties arise in a marriage, situations can develop where there must be quick intervention to endeavour to ensure the safety and welfare of a spouse or of children.
- 6.3 The law offers protection to victims of domestic abuse through recourse to the provisions of the *Family Law (Protection of Spouses and Children) Act, 1981*.
- 6.4 Under the provisions of the 1981 Act a court may make a *barring order* the effect of which is to prohibit one of the spouses from entering the family home for a specified period (which may be renewed). Evidence of actual physical violence or the threat of it is not needed before an order can be granted but the court must be satisfied that the safety or welfare of the spouse who applies for the order, or of a child of the spouses or either of the spouses, requires that the order be made.
- 6.5 In the period between an application being made for a barring order and the court making a decision on it, the court can make a *protection order* which prohibits a spouse from threatening violence against, "or molesting or putting in fear", the other spouse or a child.
- 6.6 Gardai have the power to arrest (without a warrant) a person in breach of a barring or protection order and bring that person before the court.

Criminal Evidence Act, 1991

- 6.7 The *Criminal Evidence Act, 1991* sets out clearly the circumstances in which a spouse or former spouse of an accused person is to be competent or compellable to give evidence. For example, a wife will be obliged to give evidence for the prosecution if her husband is accused of violence against her or of violence or a sexual offence against a child. The

Act also contains provisions intended to make it easier for children and persons with mental handicap to give evidence in cases of physical or sexual abuse.

Proposals for change

- 6.8 A Bill — the Family Law (Protection of Spouses and Children) (Amendment) Bill, 1987 — introduced into the Oireachtas in 1987 was designed to permit the granting of a protection order as a final remedy in appropriate cases of family violence or ill-treatment. At present the only final remedy which a court may grant in such cases is a barring order which, as mentioned above, has the effect of removing the offending spouse from the family home. The protection order is available only as an interim measure between applying for a barring order and the court's decision on the application. While the Bill was progressing through the Oireachtas (it had passed all stages in the Seanad and was awaiting second stage in the Dail) opposition to it grew among women's organisations — including the body which had originally campaigned for the Bill — based on their fear that if the Bill were enacted the courts might almost invariably take the "soft option" of granting a protection order instead of a barring order, thus diminishing the existing legal protection for wives and children who are the chief victims of family violence.

Not all of those who made representations were in agreement as to what, if anything, was required and the Bill was not proceeded with.

Other amendments of the law in this area which have been suggested raise serious issues of principle on which there would be strong opposing views. These include proposals which would extend the barring order remedy to unmarried cohabiting couples (i.e. cohabiting couples who are not prevented by law from marrying but who choose freely not to do so); which would enable a third party to apply for a barring order where the victim was afraid to; and which would enable members of the household other than the spouse of the applicant to be barred.

While no proposals are being put forward in the White Paper in these areas the matter can be looked at again in the light of any views or observations received on the subject.

Marital Rape

- 6.9 Section 5 of the *Criminal Law (Rape)(Amendment) Act, 1990* makes marital rape a crime by abolishing the common law rule that a husband generally cannot be found guilty of raping his wife. Although there was no case-law on the issue in Ireland, case-law in England had suggested that a husband could be found guilty of rape only where the spouses had been separated by a court order or there was in being a separation agreement with a non-molestation clause. The situation in England was changed, however, when the House of Lords decided on 23 October 1991 (*R. v. R* 1991 4. A.E.R. 481) that the common law rule that a husband generally cannot be found guilty of raping his wife no longer formed part of the law of England. Under the 1990 Act a married woman will now have the full protection of the criminal law: a man who rapes his wife will be subject to the same maximum penalty — life imprisonment — as applies in any other instance of rape. This protection is in addition to the protection already afforded to a wife by the criminal law by virtue of which a husband can be found guilty of assault, including the sexual assault, of his wife. The Civil Legal Aid Scheme has been extended to allow a complainant (who could be a wife alleging rape against her husband) in rape and

aggravated sexual assault cases to consult a legal aid solicitor who may accompany her into court. The institution of proceedings for marital rape requires the consent of the Director of Public Prosecutions and the trials are held in the Central Criminal Court in the absence of the public. Legislation is being prepared in relation to appeals against lenient sentences in certain cases including marital rape.

Maintenance

The 1976 Act

- 6.10 Where a spouse fails to maintain the other spouse and any dependent children of the family, redress is available through the provisions of the *Family Law (Maintenance of Spouses and Children) Act, 1976*.
- 6.11 A Court in deciding whether to make a *maintenance order* and, if so, the amount to be awarded must have regard to all the circumstances of the case and, in particular, to
 - (i) the income, earning capacity (if any), property and other financial resources of the spouses and of any dependent children *and*
 - (ii) the financial and other responsibilities of the spouses towards each other and towards any dependent children and the needs of any such dependent children, including the need for care and attention.
- 6.12 It is open to either spouse in the light of changes in circumstances to apply to court to have the terms of a maintenance order varied or discharged.
- 6.13 Generally, payments under a maintenance order are made to a District Court clerk who, in turn, transmits the payments to the person entitled to them. Where payments fall into arrears a Court clerk will take proceedings to recover the amount due if requested to do so by the person entitled to the money.
- 6.14 Where a person fails to pay amounts due under a maintenance order the court can issue an *attachment of earnings order* which directs that person's employer to make deductions from his or her earnings (for subsequent transmission to the person entitled to the money).
- 6.15 A person who fails to comply with a maintenance order can be imprisoned for a period of up to 3 months once the non-payment has not resulted from a genuine inability to pay.

Improvements in maintenance arrangements

- 6.16 *The Courts Act, 1991* provides for increases in the weekly amounts that may be awarded by the District Court for a spouse or dependent child. (There is no limit on the amount of maintenance which can be ordered in Circuit Court proceedings). The maximum payment for a dependent spouse which the District Court can order has been increased from £100 to £200 a week; in the case of a child the maximum payment has been increased from £30 to £60 a week.
- 6.17 Heretofore, legislation was required if these limits were to be increased but the 1991 Act now allows them to be increased by Government Order (subject to the approval of the

Oireachtas). **The Government proposes to keep maintenance limits under regular review and to use the new powers available to it to make Orders increasing these limits.**

- 6.18 The Report on Marital Breakdown prepared by the Combat Poverty Agency indicated that many people in whose favour maintenance orders have been made have to resort to further proceedings to have the maintenance orders enforced (Details are included at Appendix 3.4). The Report also showed, on the basis of a survey carried out by the Agency, that an attachment of earnings order doubled the chances of maintenance orders being complied with.
- 6.19 At present the attachment of earnings procedure arises only where the person due to pay maintenance has, without reasonable excuse, failed to make the required payments. In those circumstances the maintenance creditor is put to the trouble of making a separate application to court for an attachment order after the debtor has failed to pay the maintenance ordered. **Provision is made in the Scheme of the Family Law (No. 1) Bill empowering the courts when ordering maintenance payments to order at the same time that these be made by attachment of earnings** unless the person having to make the payments can satisfy the court that there are good reasons why it should not do so. This should represent a significant improvement in present procedures in that in many cases there would no longer be a need for separate court hearings to seek enforcement of maintenance orders (thereby strengthening significantly the position of the creditor spouse and dependent children).
- 6.20 **Provision is also made in the Scheme of the Family Law (No. 1) Bill to increase the range of orders which may be made by the District and Circuit Courts in maintenance cases by allowing them to order (a) secured maintenance and (b) lump sum payments.**
- 6.21 Secured maintenance involves tying up capital assets so that they continue to be available for paying the maintenance ordered by the court. This form of maintenance may also continue after the death of the person liable to pay maintenance. Lump sums could, in appropriate cases, be ordered to be paid by instalments and those instalments could also be secured.

Foreign Maintenance Orders

- 6.22 Prior to 1974 Irish maintenance orders were not generally recognised or enforced outside of Ireland; neither were foreign maintenance orders enforced in the State. *The Maintenance Orders Act, 1974* gives effect to an Agreement on the reciprocal recognition and enforcement of maintenance orders between Ireland and the United Kingdom. This Agreement with the United Kingdom has worked well and in its operation is regarded as one of the best of its kind. Negotiations have commenced with the British Authorities to see if further improvements can be made. Until 1988 the enforcement of Irish maintenance orders abroad was in effect restricted to the United Kingdom. However, in 1988 enforcement in other EC countries became possible with the enactment of the *Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988*. This Act gives effect to the 1968 EC Judgments Convention which provides *inter alia* for the reciprocal recognition and enforcement throughout EC States of judgments in civil and commercial matters including maintenance. The Convention lays down procedures by virtue of which judgments in civil and commercial matters given in Ireland are more or less

automatically enforced in all other Member States (except for Spain and Portugal — until the Convention comes into force between Ireland and those countries — see section 6.27) and *vice versa*.

- 6.23 The 1968 Convention provides that where the person from whom maintenance is sought is domiciled in a Contracting State he or she may be sued for maintenance in the country where he or she is domiciled or in the courts of the place where the person due maintenance is domiciled or habitually resident. If the maintenance claim is ancillary to proceedings concerning the status of a person (e.g. divorce proceedings) the person from whom maintenance is sought may generally be sued in the court hearing those proceedings also. However, if the person liable to pay maintenance wishes to seek a variation or revocation of a maintenance order he or she can only do this in the state where the person entitled to maintenance is domiciled. These provisions demonstrate the concern of the Member States for the weaker party in maintenance matters, i.e. the dependent spouse. Where a person entitled to maintenance has obtained either partial or full legal aid in maintenance proceedings in the country of his or her domicile he or she will automatically be entitled to full legal aid in another Member State when making an application in that State to enforce the maintenance order.
- 6.24 Although existing Community provisions provide for the reciprocal enforcement of maintenance orders throughout the EC, and legal aid is automatically made available in the country of enforcement when making an application for enforcement if it was given in the country where the judgment was obtained, these provisions do not address many of the practical difficulties involved in recovering maintenance from another country. These difficulties are likely to increase with the advent of 1992 and the increased movement of persons within the Community. When Ireland assumed the Presidency of the EC in January 1990 the Minister for Justice put forward, in the context of European Political Co-operation, a number of practical proposals in the form of a draft Convention (which will be in addition to and supplement the 1968 Convention already mentioned) aimed at facilitating the enforcement of maintenance payments throughout the Community. Agreement was reached on the proposals during the Irish Presidency and to date the Convention has been signed by 9 of the 12 Member States.
- 6.25 The main feature of this Convention is the establishment of Central Authorities in each Member State who, in co-operation with each other, will assist people entitled to maintenance in recovering payments due to them from a person living in another Member State. The Central Authorities will deal with both incoming and outgoing applications on behalf of people entitled to maintenance. The Authorities will assist with documentation, in ascertaining the whereabouts of people owing maintenance and/or their assets and will take appropriate action to bring about the recognition and enforcement of foreign maintenance judgments and the transfer of maintenance payments to the person due them. The Central Authority will be precluded from charging any fees for the services rendered by them. There will be a Standing Committee, to be comprised of representatives from each Member State, which will oversee the implementation of the Convention and seek to resolve any problems which arise in practice. **The Government proposes to introduce legislation which will allow Ireland to ratify this Convention.**
- 6.26 As part of the legislation referred to in the previous paragraph the **Government proposes to provide for the accession of Ireland to a 1956 U.N. Convention on**

the recovery abroad of maintenance on a worldwide basis. The U.N. Convention applies to over 50 states including nearly every European state as well as Australia and New Zealand. The U.N. Convention provides for a central authority system under which, for example, a person in this jurisdiction seeking maintenance from a person residing in another State party to the Convention would be assisted in taking an action in that foreign state to recover maintenance without the need for the applicant to leave Ireland. In the case of both the E.C. Maintenance Convention and the U.N. Convention it is envisaged that, initially at any rate, the Central Authority for both Conventions will be the Minister for Justice who will discharge these functions through his Department.

The Government also proposes to introduce legislation to extend the scope of the 1968 Convention to Spain and Portugal and give effect to a similar Convention in respect of Member States of the European Free Trade Association (Austria, Finland, Iceland, Norway, Sweden and Switzerland). These measures will enable Irish maintenance orders to be enforced throughout Western Europe and will greatly reduce the practical difficulties people face in recovering maintenance due to them from people living abroad.

The Family Home

Existing position

- 6.28 The *Family Home Protection Act, 1976* contains provisions to prevent a spouse from disposing of the family home without the consent of the other spouse. In particular, it provides that a spouse may not sell or mortgage the family home without the prior consent in writing of the other spouse. (The need for the other spouse's consent can, however, be dispensed with by a court where it considers that in all the circumstances the refusal to consent is unreasonable).
- 6.29 The Act provides that where one spouse is engaging in conduct which may lead to the loss of an interest in the home and that this is being done with the intention of depriving the other spouse or a dependent child of residence in the home a court may make an order in relation to protection of the home. It also contains provisions restraining a spouse from disposing of household goods to the extent that it would be difficult for the other spouse or dependent children to reside in the family home without undue hardship. In one particular case (*B.L. v. M.L. [1989] ILRM 528*) a High Court judge decided that a woman who elected to adopt the full time role of wife and mother in the home and was thus precluded from contributing directly or indirectly in money or money's worth to the purchase of the family home was, under Article 41.2° of the Constitution, entitled to have her work as home maker and mother to be taken into account in calculating her contribution towards the acquisition of the family home. However, this decision was appealed to the Supreme Court who, in a judgment given on 5 December 1991, reversed the High Court decision confirming the existing law that a spouse must make a contribution in money or money's worth to acquire a beneficial interest in the ownership of the family home.
- 6.30 While orders have been made by the courts transferring ownership of the family home under section 5 of the 1976 Act, in general the Act has no effect on actual ownership. However, where the family home is in the legal ownership of one spouse the other spouse may acquire a beneficial interest in the ownership through direct monetary

contributions made towards its purchase. Where the contributions have been indirect (such as contributions to the general expenditure of the family) the contributing spouse will generally acquire a share in the ownership of the home in the absence of any agreement to the contrary. A spouse who has contributed either directly or indirectly in this way to the acquisition of a house owned by the other spouse may make an application, under section 12 of the *Married Women's Status Act, 1957*, for a declaration of a beneficial interest in the property and if the application is successful a share in the ownership of the house is recognised and quantified.

Proposed Joint-ownership legislation

- 6.31 No share in the ownership of the family home is earned by the non-pecuniary contribution which a spouse — it will usually be the wife — makes towards the family welfare by looking after the house and family. To remedy this situation and because it would give legislative recognition to the status of marriage as a partnership **the Government proposes to introduce legislation to give each spouse a statutory entitlement to an equal share in the ownership of the family home (and household chattels)**. Preparation of the legislation has been accorded priority by the Government and is at an advanced stage. Its introduction would be in line with one of the recommendations of the Commission for the Status of Women in its First Statement to Government in April, 1991.

Other legislative measures protecting the family home

- 6.32 In addition to the protection afforded by the Family Home Protection Act and the possibility of acquiring an interest in the family home by direct or indirect contributions, the non-owning spouse also has the benefit of several other legislative measures. Under the *Judicial Separation and Family Law Reform Act, 1989* the courts have wide powers to make orders in respect of property on the granting of a decree of judicial separation. One of the matters the court is empowered to take into consideration in making such orders is the contribution of a spouse in looking after the home and caring for the family. It is understood that the general practice of the courts to date in applying these provisions has been to give both spouses an equal share in the family home or the proceeds from its sale. *The Succession Act, 1965* provides that on the death of one spouse the surviving spouse may — subject in certain circumstances to the agreement of the court — require the family home to be appropriated towards her share of the estate of the deceased.

The Bankruptcy Act, 1988, which consolidates and modernises the entire statute law in relation to bankruptcy, contains special provision for the family home in the event of the bankruptcy of one (or both) of the spouses. Unlike other property of the bankrupt, which under the Act vests in the Official Assignee and which he may realise on his own initiative, a family home (within the meaning of the *Family Home Protection Act, 1976*) cannot be disposed of without the prior sanction of the High Court and any such disposition made without such sanction will be void. In cases where an application for disposal of the family home is made by the Official Assignee the court has power to order postponement of the sale having regard to the interests of creditors and of the spouse and dependants of the bankrupt as well as to all the circumstances of the case.

Succession Rights

- 6.33 Succession rights are governed by the provisions of the *Succession Act, 1965*. (The position in relation to the relinquishing or extinguishment of succession rights in certain circumstances is dealt with in Chapter 8).
- 6.34 Where a spouse dies *not having made a will*, the surviving spouse has a right to *all* of the deceased's estate where there are *no children*.
- 6.35 Where there are *children* and a spouse dies *not having made a will* the surviving spouse has a right to *two-thirds* of the deceased's estate and the children have a right to *one-third*.
- 6.36 Where a spouse dies *having made a will*, the surviving spouse has a right to *one-half* of the deceased's estate where there are *no children*.
- 6.37 Where there are children and a spouse dies *having made a will* the surviving spouse has a right to *one-third* of the deceased's estate; a surviving spouse is free to choose between a legal right share on the one hand and a devise or bequest to him or her on the other. While a child does not have an automatic right to part of the estate a court may make an order for whatever provision for the child from the estate it thinks fit where the court is of the opinion that the person who made the will has "failed in his moral duty to make proper provision for the child".
- 6.38 Whether a will has been made or not and the estate included a dwelling in which the surviving spouse was ordinarily resident at the time of the other spouse's death, the surviving spouse may require the person administering the estate to transfer to him or her the dwelling and any household goods in satisfaction of or towards satisfaction of his or her share in the deceased's estate.
- 6.39 Under the unworthiness to succeed provisions of the Succession Act (section 120) a spouse against whom the deceased obtained a decree of divorce *a mensa et thoro* or a spouse guilty of desertion for two years or more prior to the deceased's death is precluded from taking any share in the estate of the deceased on intestacy or as a legal right. The *Judicial Separation and Family Law Reform Act, 1989* has however changed the position. With the abolition of the decree of divorce *a mensa et thoro* (by the 1989 Act) the above provision applies only to decrees of divorce *a mensa et thoro* granted in proceedings commenced before the 1989 Act came into force. The question of succession rights following the granting of a decree of judicial separation is dealt with in Chapter 7. There are also provisions in section 120 of the 1965 Act disentitling a spouse who is guilty of desertion for 2 years or more prior to the deceased spouse's death or who has committed a criminal offence against the deceased spouse or any child of the deceased. Those provisions were unaffected by the 1989 Act.
- 6.40 The Succession Act also contains provisions to counteract attempts by one spouse to disinherit the other spouse or any of his children. If a deceased person has made any disposition of his property within three years before his death (other than to a purchaser) for the purpose of defeating or substantially diminishing the share of his spouse, whether as a legal right or on intestacy, or the intestate share of any of his children or of leaving any of his children insufficiently provided for, the court may order that the disposition shall be set aside and instead form part of the estate of the deceased.
- 6.41 *The Status of Children Act, 1987*, which is discussed in more detail in the next Chapter, provides that children born outside marriage have the same succession rights as children born within marriage.



Chapter 7

The Position of Children

Houses of the Breachtas

Chapter 7

The Position of Children

Introduction

- 7.1 The previous Chapter set out some of the legal provisions in relation to the protection of and financial support for children. This Chapter concentrates on other legal provisions relating to the position of children.

Custody and Access

Guardianship of Infants Act, 1964

- 7.2 Where disputes arise between spouses about issues such as custody of and access to children a court may, under the provisions of the *Guardianship of Infants Act, 1964*, make orders in relation to the custody of a child, the right of access to a child by a father or mother or the handing over of a child.
- 7.3 In considering such issues the court is obliged to regard the welfare of the child as the first and paramount consideration.

Child Abduction

- 7.4 The *Child Abduction and Enforcement of Custody Orders Act, 1991* deals with the problems that arise when a parent abducts his child across frontiers in defiance of a court order or against the wishes of the other parent. Child snatching by parents is a growing international problem reflecting increasing levels of family breakdown in states and the growing mobility of individuals between states. Until recently Ireland was not a party to any international agreement dealing with child abduction and there was no legislation specifically aimed at the matter. There were no arrangements under which an Irish custody order could be "automatically" recognised and enforced in another state. In the absence of such arrangements, in order to recover a child who had been abducted from the State, proceedings needed to be taken in the other state where the issue would be decided on its merits. Such proceedings were likely to be expensive and time-consuming. The High Court has in recent years ordered the return of children who have been wrongfully removed to Ireland from their country of residence. The fact that a custody order had been made by a foreign court did not, however, prevent the issue being reopened before an Irish court.
- 7.5 The 1991 Act gives the force of law in Ireland to
- (a) the 1980 Hague Convention on the Civil Aspects of Child Abduction, and
 - (b) the 1980 European (Luxembourg) Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.

The Act is effective from 1 October, 1991 following the ratification by Ireland of the Hague and Luxembourg Conventions. The Conventions have, in practice, proved to be of substantial benefit and, between 1 October, 1991 and 31 July, 1992, 20 children were returned to Ireland either by order of a foreign court or voluntarily once proceedings were commenced; 5 children were returned from Ireland.

Both Conventions have administrative and judicial measures designed to secure the return of children under 16 years of age who are removed by a parent to any Contracting State.

The Conventions deal with the practical and legal problems involved

- by the establishment in each state of a Central Authority to facilitate the operation of the Conventions;
- in the case of the Luxembourg Convention by a scheme of recognition and enforcement under which custody orders of one Contracting State are recognised and enforced in other Contracting States;
- and in the case of the Hague Convention by expeditious procedures for the return of the child which can operate in the absence of a court order in the state from which the child was removed.

- 7.6 The Act designates the Minister for Justice as the Central Authority in Ireland for both Conventions (although the Act also empowers the Minister to nominate a Central Authority separate from his Department) thus adding to the international network of Central Authorities which exist between states who are party to the Conventions. In practice, the Minister for Justice fulfils his responsibility as a Central Authority through the Department of Justice which deals with incoming and outgoing applications under the Conventions as follows—

- (a) *where a child has been abducted into the State the Central Authority*
 - initiates steps to trace the child;
 - seeks the child's return or secures access to the child;
 - arranges, if necessary, for court proceedings to secure the return of, or access to, the child.
- (b) *where a child has been abducted from the State*
 - assists the wronged party in seeking return of the child
 - collates and sends to other Central Authorities information (including welfare reports) about the child.

- 7.7 Applicants under the Conventions are entitled to legal aid and no charge is imposed in relation to applications to Central Authorities. Applications to the State from other Contracting States are, generally, transmitted to the Legal Aid Board for the relevant proceedings to be taken in the High Court.

- 7.8 The Act gives the Garda Síochána power to detain a child who they reasonably suspect is being removed from the State in breach of any custody order (including orders made under either Convention) or while proceedings in relation to custody orders are pending or are about to be made.

Contracting States to Conventions

- 7.9 To date twenty four states are party to the Hague Convention — Argentina, Australia, Austria, Belize, Burkina Faso, Canada, Denmark, Ecuador, France, Germany, Hungary,

Ireland, Israel, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom and the United States of America. Fifteen states are party to the Luxembourg Convention — Austria, Belgium, Cyprus, Denmark, France, Germany, Ireland, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom.

Children born within and outside marriage

- 7.10 *The Status of Children Act, 1987* removed discrimination in the law as between children born within and outside marriage. Before the coming into effect of this Act, the legal position of the child born to parents not married to each other compared unfavourably in many respects with that of a child of married parents.
- 7.11 In the area of *succession rights*, the former position was that a child of parents not married to each other had limited rights to succeed on the death of its mother where she had not made a will and no rights at all on the death of its father or anyone related through him where the father had not made a will. As regards wills, there was a rule of interpretation the effect of which was that a reference to a family relationship excluded any links to or through an illegitimate relation unless the contrary intention appeared. Since the coming into effect of the Act, distribution of an estate where there is no will is now carried out without distinction based on the marital status of any relative's parents; and wills and other instruments made since then are interpreted on the basis that references to family relationships are to be construed, unless the instrument otherwise provides, without regard to whether any person's parents have married each other. The provision of the *Succession Act, 1965* — section 117 — which enables a child of a person who died having made a will to apply to court for proper provision out of the estate, where such provision has not been made, applies to all children of a deceased who died after the coming into effect of the Act, whether or not the deceased had married the child's other parent.
- 7.12 As regards *guardianship*, the mother of a child born outside marriage was the sole guardian; the father's only entitlement was to apply to court for access to or custody of the child, but he could not become guardian except by marrying the child's mother. Since the coming into effect of the Act, the father of a child born outside marriage may now apply to court to become guardian of his child jointly with the child's mother and the court will make its decision treating the welfare of the child as the first and paramount consideration.
- 7.13 As regards *maintenance* for a child of unmarried parents, the former position was that maintenance could be sought only from the father; an application normally had to be made within three years of the birth; and there was a statutory requirement that the mother's evidence be heard and corroborated before a maintenance order (or, as it was called, an affiliation order) could be made. Since the coming into effect of the Act proceedings are similar to an application for maintenance of a dependent child of a family: either parent may seek maintenance from the other at any time while the child is a dependant, and there are no statutory requirements as to the mother's evidence.
- 7.14 The Act establishes a new procedure whereby a person can seek a declaration as to the identity of his parents. The Act also makes new provisions regarding the use of blood test evidence in cases where parentage is in dispute. Heretofore, such evidence could be used where it was made available to the court; but if a party declined to make a sample

available for blood testing, the court could not draw conclusions from the refusal. The court may now direct the taking of blood samples and draw inferences from a refusal to comply with such a direction.

- 7.15 Under previous law the presumption of legitimacy, which arose where a married woman gave birth to a child, could be rebutted only on evidence which put the matter beyond reasonable doubt. This presumption has been replaced by a presumption of paternity, rebuttable on the balance of probabilities. The presumption of paternity of a married woman's husband does not arise where another man's name has been entered as father on the register of births, or where the mother and her husband have been living separately and apart as a result of a judicial separation or a deed of separation.
- 7.16 The procedures for having the father's name entered on the births register where he is not married to the mother have been eased. Heretofore, both parents had to present themselves together in person to the registrar. Now, in addition to that method, either parent may have the father's name entered by producing a statutory declaration from the other parent or a court order in a maintenance or guardianship matter which identifies the father.

Adoption

- 7.17 Under the Adoption Acts, 1952-1976, an adoption order could be made only in respect of a child—
- (i) who was an orphan, or
 - (ii) whose parents were not married to each other, or
 - (iii) whose parents married each other after his birth but whose birth had not been registered,

where the child's mother or guardian or any person having control over him consented to his adoption or their consent was dispensed with on limited grounds.

The *Adoption Act, 1988* permits the adoption of children whose parents are deemed by the courts to have failed in their constitutional duty to care for them. The Act permits the High Court — but only in certain strictly defined circumstances — to authorise the adoption of any child, whether his parents are married or unmarried or have adopted him, without requiring the consent of his parents or guardian.

The *Adoption Act, 1991* contains provisions in relation to the recognition of foreign adoptions. It also extends the categories of persons eligible to adopt by permitting an adoption order to be made, in particular circumstances, to a single person or a married person who has separated.

Child Care

- 7.18 The *Child Care Act, 1991** up-dates the law in relation to the care of children, particularly children who have been assaulted, ill-treated, neglected or sexually abused or who are at risk.

*The provisions of the Act are being implemented on a phased basis. A number of the provisions of the Act were commenced on 1 December, 1991 and it is intended to bring substantial elements of the Act into operation during 1992.

The main provisions of the Act are:—

- (i) the placing of a statutory duty on health boards to promote the welfare of children who are not receiving adequate care and protection;
- (ii) strengthening of the powers of health boards to provide child care and family support services;
- (iii) improved procedures to facilitate immediate intervention by health boards and the Gardaí where children are in serious danger;
- (iv) revised provision to enable the courts to place children who have been assaulted, ill-treated, neglected or sexually abused, or who are at risk, in the care of or under the supervision of health boards;
- (v) introduction of arrangements for the inspection and supervision of pre-school services;
- (vi) revised provisions in relation to the registration and inspection of residential centres for children.

U.N. Convention on the Rights of the Child

- 7.19 The 1989 U.N. Convention on the Rights of the Child reflects a broad consensus on the obligations of families, society and the international community towards children. Measures in the Convention cover a wider front than that of marital breakdown. It was signed, subject to ratification, by Ireland in 1990. **The Government proposes to have the Convention ratified shortly.**



Chapter 8

Nullity/Separation/ Foreign Divorces

Chapter 8

Nullity/Separation/ Foreign Divorces

Introduction

- 8.1 This Chapter deals with specific aspects of the law which have implications for the status of a marriage.

Nullity

- 8.2 The High Court may, in certain circumstances, grant a *decree of nullity*. The grounds on which a decree might be granted must have been present at the time the marriage took place. The effect of such a decree is that the marriage is regarded as never having taken place. As a consequence the legal provisions relating to marriage no longer apply. For example, as the marriage is not valid succession rights do not arise. At present the court has no power to make financial provision for a person whose marriage has been annulled (but it has power to order maintenance for the children of the parties who are involved).
- 8.3 In its report on the Law of Nullity (LRC9 — 1984) the Law Reform Commission states that, having regard to recent judgments, many aspects of the law which would have appeared to require reform years ago had since been restated by the court in modern terms. This did not, in the Commission's view, mean that statutory reform of the law on nullity had been rendered unnecessary; merely that the law had been clarified significantly in recent years. There have been significant further developments in the courts since the Commission's Report was published and these have tended to clarify further the law in this area and extend the grounds on which a marriage will be declared null and void. In the circumstances the **Government proposes that the possible need for legislation dealing with the grounds for a decree of nullity will be kept under review particularly in the light of further developments in this particular area as well as in the general area of avenues of legal redress open to those whose marriages have broken down.**
- 8.4 In the meantime, the Government proposes to make two significant changes to the law in this area.
- 8.5 First, **the Government proposes to introduce legislation to empower the Circuit Court to grant nullity decrees** (at present jurisdiction in this area is confined to the High Court). **Head 46 of the Scheme of the Family Law (No. 1) Bill contained in Appendix 1 provides accordingly.** This should help to reduce the cost of nullity proceedings and will bring court jurisdiction in line with that which applies to judicial separations, with what is proposed in the case of divorce, if a Constitutional amendment

permitting divorce were to be accepted by the people, and with what is proposed in the case of declarations of status (see Part III of the Scheme of the Family Law (No. 1) Bill).

- 8.6 Secondly, **the Government proposes to introduce legislation to empower the Circuit and High Courts to make in certain circumstances financial and property provisions for parties whose marriage has been annulled on similar lines to those in place for judicial separation and which would be envisaged if divorce were to be introduced here. Part II of the Scheme of the Family Law (No. 1) Bill contains the necessary provisions.** This proposal is in line with the recommendations contained in "The Law of Nullity in Ireland" published by the Office of the Attorney General in 1976 and goes beyond what is recommended by the Law Reform Commission in their Report on Nullity of Marriage (LRC9-1984) which recommended that property orders in these cases could only be made with consent. The Government believes that, notwithstanding the fact that a decree of nullity means that a marriage never was valid, the reality whereby a couple prior to the granting of a decree of nullity may have lived together for a number of years during which financial and other arrangements were made in the same way as in a valid marriage and as a consequence one spouse became dependent on the other cannot in equity be overlooked and it is in this light that this proposal is being put forward.

Separation Agreements

- 8.7 Couples who agree to separate and who can reach agreement on issues such as custody of and access to children and property/financial arrangements can enter into a *separation agreement*. A separation agreement may, on application to court, be made a rule of court provided it includes either or both of the following: (i) provision for the payment of maintenance by one spouse to the other and/or to any dependent children of the family; (ii) financial provisions, other than maintenance, or the disposition or use of any property. If the court is satisfied that the agreement is a fair and reasonable one which in all the circumstances adequately protects the interests of both spouses and any dependent children of the family, it may make the agreement a rule of court. The advantage of this approach is that it affords to the spouse in receipt of maintenance the right to have his or her maintenance paid through the District Court and the sum payable enforced by way of an attachment of earnings order. Also, if a party to the agreement refuses or fails to comply with any provision in it he or she can be held to be in contempt of court.
- 8.8 The *Judicial Separation and Family Law Reform Act, 1989*, which is discussed later in this Chapter, requires the solicitor of a person applying for a judicial separation to discuss with that person the possibility of engaging in mediation to help effect a separation on an agreed basis. This reflects a view that it is desirable where couples decide to separate for them to agree on the terms of their separation rather than having the terms decided by a court.
- 8.9 A separation agreement generally sets out the agreement of a couple to separate and the terms governing their separation. Normally areas such as financial and property provisions together with issues such as custody of and access to children would be covered. A typical feature of separation agreements would be a provision whereby each spouse relinquishes succession rights to the other's estate.
- 8.10 In general, the provisions of separation agreements are regarded as legally enforceable

but there are exceptions. For example, a provision in an agreement which purported to deny or limit the right of a spouse to apply for maintenance under the *Family Law (Maintenance of Spouses and Children) Act, 1976* is void under the terms of that Act.

Judicial Separation

The 1989 Act

- 8.11 The *Judicial Separation and Family Law Reform Act, 1989* abolished the action for divorce *a mensa et thoro* and replaced it with a new action for *judicial separation*. This can be obtained on wider grounds with substantially improved provision for dependent spouses and children.

Grounds

- 8.12 An action for divorce *a mensa et thoro* could be applied for only on the (fault-based) grounds of adultery, cruelty and unnatural practices. Under the 1989 Act a spouse may now apply for a judicial separation on (any one or more of) the grounds that
- the other spouse has committed adultery
 - the other spouse has behaved in such a way that the applicant cannot reasonably be expected to live with the other spouse
 - there has been desertion by the other spouse for a continuous period of *one* year immediately preceding the date of the application for a decree (desertion includes conduct on the part of the other spouse that resulted in the applicant, with just cause, leaving and living apart from the other spouse)
 - the spouses have lived separately for a continuous period of at least *one* year immediately preceding the date of the application where the other spouse consents to a decree being granted
 - the spouses have lived separately for a continuous period of *three* years immediately preceding the date of the application
 - the marriage has broken down to the extent that a normal marital relationship has not existed between the spouses for a period of at least *one* year immediately preceding the date of the application.

Conciliation and Mediation

- 8.13 The 1989 Act places an onus on the legal representatives of the spouses in separation proceedings to make them aware of the alternatives to court proceedings, i.e. counselling, mediation or, if necessary, a deed of separation. The court must also consider the possibility of a reconciliation between the spouses or, in the alternative, mediation leading to an agreed separation and the court has discretion to adjourn the separation proceedings for these purposes. However, there is no question of any compulsion involved since the essential feature of conciliation or mediation is the voluntary nature of participation by parties in the process.

Financial and Property Orders

- 8.14 Prior to the 1989 Act the powers of the court in divorce *a mensa et thoro* proceedings to make orders in support of a spouse or dependent children were very limited. The court

had no general power to order the transfer of property between the spouses or to children. It also had no power to order secured maintenance or lump sums. Under the Act the court has a wide range of powers to order financial relief: it is empowered (a) to order maintenance, as well as secured maintenance (which involves tying up capital assets so that they continue to be available for paying the maintenance ordered by the court; this form of maintenance can continue after the death of the person liable to pay maintenance); (b) to order lump sums; (c) to order the transfer of property, including the family home, between the spouses and to dependent children or to order that a spouse may occupy the family home for life. The court also has powers to order the sale of property whenever it makes an order involving capital assets (e.g. a lump sum, transfer of property or a secured periodical payments order). The court is required to exercise its powers to make financial provision and property orders in a manner which shall seek to ensure that such provision is made for any spouse and dependent children as is adequate and reasonable having regard to all the circumstances. In making such orders the court must also have regard to such matters as the income, earning capacity, property and other financial resources of the spouses and a spouse's contribution in caring for the family and looking after the family home. These provisions in regard to property orders go further than the recommendations of the Law Reform Commission in its Report (LRC8-1983) on *Divorce a Mensa et Thoro* and related matters. The Commission recommended the making of property orders only where there was the consent of both parties.

Conduct

- 8.15 In deciding whether to make financial provision for a spouse the court is required to take the conduct of that spouse into account if the conduct is such that in the opinion of the court it would in all the circumstances be repugnant to justice to disregard it. Desertion is a bar to the making of a financial provision order unless it would be repugnant to justice not to make such order.

Succession Rights

- 8.16 As has already been mentioned a spouse against whom a deceased obtained a decree of divorce *a mensa et thoro* is precluded from taking any share in the estate of the deceased as a legal right or on intestacy. The position following the 1989 Act is that on the granting of a decree of judicial separation or at any time thereafter, on the application of either spouse, the court is empowered to consider whether it should make an order extinguishing the succession rights of the other spouse. The court will extinguish the succession rights of a spouse
- (i) if adequate and reasonable provision of a permanent nature has been made to provide for the future security of a spouse, or
 - (ii) if it is not a case where permanent provision should be made for a spouse (for example, where the couple is young and childless and it would not be appropriate to make permanent provision for either spouse), or
 - (iii) if the spouse is not a dependent spouse, or
 - (iv) if the spouse is not a spouse in respect of whom the court has ordered or would order financial provision, on grounds of conduct (which it would be repugnant to justice to disregard).

Avoidance of dispositions of property

- 8.17 There are safeguards in the Act against transactions intended to defeat a spouse's claim for financial relief. These make void transactions intended to frustrate the making of financial relief orders (or reduce the amount that otherwise would be available) in respect of spouses and children.

Children

- 8.18 A decree of judicial separation may not be granted unless a court is satisfied that proper provision in the circumstances has been made for dependent children. In the context of, or following, proceedings for a judicial separation a court may give directions in relation to issues such as custody of and access to children under *section 11 of the Guardianship of Infants Act, 1964*.

Effect of decree

- 8.19 While a judicial separation decree has the effect that it is no longer obligatory for the spouses to cohabit it does not legally end the marriage and, accordingly, does not permit remarriage.

Survey of cases

- 8.20 Details of a survey of cases taken during a particular period under the 1989 Act are at Appendix 3.3. The survey shows, *inter alia*, that 87% of applicants for a decree of judicial separation were wives and that the most common ground for the granting of a decree was that the marriage had broken down to the extent that a normal marital relationship had not existed for at least a year. However, in many cases where this ground was pleaded other grounds were also pleaded.

Recognition of Foreign Divorces and other orders***The 1986 Act***

- 8.21 Before the coming into effect of the *Domicile and Recognition of Foreign Divorces Act, 1986* (on 2 October, 1986), a woman on marriage was treated as acquiring her husband's domicile* and was regarded as incapable of shedding that domicile while the marriage subsisted. The Act did away with this rule; a married woman's domicile is now determined in the same way as anyone else's. The Act also altered the rule whereby divorces obtained abroad are recognised under Irish law. Up to the coming into effect of the Act, the rule was that a divorce granted in a foreign jurisdiction would be recognised only if both parties were domiciled in that jurisdiction at the time the divorce proceedings were commenced. Thus a man domiciled abroad who married an Irishwoman could because of domicile of dependency obtain a divorce in the jurisdiction of his domicile which would be recognised by Irish law, notwithstanding that his wife

*Domicile is a legal concept that can be a determining factor in certain cases, all of which have an international dimension, in deciding which country's law it is appropriate to apply (e.g. to determine whether a person is liable to pay tax to a particular state) or whether a legal act (e.g. a divorce) done in one state will be recognised in another. For these purposes a person is regarded as being domiciled in a particular state: for instance a person may be treated as having the domicile of the country of birth or as deriving domicile from that of his or her parents; or by moving to another state and forming an intention to remain indefinitely there to acquire a domicile of choice in that state. (The concept of domicile is distinct from that of habitual residence. Paragraph 13 of Appendix 3.7 discusses recommendations made by the Law Reform Commission in relation to the use of the concept of habitual residence.)

might never have been in his country of domicile. (It should be noted, however, that Walsh J. observed (*obiter*) in *Gaffney v. Gaffney* [1975] I.R.133 in relation to this type of case that "it is possible that some day it (i.e. domicile of dependency of a married woman) may be challenged on constitutional grounds in a case where the wife has never physically left her domicile of origin ..."). A woman, whether from Ireland or abroad, who married an Irishman could obtain a divorce which would be recognised here only if the man acquired a domicile in another jurisdiction (a very difficult thing to establish). The position in the case of a divorce granted in a foreign jurisdiction on or after 2 October, 1986 is that Irish law will recognise the divorce if either of the parties was domiciled in that jurisdiction at the time of the institution of the divorce proceedings. There are other grounds also. Where a divorce is granted in a country other than a country where either of the spouses is domiciled, the divorce will be recognised under Irish law if it is recognised by the law of the country where both spouses are domiciled, or if they are domiciled in different countries, if it is recognised by the laws of both those countries. Where the divorce is granted in England and Wales, Scotland, Northern Ireland, the Channel Islands or the Isle of Man it will be recognised here if either spouse is domiciled in any of these jurisdictions whether or not this is the jurisdiction in which the divorce is granted.

Hague Convention

- 8.22 The Law Reform Commission in its Report on Foreign Divorces and Legal Separations (LRC 10-1985) proposed new rules of recognition for foreign divorces and legal separation which would enable Ireland to ratify the 1970 Hague Convention on the recognition of foreign divorces and legal separations. The Commission's recommendations were linked to a previous recommendation made by the Commission in their Report on Domicile and Habitual Residences (LRC 6-1983) which recommended the substitution of habitual residence for domicile as a connecting factor in the various areas where domicile is relevant in cases which have international dimensions including cases concerning the recognition of foreign divorces. These recommendations are discussed in paragraph 13 of Appendix 3.7. **As to the question of ratification of the 1970 Hague Convention this is a matter the Government will look at again in the context of whatever proposals are being considered in the light of responses to this White Paper.**

Financial Provisions

- 8.23 There is no provision in present law to enable a court in this country to make ancillary orders relating to such matters as maintenance and property where a foreign decree of divorce, nullity or judicial separation is recognised here. This can give rise to problems. For example, problems have arisen under the 1968 Judgments Convention (and under the Ireland-U.K. maintenance agreement) in the situation where a maintenance order is granted by a court to a spouse in one Member State and the other spouse obtains a divorce decree in the Member State where enforcement of the maintenance order is sought. It has been held that in such a case when it comes to seeking enforcement of the maintenance order there are, in effect, two conflicting judgments. On the one hand, there is a maintenance order arising out of a failure by one spouse to maintain the other spouse and, on the other hand, there is a divorce decree ending the duty to maintain based on marriage.

- 8.24 **The Government proposes to introduce legislation to empower the courts here**

to make appropriate financial provision for the protection and support of persons with close connections with this country whose marriage has been dissolved or annulled abroad or in respect of which a judicial separation has been granted abroad where the decree of divorce, nullity or judicial separation is entitled to recognition in this country. Part IV of the Scheme of the Family Law (No. 1) Bill provides for the making of these financial orders.

Declarations of Status

- 8.25 A person can apply to the High Court under the *Legitimacy Declaration Act (Ireland), 1868* for a declaration that his or her marriage was or is valid (or that the marriage of his or her parents was valid). Apart from this, the High Court has a broad discretionary jurisdiction to grant a declaration as to the validity of a marriage whether or not any consequential relief is sought.
- 8.26 **The Government proposes to introduce legislation to**
- (a) **restate the law which enables a person to apply to the court for a declaration as to the validity of his or her marriage;**
 - (b) **empower the court to make a declaration that a decree of divorce, nullity or judicial separation obtained abroad is or is not entitled to recognition in the State;**
 - (c) **set out the basis of jurisdiction in the proceedings for such declarations.**

The Circuit Court will, concurrently with the High Court, have jurisdiction to make declarations of status (see head 46 of the Scheme of the Family Law (No. 1) Bill). Since the Circuit Court is also being given jurisdiction in nullity and, if divorce were to be introduced, in divorce cases, it will have a full family law jurisdiction concurrently with the High Court.

The proposals take into account the recommendations on these matters in the report of the Law Reform Commission on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6 — 1983). Part III of the Scheme of the Family Law (No. 1) Bill provides for these declarations of status.



Chapter 9

Other Measures/Social Policies

Other Measures/Social Policies

Houses of the Oireachtas

Chapter 9

Other Measures/Social Policies

Introduction

- 9.1 This Chapter gives details of some other measures and policies which impinge on family life and the problems of marriage breakdown including miscellaneous legal provisions, the availability of legal aid, the nature of court proceedings, the provision of counselling and mediation services and policies in the areas of taxation, housing, social welfare and education.

Miscellaneous Legal Provisions

Conjugal rights

- 9.2 The *Family Law Act, 1988* abolished the action for restitution of conjugal rights whereby a deserted spouse could seek an order against the deserting spouse seeking that spouse's return "to bed and board". Used at one time as a preliminary to maintenance or separation proceedings, the action had long been obsolete.

Jactitation of Marriage

- 9.3 The action for jactitation of marriage is used to restrain a person from falsely claiming to be married to a particular person. The action has fallen into disuse and the *Government proposes the abolition of the action for jactitation of marriage* as an obsolete provision in the law — Head 30 of the Scheme of the Family Law (No. 1) Bill. The proposal takes into account the Law Reform Commission's Report (LRC 6-1983) on, among other matters, Jactitation of Marriage.

Finance Act, 1990 — stamp duty

- 9.4 Section 114 of the *Finance Act, 1990* provides for exemption from stamp duty of any instrument whereby any property is transferred between spouses. The provision is in addition to section 14 of the *Family Home Protection Act, 1976* which exempts from stamp duty and certain fees any transaction which creates a joint tenancy between spouses in respect of a family home. These provisions are intended to encourage spouses to distribute ownership of property between them. The provisions also cover the case where the court orders the transfer of property between spouses (e.g. in judicial separation proceedings).

Legal Aid

Scheme of Civil Legal Aid and Advice

- 9.5 The Scheme of Civil Legal Aid and Advice, which was introduced on a non-statutory basis in 1980, is administered by the Legal Aid Board. Family law cases account for about 85% to 90% of the Board's workload and in the area of family law about 80% of the Board's clients are women.
- 9.6 Under the Scheme, the services of solicitors and, if necessary, barristers are made available to persons of modest means at relatively little cost. The Board provides services through Law Centres, staffed by the Board's own solicitors, at various locations around the country. Applicants for legal services under the Scheme have to satisfy a test of financial eligibility and a merits test and are liable to pay certain contributions based on means although in cases of hardship these can be waived. The means test limits in the Scheme and the various allowances which are deducted from gross income to arrive at a figure for disposable income were increased with effect from 17 January, 1991. These limits which are quite generous have been revised on several occasions since they were initially fixed in 1981. Under the current limits legal services would be available to a married applicant with 3 children and the usual outgoings on a gross salary of £13,500 p.a. for a maximum contribution of £469.
- 9.7 Notwithstanding the pressure on public finances generally, the position in relation to funding for the operation of the Scheme has improved significantly in recent years. For example, the Board, during the course of 1990, were able to recruit extra solicitors to bring their number up to full strength and most of the staff vacancies on the administrative side were filled. In addition 4 Law Centres which had been funded previously from non-Exchequer resources had their funding placed on a permanent basis thus ensuring their continued operation.
- 9.8 More recently, extra funding was made available to the Board, mainly to allow 3 new Law Centres to be opened. This, together with the opening of 2 new Law Centres in Dublin towards the end of 1992 in place of an existing centre, will bring the number of full-time Law Centres to 16 and a corresponding increase in the number of part-time Law Centres or clinic services has been provided for. This represents the most significant expansion since 1982 of the legal aid service funded by the Exchequer. The increased resources being provided take into account the extra demands on the Board arising from the operation of the *Judicial Separation and Family Law Reform Act, 1989* (since the Act came into effect the Board's Exchequer allocation has increased by almost £1m).
- 9.9 The situation with regard to the provision of legal services under the Scheme is under constant review and further initiatives are being taken to bring about an improvement in the provision of services within the Board's existing financial allocation. **The Government proposes, as and when the availability of financial resources and the overall situation with regard to public finances allows, to develop and expand the Scheme through the phased opening of additional Law Centres. In addition the Government proposes to introduce legislation to place the Scheme on a statutory basis.**

Legal Aid : other countries

- 9.10 Ireland has ratified the *European (Council of Europe) Agreement on the Transmission of Applications for Legal Aid*, the provisions of which came into force on 16 December, 1988. This means that residents of the Contracting States* who wish to apply for legal aid in civil, commercial or administrative matters in another such State, can do so via a transmitting authority in the State in which they are resident. The Legal Aid Board, 47 Upper Mount Street, Dublin 2 is the designated transmitting and receiving authority for Ireland.
- 9.11 In practical terms the Agreement represents a considerable improvement for people in Ireland who wish to pursue legal action by means of legal aid in other countries. The Legal Aid Board will process the necessary documentation and forward it to the appropriate receiving authority in the relevant country. People abroad can pursue legal remedies in Ireland by having their applications processed by the Legal Aid Board and, because the Board also administers the Civil Legal Aid Scheme, the matter will be dealt with by the Board in suitable cases. The Agreement helps to overcome difficulties mainly with regard to obtaining information on legal aid facilities in other countries, establishing lines of communication and language problems.

Family Law Hearings

Court Accommodation

- 9.12 In Dublin separate courtrooms are provided for High, Circuit and District Court hearings of family law cases. The High and Circuit Court courtrooms are in Aras Uí Dhálaigh, beside the Four Courts. This facility was opened in 1988. The District Court courtroom is in Dolphin House at East Essex Street, Dublin 2. These courtrooms were specially designed for family law hearings and are considered to meet present requirements adequately.
- 9.13 Outside Dublin family law cases are heard in ordinary courtrooms *in camera*, special rooms or the Judge's Chambers. In March, 1990 the Government decided to transfer financial responsibility for the provision and maintenance of court accommodation outside Dublin from the Local Authorities to the Exchequer. In practice, this responsibility is now discharged by the Department of Justice, in consultation with the Office of Public Works. This arrangement is intended to ensure that courthouses in greatest need receive priority and that appropriate facilities are provided at each location — for example, through the provision of special facilities for hearing family law cases where this type of special facility is considered desirable, warranted by the amount of business arising and capable of being accommodated in the space available without undue cost. **In particular, it is proposed to provide a special family law courtroom in future large scale projects. It is considered, however, that a more urgent requirement is the provision of appropriate interview facilities for District Court clerks to meet family law clients and this is being given priority as schemes come up.** What has been achieved to date and what is now being proposed is in line with demands for family courts.

*Austria, Belgium, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Norway, Portugal, Spain, Sweden, Turkey, and the United Kingdom.

Provisions of the Judicial Separation Act

- 9.14 The *Judicial Separation and Family Law Reform Act, 1989* contains a number of provisions in relation to family law hearings. It provides that
- the Circuit Family Court (as the Circuit Court is known when hearing family proceedings) shall sit in a different place, or at different times or on different days from those on which the ordinary sittings of the Circuit Court are held
 - family law proceedings in all courts shall be as informal as is practicable and consistent with the administration of justice
 - wigs and gowns shall not be worn by judges and lawyers in family law proceedings.

Family Courts

- 9.15 The extent to which the concept of family courts is achieved in practice at present through arrangements for separate hearings and the introduction of more informality in family law hearings has been outlined in the preceding paragraphs. The Law Reform Commission is at present examining the subject of family courts and **the Government proposes to consider further the question of family courts when the Commission's Report has been received.**

Counselling/Mediation

Counselling

- 9.16 A number of voluntary organisations provide marriage counselling and mediation services for couples who are encountering difficulties in their marriage. There is widespread public recognition of the need for, and the value of, such services. Attendance at a centre providing marriage guidance services may present a couple with the first opportunity to identify and discuss their marital problems in an objective manner under the guidance of a skilled counsellor. Details of voluntary agencies providing these services to whom grants are paid through the Health Boards are given at Appendix 3.5.

Pilot Family Mediation Service

- 9.17 The Family Mediation Scheme was set up in Dublin in July, 1986, under the auspices of the Department of Justice, for an experimental period of 3 years. The purpose of the Scheme is to assist a husband and wife whose marriage has broken down to reach a voluntary agreement about arrangements for children, property, the family home, maintenance and succession rights without the need for court intervention. Under the present Scheme mediation is provided free of charge. Statistics relating to mediation cases are at Appendix 3.6. A grant of £112,000 has been provided in the 1992 Estimates of the Department of Justice to enable the existing Mediation Service to continue to operate.
- 9.18 Following receipt of a report by the Minister for Justice from the Steering Committee of the ad-hoc Mediation Service, the Government has decided to establish a Review Committee, with detailed terms of reference, to report on the whole area of mediation. **The Government recognises the success of mediation services and proposes to determine the nature of appropriate long-term mediation services in the light of this review.**

Law Reform Commission Reports

- 9.19 The Law Reform Commission has issued many Reports in the Family Law area in recent years and the work of the Commission has been reflected in various legislative reforms which have been outlined. For ease of reference details in regard to the Commission's Reports and the position in relation to them are given at Appendix 3.7.

Education

- 9.20 The recently published Green Paper on Education — *Education For A Changing World* — discusses in Chapter 4 the need to broaden education and mentions in particular a need for the education system to develop in the student an ability to relate effectively to other people. The Green Paper emphasises that the personal and social development of students must be a central concern of the school. In considering responses to both this Paper and the Green Paper on Education the Government will be conscious of the relevance of the education system to the issues of family life and marital breakdown.

Housing

General

- 9.21 Marital breakdown is now a significant factor in generating additional housing requirements in both the social and private sectors of the housing market. A number of legislative and administrative measures have been taken in the housing area in recent years in response to this trend. The *Housing Act, 1988* (section 25) provided that the £2,000 new house grant (which is normally payable only in respect of the provision of a new house by a first time owner occupier) could be paid in certain circumstances to a previous owner occupier providing a new house where the applicant is in need of housing in circumstances of marital breakdown.

Local Authority Housing

- 9.22 The results of the most recent assessment of *local authority* housing needs (carried out under Section 9 of the *Housing Act, 1988*) showed that at 31st March, 1991 some 1,762 or 7.58% of the total approved applicants for local authority housing at that time were separated or deserted spouses. The corresponding figures for the previous assessment carried out in September, 1989 were 1,284 or 6.6% of the total.

Other than in exceptional circumstances, it is the general policy of housing authorities to require that new tenancies be in the joint names of both spouses. Similarly, in regard to the sale of local authority dwellings and house purchase loans the authorities require the ownership to be in joint names.

The Voluntary Sector

- 9.23 The *Plan for Social Housing* published by the Department of the Environment in February, 1991 announced significant developments in the voluntary housing area. The terms of the Voluntary Housing Capital assistance scheme were improved by increasing the 80% cost percentage limit to 90% and the per unit grant limit from £20,000 to £22,000 for one or two-person accommodation and to £25,000 for larger accommodation (a new category). This scheme applies to accommodation provided by approved voluntary housing organisations for designated categories of housing needs including persons in

need of rehousing as a result of marital breakdown and unable to provide it from their own resources. In addition, a new rental subsidy scheme to assist voluntary housing organisations to provide family accommodation was introduced. Under this scheme an approved voluntary organisation may borrow from the local authority the full cost of providing accommodation and the loan charges plus a contribution towards the maintenance and management costs will be met from a state subsidy and the rental income. The Plan also included other measures, notably, a new system of shared ownership (which is provided for in the *Housing Act, 1992*) aimed at improving access to adequate housing for households with limited resources.

Victims of Family Violence

- 9.24 The *Housing Act, 1988* greatly extends the powers of local housing authorities to secure accommodation for homeless persons in addition to any accommodation which they could provide directly from their own rented housing stock. These new powers enabled housing authorities to secure accommodation for homeless persons, through making arrangements with voluntary housing organisations, to assist homeless persons financially and otherwise and where necessary to rent accommodation to meet the needs of homeless persons.
- 9.25 The guidelines issued by the Department of the Environment on the implementation of the provisions of the *Housing Act, 1988* regarding homeless persons indicate that persons who are unable to occupy or remain in occupation of otherwise suitable accommodation due to violence may be regarded as homeless persons. The guidelines also indicate that victims of family violence may require professional care and counselling in emergency accommodation provided by or with assistance from the relevant Health Board. The subsequent accommodation of those who have passed through the care and counselling phase and are homeless should be regarded as the responsibility of the housing authority.

Taxation

- 9.26 The following paragraphs contain a summary of the taxation treatment of married, separated and divorced persons. The taxation code would, of course, fall to be reviewed particularly in the light of changes in the avenues of legal redress open to those whose marriages have broken down.

Income Tax

- 9.27 A. *Married Couples Living Together*

A husband and wife who are living together have three options as to how they are charged to tax: the aggregation basis, separate assessment and single treatment.

(i) The Aggregation Basis

This is the norm for the vast majority of married couples and applies unless a couple elect for one of the other two options. Under it, the incomes of husband and wife are aggregated and taxed as the income of the husband. All allowances due are set against this income, and the husband is entitled to double the rate-bands available to a single person, but where the wife is in employment the inspector allocates to her, where due, the PAYE and PRSI allowances and any employment-related expenses allowance and half a tax table allowance where appropriate, and any other allocation of allowances as agreed between them.

(ii) *Separate Assessment*

Either spouse can elect that both spouses be separately assessed. The election for separate assessment must be made within six months before 6 July in the year of assessment. The election will have effect for the year of assessment for which it is made and for subsequent years until it is withdrawn. Withdrawal must be made before 6 July.

Under separate assessment, tax is charged separately on each spouse's income. The married personal allowance is divided in half between them and each is entitled to single rate bands. The PAYE and PRSI allowances, and any employment-related expenses allowance, are allocated, as due, to each spouse. Other allowances and reliefs are allocated to one or other spouse, or apportioned between them, depending on the circumstances attaching to the particular allowance or relief. Where an element of an allowance, relief or rate-band to which the spouses are entitled is unused by one spouse, it is allocated to the other. Consequently, the combined total of the couple's allowances and reliefs, and the combined total of tax payable by them, are the same as on the aggregation basis.

(iii) *Single Treatment*

Either spouse can elect that both spouses be treated as single persons for the purposes of the Income Tax Acts. The election must be made for a year of assessment before the end of that year. The election can be subsequently withdrawn and ceases to have effect for the year in which it is withdrawn.

Under single treatment, each spouse is treated as a single person, with entitlement to allowances, reliefs and rate-bands as for a single person. Generally, more tax is payable on single treatment than on the aggregation basis or separate assessment.

B. *Married Couples Living Apart*

A husband and wife who are living apart are generally treated as single persons for tax purposes.

Where maintenance payments are being made by one spouse to the other, the tax treatment of the maintenance payments varies depending on the date on which the arrangement was made. Payments made under legally enforceable maintenance arrangements entered into after 7 June, 1983 are treated for tax purposes as follows:

- the spouse making the payment is allowed a deduction for the amount of maintenance paid when computing his/her total income for the tax year;
- the spouse receiving the payment is taxable in respect of it.

Where the maintenance arrangement provides for payment for the benefit of a child, the payer is not allowed to deduct this amount from his/her total income for the tax year and the child is not taxable in respect of it.

As an alternative to the above, where the marriage has not been dissolved or annulled and the spouses are resident in the State for the tax year, they may jointly elect for the aggregation basis described in Part A. If the recipient of the maintenance payment has other income, the couple will be assessed for tax as if an application for separate assessment had been made.

The tax treatment of payments made under arrangements entered into on or before 7 June, 1983 is more complex and varies depending on the circumstances in which the payment is made (i.e. Deed of Separation, Order or Rule of Court, Family Law (Maintenance of Spouses and Children) Act, 1976 etc.).

The above tax treatment applies where the spouses are living apart, whether or not a

foreign divorce has been obtained. Where a foreign divorce is recognised here and a spouse remarries, the new couple will be treated as married.

Capital Gains Tax

9.28 A. Married Persons

Section 13, *Capital Gains Tax Act, 1975*, as amended, provides special rules for the treatment of disposals of assets by married persons.

The special rules in relation to married persons are as follows:

(i) Assessment of married persons

Any capital gains tax arising on gains accruing to a wife in any year of assessment is normally assessed and charged on the husband. The law provides that, in this instance, no additional capital gains tax can be chargeable over and above the amount which would have been chargeable if the married persons were separately assessed.

(ii) Separate assessment

Married persons can also opt for separate assessment, as in income tax. They can do so by giving notice in writing to the Inspector of Taxes within three months after the end of the relevant year of assessment.

(iii) Losses

The surplus losses of one married person in any year of assessment can be set against the gains of the other married person in that year. This provision does not apply, however, where an election for separate assessment has been made.

(iv) Annual exemption

Section 16, *Capital Gains Tax Act, 1975* provides that individuals are entitled to an annual exemption of £2,000 and married persons an annual exemption of £4,000 in respect of disposals.

The legislation also provides that, where both husband and wife are chargeable to capital gains tax in any year of assessment (or would be but for the annual allowance) and the gains of one spouse are less than that spouse's annual exemption, the unused part of the annual exemption can be transferred and used by the other spouse, in addition to that spouse's own annual exemption.

(v) Single Treatment

Married couples can also opt for single treatment, as in income tax, and each spouse is then treated as a single person.

(vi) Disposal to spouse

Disposals by one spouse to the other, whether by gift or inheritance, are treated as "no gain/no loss" disposals, i.e. no charge to capital gains tax arises. However, the spouse acquiring the asset is deemed to have acquired it at market value on the same date as did the spouse who disposed of it. This provision does not apply where the disposals involve trading stock.

B. Married Couples Living Separately

A husband and wife who are living apart are treated as single for Capital Gains Tax

purposes, whether or not a foreign divorce has been obtained. Where a foreign divorce is recognised here and a spouse remarries, the new couple will be treated as married.

Capital Acquisitions Tax

9.29 A. Married persons

Inheritances taken by one spouse from the other are totally exempt from capital acquisitions tax since 30 January, 1985. Gifts between spouses are exempt since 31 January, 1990.

B. Separated persons

Separated persons are treated as married persons — exemptions as at (A) apply.

C. Persons divorced abroad

- (i) If the divorce is not recognised here the position is the same as at (A).
- (ii) If the divorce *is* recognised here the parties to the original marriage will be treated as not related and will be entitled to the £10,000 class threshold (as subsequently indexed) before capital acquisitions tax is charged.

Social Welfare

- 9.30 The following paragraphs set out some details of social welfare provisions. These arrangements would, of course, fall to be reviewed particularly in the light of changes in the avenues of legal redress open to those whose marriages have broken down.

Lone Parent's Allowance

- 9.31 A new social assistance allowance for parents bringing up children on their own came into effect from October 1990.

The new scheme effectively streamlines all existing social assistance payments for lone parents and incorporates the existing unmarried mother's allowance, widower's (non-contributory) pension and deserted husband's allowance. Women receiving widow's (non-contributory) pension, deserted wife's allowance or prisoner's wife's allowance, who have child dependants, have also been brought into the new scheme.

The new allowance, for the first time, provides a special means-tested social welfare payment for certain lone parents such as separated spouses, unmarried fathers and prisoner's husbands. Prior to that, the only social welfare payment available to lone parents in those circumstances was Supplementary Welfare Allowance.

The new allowance will apply to lone parents who:

- are bringing up at least one dependent child on their own. Children can be regarded as dependants until they reach the age of 18 (or 21 if they are in full-time education)
- satisfy a means test
- are not cohabiting, that is living with another person as husband or wife
- as a separated (including deserted) person, has made reasonable efforts to get maintenance from his/her spouse.

“Liable Relatives”

- 9.32 The *Social Welfare Act, 1989*, imposes a liability on a husband to maintain his wife and family and, likewise, imposed a liability on a wife to maintain her husband and family. The Act also includes provisions designed to ensure, as far as possible, that adequate contributions are forthcoming from a deserting spouse who fails to adequately maintain their dependant spouse and children.

The main provisions are as follows:—

- (a) A competent authority — either the Minister for Social Welfare or a Health Board — can decide, in a case where a benefit or allowance is being paid to a claimant, how much should be repaid by the person who is liable to maintain the claimant and, if necessary, to seek a maintenance order against that person and the District Court must order that person to pay maintenance to the competent authority.
- (b) Where the persons concerned or their employers fail or refuse to supply social welfare officers or officers of the Health Boards, as the case may be, with any information or documents required for the purpose of any investigation related to the award of payments under certain schemes, they are guilty of an offence and subject, on conviction, to substantial fines.
- (c) Where maintenance is paid to a deserted spouse, the recipient must transfer such maintenance to the competent authority if the recipient is in receipt of welfare assistance from the competent authority. However, provisions were also made to protect the income position of existing claimants.

Suitable amendments were made in the *Social Welfare Act, 1990* to apply the “Liable Relatives” provisions to the Lone Parent’s Allowance Scheme.

In deciding the amount to be recovered from a liable relative, the competent authorities have adopted the following guidelines:—

- (a) the maximum amount which may be claimed is the total payment made by the Department in respect of the dependants.
- (b) if the liable relative is not married to the claimant, liability will be limited to child dependants.
- (c) the contribution payable is determined by reference to the liable relative’s net income i.e. after allowing for such outgoings as income tax, PRSI contributions, housing costs, etc. Allowance is also made for dependants living with and being maintained by the liable relative. The maintenance contribution payable is calculated at 50% of net disposable income, subject to a maximum contribution amounting to the total payment made by the Department to support the family. A special section has been established in the Pension Services Office in Sligo to implement the new arrangements. The new section has responsibility for tracing the “absent” spouse, deciding whether they are liable to contribute, determining the amount to be contributed, making arrangements for the contributions to be paid, and taking action, where necessary, to ensure that contributions continue to be paid regularly.

- 9.33 Appendix 3.11 sets out some details in relation to social welfare payments.



Chapter 10

Divorce: Issues which Arise

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Introduction

- 10.1 Article 41.3.2° of the Constitution of Ireland states that no law shall be enacted providing for the grant of a dissolution of marriage. If divorce were to be introduced here, therefore, an amendment to the Constitution would be required. This Chapter discusses issues which arise in considering whether the avenues of legal redress open to those whose marriages have broken down should be extended to include divorce. Chapter 11 considers approaches which might be taken to amending the Constitution to allow for the introduction of divorce and Chapter 13 contains a commentary on the Scheme of the Family Law (No. 2) Bill which the Government considers it would be appropriate to introduce should an amendment to the Constitution be put to the people and be accepted by them.

Marriage and the breakdown of marriages

- 10.2 The European Convention on Human Rights provides that men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right. Though the right is subject to national laws, the European Court of Human Rights has held that the right must not be reduced or restricted in such a way or to such an extent that the right is impaired.
- 10.3 The vast majority of persons in Ireland who get married go on to live together in a life-long union. There is, however, a minority whose hopes and expectations of a permanent union are dashed. Marriages break down; couples separate. Some arrange a legal separation by means of a separation agreement. Others get a judicial separation. A number get divorced abroad. Some of those divorces are recognised here; very many are not. A very small number get civil annulments — a remedy which is of necessity limited, based as it is on the state of affairs prevailing at the time the marriage itself is entered into rather than on any subsequent events. The breakdown of a marriage is normally a process which brings with it a painful, emotional, psychological and financial crisis. Both spouses face having to make substantial changes in their style and standard of living and arrangements must be made for the care and upbringing of any children. There are extensive social and legal provisions, including Church and voluntary programmes, for the support of persons whose marriage has, for any number of reasons, got into difficulties or, ultimately, broken down. Social policies are formulated to promote and strengthen the family and where breakdown occurs social welfare and other arrangements are in place to provide support for those in need. Our separation laws encourage spouses

to avail themselves of counselling and mediation and there is now more informality in family law proceedings in the courts. The courts have very wide powers to redistribute property between the spouses and children, to order financial relief for dependants (and, in certain circumstances, to extinguish succession rights).

- 10.4 The Government is concerned with the preservation of stable marriages and the avoidance of marriage breakdown. It must also be concerned to ensure that where marriages do break down, there is in our law and social policies a proper response to the matter. It would ultimately be a matter for the people to decide in a Referendum whether the law should go further than at present by allowing persons, whose marriage has broken down irretrievably, to have, in certain circumstances, their marriages legally ended, thus leaving them free to remarry.

Legal position in the absence of divorce

Judicial Separation

- 10.5 Under existing law a spouse whose marriage has broken down may obtain a judicial separation from the courts. The effect of the decree is that the spouses are no longer obliged to cohabit (*section 8 of the Judicial Separation and Family Law Reform Act, 1989*). The decree does not end the marriage and the decree may be rescinded by the courts at any time in the future on a reconciliation between the spouses and the resumption of cohabitation. The granting of a judicial separation decree does not permit remarriage.

Civil decree of nullity

- 10.6 A party to a marriage who obtains a civil decree of nullity is entitled to remarry. In this connection a distinction must be drawn between a marriage which is *void* and a marriage which is *voidable*. In the case of a marriage which is *void* (e.g. for absence of consent or lack of capacity) there is no need to obtain a decree of nullity from the courts since there never was a marriage in the first place (although it may be advisable to seek a declaration from the courts that a marriage was void in order to remove any doubt in the matter). In the case of a marriage which is *voidable* the marriage continues to subsist until the court grants a decree of nullity. The effect of the decree is that the marriage is rendered void *ab initio* i.e. as never having taken place. The essential difference between a decree of nullity of a voidable marriage and a decree of divorce is that in the case of the former the ground on which a decree is applied for (e.g. physical impotence) has to exist at the date of the marriage: events or acts subsequent to the marriage are never a ground for a declaration of nullity. In the case of divorce it is events or acts subsequent to the marriage which would usually form the grounds for the decree.

Foreign divorces

- 10.7 A person who obtains a foreign decree of divorce or nullity which is recognised in Ireland is, of course, entitled to remarry in the State. On the other hand, an Irish citizen who obtains a foreign decree of divorce or nullity which is *not* recognised in Ireland and who enters into a second marriage, whether in Ireland or elsewhere, may be guilty of bigamy under Irish law. Because the recognition here of foreign divorces requires at least one of the parties to be domiciled abroad — see section 8.21 — very few foreign divorces will, in practice, receive recognition and it is probable that many of the divorces that have been obtained by Irish persons abroad are not, in fact, recognised by our law.

Church annulments

- 10.8 Where in the case of a voidable marriage there has been a church annulment but there has not been a civil annulment the marriage remains a subsisting valid marriage under the civil law of the State. A party to a subsisting valid marriage who enters into a second marriage, knowing the other party to the first marriage to be alive, commits (under section 57 of the *Offences against the Person Act, 1861*) the offence of bigamy.
- 10.9 In practice, the number of decrees of nullity granted each year by the Catholic Church averages around 200 (covering the 32 counties). In about 75% of cases a prohibition on "remarriage" in the Church is imposed on one or both parties on the basis, it is understood, that the defect which caused the nullity is judged to be serious enough to put at risk the validity of a future marriage. The veto may be lifted by the local Bishop only if he is satisfied, after investigation, of the person's fitness for marriage in all essential respects. Further details in relation to the number of Catholic Church decrees of nullity are contained in Appendix 3.8.
- 10.10 A suggestion sometimes made to the effect that the state law of nullity should give legal recognition to church decrees of nullity raises fundamental questions of principle including constitutional issues. Even if the grounds for nullity available under civil law and canon law were identical it would be inevitable that there would be differences in decisions in individual cases.

Effect of divorce

- 10.11 The granting of a decree of divorce has two functions: first, it enables couples whose marriages have broken down irretrievably to end legally what is often referred to as the "empty shells" of their marriages and, secondly, it allows people to remarry. It cannot, of course, affect in any way the religious status of a marriage. In practice not all of those who obtain a divorce in other jurisdictions marry again. For example, in 1986 in England and Wales there were over 2 million divorced people who had not remarried (Stone: *Road to Divorce*).

A "Right" to divorce?

- 10.12 Some people advance the proposition that divorce is a basic human right. It is nevertheless the case that no such right has been recognised under either the *European Convention on Human Rights* or the *United Nations International Covenant on Civil and Political Rights*. In particular, in the case of *Johnston and Others v. Ireland* (1986) the European Court of Human Rights held that the European Convention did not include any guarantee of a right to divorce. In a separate case — *F. v. Switzerland* (1987) — the Court held, however, that a limitation on the right to remarry, following a divorce, would be in breach of the Convention. The Court held to be in violation of the Convention a law enabling a court, when granting a divorce where fault was proved, to fix a period of up to 3 years during which the person at fault would not be entitled to remarry.

The legal position of "second" unions

- 10.13 Some parties to marriages which have broken down go on, in the absence of a means to bring their marriages legally to an end, to set up "second unions" outside of marriage.

- 10.14 The children of unions of this kind have been given full legal protection by the *Status of Children Act, 1987* (which was discussed in Chapter 7) under which all children are entitled to the same maintenance, succession etc. rights whether or not their parents are married to each other.
- 10.15 Neither party to a "second" union enjoys the same legal protection available to the parties to a marriage. They are in the same legal relationship as any two people who choose to live together (unlike in some other countries our law does not provide for contracting a "common-law" marriage). This means that they have no right to be maintained by the other, the father is not the guardian of any children of the second union (unless he succeeds in an application to court under the *Status of Children Act, 1987* — see section 7.12) and they have no automatic rights of succession to each other's estate when one of them dies. The remedy of a barring or protection order is not available to either party against the other. In this situation a person seeking the protection of the law must rely on the common law remedy of an injunction to bar the other party from the home. (However, unlike the barring and protection order, breach of either of which gives the Gardaí power to arrest without warrant the spouse in breach and bring that spouse before the court, breach of an injunction does not, by itself, render a person liable to arrest or criminal prosecution: committal proceedings must be initiated by the person in whose favour the injunction was originally granted). Likewise, the presumptions which operate in the area of matrimonial property do not apply to parties to a second union (an example would be the presumption — unless and until the contrary is proved — that spouses have agreed that the indirect contribution of one spouse to the acquisition of the family home by the other spouse confers on the first named spouse a beneficial interest in the home to the extent of the contribution made). Instead, the general rules relating to the contributions of one person to the acquisition by another of property apply.
- 10.16 As a general proposition it follows that, since the remedies available in family law were introduced on the basis that the ordinary rules of law did not give sufficient protection to spouses, parties to a second union outside marriage — who must rely on the ordinary rules — do not have as high a level of safeguards and entitlements as spouses have. The special protection afforded by the law to spouses may be seen as reflecting the provision in Article 41.3.1° of the Constitution to the effect that the State pledges itself to guard with special care the institution of marriage, on which the Family is founded, and to protect it against attack. On the introduction of divorce the full benefits of family law would apply to the parties of "second unions," where the parties marry. On the other hand, following a divorce neither party to the marriage which has been dissolved retains the legal rights (or owes the legal duties) of a spouse arising out of that marriage — although there may remain legal obligations such as maintenance. Consequently, a principal issue to be addressed, if divorce were to be introduced, would be the safeguarding as far as possible of the position of divorced dependent spouses (as well as the position of dependent children).

Protection of spouses and children

- 10.17 Where marriages break down and couples separate this inevitably has financial consequences for families. There are already comprehensive provisions in the *Judicial Separation and Family Law Reform Act, 1989* which aim at the protection as far as possible of spouses and dependent children and these are adaptable for any divorce legislation.

One of the issues raised during the 1986 Divorce Referendum was the possible adverse effects, particularly on family farms and family businesses, of any proposals for the division and redistribution of family property following divorce. In this regard **the Government would propose that property transfer provisions on the lines of those already in force in the case of judicial separation would apply in the case of divorce if a referendum to allow divorce were to be held and was successful.**

- 10.18 In many cases there will be only one income and little property and it is likely that, no matter what the legislation provides, it will prove difficult for a spouse who divorces and remarries to support a first and second family, with consequent disadvantages particularly for the first family. While many of these difficulties exist already in cases of judicial separation*, divorce — as distinct from separation — may in some cases tend to add to the difficulties since it enables a spouse, through remarriage, to create new legal responsibilities towards a second spouse. Problems are likely in practice to be greatest in the case of wives who have given up careers on marriage and who may find it difficult to re-establish themselves in employment after a long period of marriage — young wives who have remained in employment during marriage are likely to have less difficulty in coping financially after divorce. The court will be empowered under the legislation that is proposed, in the event of divorce being approved by the people, to make whatever orders are necessary in the circumstances in order to ensure that the interests of the first spouse are protected as far as possible. These issues are dealt with in sections 13.3 to 13.12 and in the Explanatory Notes to the provisions in Part III of the Scheme of the Family Law (No. 2) Bill (Appendix 2).
- 10.19 It is clearly important that the court in divorce proceedings should give as much thought as possible to arrangements for children. The Judicial Separation Act attempts to safeguard children by providing that before granting a decree of judicial separation the court must be satisfied that the arrangements made for the welfare of each child are proper in all the circumstances. The court is empowered to deal with the arrangements whether or not the parents desire it to do so. It is proposed that similar provisions would be included in any divorce legislation.

While the breakdown of a marriage and the circumstances giving rise to it can be expected inevitably to be difficult for children their legal rights are not affected by divorce because after divorce

- all constitutional and statutory rights of children (including their right to maintenance) remain;
- parents remain guardians of their children, though the court may have to decide which parent is to have custody as it does in separation cases; and
- children remain entitled to inherit from their parents where there is no will and, where there is a will, remain entitled to apply to have proper provision made out of the deceased parent's estate where such proper provision has not been made by will or otherwise.

*The Supreme Court in *R.H. v. N.H.* (24 October 1985, unreported) had this to say in laying down broad principles governing the award of maintenance: "The court ... must first have regard to the somewhat pathetic fact that upon the separation of husband and wife, and particularly a husband and wife with children, it is inevitable that all the parties will suffer a significant diminution in the overall standard of living. The necessity for two separate residences to be provided for makes this an inescapable consequence of the separation".

Divorce in other jurisdictions

- 10.20 Appendix 3.9 sets out information on the grounds for divorce in a number of European countries and statistics in relation to the number of divorces granted. As will be seen from the information contained in the Appendix, there are considerable variations on the circumstances in which divorce is permitted in other European countries. The following table, which sets out, for the years shown, the divorce rate in a number of European countries per 1,000 married couples also shows wide variations among those countries in the prevalence of divorce.

Divorce rate per 1,000 married couples

	1961	1971	1981	1985
England/Wales/Scotland	2.1	5.8	11.5	13.2
Belgium	2.0	2.8	6.1	7.3
Denmark	5.7	10.8	12.1	12.6
France	2.9	3.5	6.8	8.1*
Germany (Fed. Rep.)	3.6	5.2	7.2	8.6
Greece	1.5	1.7	2.5	
Italy		2.5	0.9	1.1
Luxembourg	2.0*	2.6*	5.9	7.2
Netherlands	2.2	3.7	8.3	9.9
Portugal	0.4	0.3	2.8	3.7
Spain			1.1	

(Note: figures marked * are for the closest year for which figures are available)

[Source: Statistical Office of the European Communities: Office of Population Census and Surveys-published in Social Trends 18, Crown Copyright 1988.]

- 10.21 The suggestion is sometimes made that the introduction of divorce and, in those countries which already have divorce, making divorce easier to obtain, leads to an increasing rate of marital breakdown — in other words that “divorce breeds divorce”. The figures shown above may appear to support this belief but may also support a different interpretation — that is that as the incidence of marital breakdown increases the demand for divorce increases. Those who favour this view would argue that the law cannot of itself cause or prevent marital breakdown.
- 10.22 Most of the applicants for divorce in England and Wales are wives: 72% in 1985. The situation in Northern Ireland is similar: 69% of those granted *decrees nisi* in 1989 were wives. (Of the applicants for a judicial separation here in 1990, 87% were wives). As mentioned earlier it is by no means the case in other jurisdictions that all of those who obtain a divorce marry again. For example, in 1986 in England and Wales there were over 2 million divorced people who had not at that time remarried. In the case of remarriages following divorce, however, research in some countries indicates that second marriages tend to be of shorter duration, especially if there are children from the first marriage (Divorce Research To-day [1991] Family Law 70). The evidence from the UK — where there is a relatively liberal divorce “regime” — is that second marriages there are more likely to end in divorce than first marriages (English Law Commission [1988] *Discussion Paper: Facing the Future*, Note 87). Data from the United States tends to support this view. Glick and Norton (1977) indicated a 44% divorce rate among second marriages (Ihinger-Tallman/Pasley “Factors influencing stability in remarriage” paper

presented to the XIXth CFR International Seminar on Divorce and Remarriage at Leuven, Belgium 1981)

Northern Ireland

- 10.23 The number of decrees absolute granted in Northern Ireland for the years shown below (in rounded figures) was

1961: 100; 1971: 300; 1976: 600; 1982: 1,400; 1989: 2,000.

[Sources: Office of Population Censuses and Surveys; Lord Chancellor's Department; published in *Social Trends* 18, Crown Copyright 1988; the Northern Ireland Court Service (1989 figure).]

The law on divorce was liberalised in Northern Ireland in 1978 enabling a divorce to be obtained on the basis of separation.

- 10.24 Irretrievable breakdown is the ground for divorce in Northern Ireland. This must be proved by one or more of the following facts:

- adultery
- unreasonable behaviour
- desertion for at least 2 years
- separation for at least 2 years where there is consent to the granting of a decree
- separation for at least 5 years

A petition for divorce is not permitted before the expiration of a period of 3 years from the date of the marriage save in exceptional cases. The corresponding period in England and Wales is one year — the grounds for divorce are the same.

- 10.25 In Northern Ireland separation is the most common ground on which a divorce is granted. In 1985 70% of decrees were granted on that basis (50% on the basis of 2 years separation and 20% on the basis of 5 years separation). This contrasts with the situation in England and Wales where, in 1986, only 24% of divorce decrees granted to wives and 39% of decrees granted to husbands were on the grounds of separation. The use of other grounds in England and Wales may partly reflect the one-year rather than three-year limit before, generally, a divorce can be applied for. In Northern Ireland undefended applications for divorce are heard in the County Court while defended applications are heard in the High Court. The proportion of cases processed in County Courts in 1989 was 36% of the total number of applications. This contrasts with the position in England and Wales* where more than 99% of divorces are undefended and all but a tiny number of those are proved under the so-called "special procedure" where the petition and supporting affidavits are scrutinised by a court registrar and the decree is formally pronounced by a Judge in reliance on the Registrar's Certificate (Law Commission No. 192, *Family Law — The Grounds for Divorce*, para. 2.2).
- 10.26 The number of divorce decrees granted in Northern Ireland per 1,000 marriages was 2.3 in 1983 and an average of 2.1 in the years 1986 to 1988 (Registrar General's Report already cited).

*However, in July, 1992 a Draft Order in Council was circulated in Northern Ireland which proposed in certain cases a new procedure similar to the "special procedure" in England and Wales.



Chapter 11

Divorce: Possible Approaches to a Constitutional Amendment

Chapter 11

Divorce: Possible Approaches to a Constitutional Amendment

Introduction

- 11.1 This Chapter sets out possible approaches which might be taken to amending the Constitution so as to remove the prohibition on divorce. A proposal to amend the Constitution must be introduced in the Dáil as a Bill and if such a Bill is passed by both Houses of the Oireachtas it must be submitted to the people for approval in a referendum. If a majority of the votes cast at the referendum is in favour of the proposal, the Bill is signed by the President and the Constitution is amended accordingly.

Background

- 11.2 It was the view of a majority of the Oireachtas Joint Committee on Marriage Breakdown (1985) that a referendum should be held on divorce. In 1986 a Government Bill containing proposals to repeal the Constitutional ban on divorce and for its replacement with a new provision (enabling divorce in certain circumstances) was passed, unopposed, by both Houses of the Oireachtas. Details of that Constitutional amendment proposal are contained in Appendix 3.10. In the subsequent referendum 63% of those who voted were against the proposal to amend the Constitution.
- 11.3 In the context of the continuing debate about divorce the Government is concerned to ensure that the people, who would have to decide in any further referendum whether they wish to amend the Constitution to enable divorce legislation to be introduced, should be fully informed about the legal and other implications of the matter. In addition to the information already set out, the Government has decided to publish in this White Paper details of
- (a) forms which a Constitutional amendment in relation to divorce might take;
 - (b) the Scheme of a Bill (the Family Law (No. 2) Bill) which the Government believes it would be appropriate to enact if a Constitutional amendment — in any of the forms outlined — were to be passed by the people;

The forms which a Constitutional amendment might take are discussed in the rest of this Chapter. Chapter 13 contains a general commentary on the Scheme of the Family Law (No. 2) Bill which is contained, together with explanatory notes, in Appendix 2.

- 11.4 The Government proposes to proceed with a divorce referendum after a full debate on the complex issues involved and following the enactment of other legislative proposals in the area of family law which are outlined in the White Paper. The Government will consider the responses to the options contained in this White Paper in advance of finalising its proposals on this matter.

Options for Constitutional Change

- 11.5 A key question which arises in determining an appropriate approach to a constitutional amendment is whether it should be drafted so that the actual form of divorce legislation should be left entirely at the discretion of the Oireachtas or whether the amendment should *entrench* in the Constitution provisions which would establish the circumstances in which divorces could be granted and thus take that decision out of the hands of the legislature. The entrenchment approach has clear drawbacks. What may prove to be desirable changes in the circumstances in which divorces could be granted and which would normally be dealt with by way of amending legislation might not in practice be proceeded with if a referendum were necessary on each occasion and such an approach could be seen to represent a needlessly restrictive restraint on the legislature in responding to changing circumstances. There is also the argument that a Constitution is more properly concerned with statements of fundamental principles and that the enshrinement in it of the level of detail generally contained in legislation itself could be regarded as inappropriate. On the other hand it has been argued that, in the absence of an entrenchment provision in the Constitution, there would be nothing to prevent the Oireachtas from providing for a very liberal divorce regime without direct reference to the people.
- 11.6 The following sections of this Chapter set out 5 possible approaches to amending the Constitution. The first example would leave it entirely up to the Oireachtas to decide on the provisions of any divorce legislation; examples 2,3 and 4 attempt to meet the criteria that an amendment should establish in broad outline the circumstances in which divorce could be granted but at the same time should be sufficiently specific so as to avoid criticisms that it does not in reality impose effective restrictions; example 5 would insert in the Constitution the actual precise grounds for divorce (this would mean, of course, that *any* widening of these precise grounds to permit easier or wider divorce in future years could come about only after a further referendum). **The amendment in each case would be in substitution for the present Article 41.3.2° of the Constitution.** The periods of time used in the examples of amendments could, of course, be varied if this were to be considered desirable.

Example 1: Grounds for divorce a matter for Oireachtas

- 11.7 “Provision may, however, be made by law providing for the grant of a dissolution of marriage subject to any conditions prescribed by law”.

Commentary

This example leaves it entirely up to the Oireachtas to decide on the provisions of any divorce legislation. This approach was discussed in section 11.6. If such an amendment were to be made to the Constitution the Government would be in a position to introduce legislation allowing for divorce based on one or more of the grounds included in the following example amendments viz.

- absence of normal marital relationship for 5 years

- separation for 5 years
- judicial separation or entitlement thereto plus a period of 2 years
- irretrievable breakdown on proof of specified 'fault' and 'no fault' grounds.

Example 2: Absence of normal marital relationship for 5 years

- 11.8 **“Where, and only where, such court established under this Constitution as may be prescribed by law is satisfied that a normal marital relationship has not existed between the parties to a marriage for a period of at least 5 years, there is no reasonable possibility of such a relationship being resumed and any other condition prescribed by law has been complied with, the court may in accordance with law grant a dissolution of the marriage provided that the court is satisfied that adequate and proper provision, having regard to the circumstances, will be made for any dependent spouse and for any child of or any child who is dependent on either spouse.”**

Commentary

This formulation is somewhat similar to the formulation rejected in the 1986 Referendum. The main difference is that “absence of a normal marital relationship for a period of 5 years” replaces the “failure of the marriage” concept (the latter concept is unfamiliar to our law whereas the former is well known).

Breakdown of marriage to the extent that the court is satisfied in all the circumstances that a normal marital relationship has not existed between the spouses for a period of at least one year immediately preceding the date of the application is a ground for the grant of a decree of judicial separation.

A constitutional amendment along these lines would mean that the absence of a normal marital relationship for a period of five years would be the sole ground for a divorce although, if considered necessary, the legislation could include examples of situations — e.g. actual separation of the spouses for 5 years — where ‘absence of a normal marital relationship for 5 years’ would be presumed to exist. It would not *require* actual separation in order to be invoked.

The concept of a normal marital relationship is widely used in the High Court in nullity cases and the lack of capacity to form or maintain such a relationship is fully investigated in these cases. It can refer not only to physical incapacity but also the capacity to sustain an emotional and psychological relationship. Its proposed use in the case of judicial separation was criticised by some on grounds of vagueness. Almost 50% of all judicial separations granted in the period since the Judicial Separation Act came into force on 19 October, 1989 to December 1990 were granted on that basis. This does not necessarily mean, however, that that was the only ground pleaded. Indeed, this ground is in many cases being pleaded along with one of the other grounds of adultery, unreasonable behaviour, desertion or separation which in practice form the basis of the finding of “absence of a normal marital relationship” in those cases.

If the concept were to be used in a constitutional amendment on divorce it would eventually fall to be interpreted by the High and/or Supreme Courts in the constitutional

context. Some might argue that a liberal interpretation would, in effect, amount to what might be regarded as divorce on the demand of one spouse to the extent that a claim by one of the spouses that there has been an absence of a normal marital relationship might tend to be regarded by the court as *prima facie* evidence of the fact and not be investigated in detail particularly if the application for divorce is undefended (although there is the restriction that such a breakdown would have to be claimed to have existed for at least 5 years). On the other hand a strict interpretation might require investigation in every case — whether defended or not — as, indeed, happens at present in the case of petitions for nullity. (At present about 20% of judicial separation applications are undefended).

It would be difficult to define in legislation the many circumstances covering the absence of a normal marital relationship although it might be possible to use the phraseology used by the courts at present in nullity cases e.g. the absence of a physical, emotional or psychological relationship. In any event this might be otiose since these are the criteria already used by the courts, albeit in nullity cases.

Example 3: Separation for 5 years

- 11.9 **“Where, and only where, such court established under this Constitution as may be prescribed by law is satisfied that the parties to a marriage are living apart from one another and have lived apart from one another for a period or periods to be prescribed by law but which shall amount in total to not less than 5 years, there is no reasonable possibility of cohabitation being resumed and any other condition prescribed by law has been complied with the court may in accordance with law grant a dissolution of the marriage provided that the court is satisfied that adequate and proper provision, having regard to the circumstances, will be made for any dependent spouse and for any child of or any child who is dependent on either spouse.”**

Commentary

This formulation would remove findings of fault entirely from the divorce proceedings. Irretrievable breakdown provable by separation (for one year) is the only ground for divorce in Australia. Separation as the sole ground would be simple, objective and judgmentally neutral. On the other hand it might in some cases encourage people to separate in order to obtain a divorce thereby reducing the chance of a reconciliation. In addition, it might present problems for the less well off who might have difficulty in separating (though separation would, of course, have to be defined as including separation in two households but under the one roof but this, naturally, would be more difficult to prove). The legislation would be straightforward: providing for 5 years separation as the only ground; defining separation (as in section 2(3)(a) of the Judicial Separation Act); allowing for short breaks in the separation (see section 2(2) of the Judicial Separation Act); and making any other provision deemed necessary. In this type of approach divorce would not be possible until there had been 5 years separation even in a case where adultery, unreasonable behaviour or desertion represent the real grounds giving rise to seeking a divorce (in the previous example even in such cases a divorce would not be possible until there was an absence of a normal marital relationship for 5 years).

Example 4: Judicial separation or entitlement thereto plus a period of 2 years

- 11.10 “Where, and only where, such court established under this Constitution as may be prescribed by law is satisfied that a marriage has irretrievably broken down, and any other condition prescribed by law has been complied with, the court may in accordance with law grant a dissolution of marriage provided that the court is satisfied that adequate and proper provision, having regard to the circumstances, will be made for any dependent spouse and for any child of or any child who is dependent on either spouse. A marriage shall be regarded as having irretrievably broken down if, but only if, a decree of judicial separation in respect of that marriage has been granted in accordance with the law for the time being in force at least two years before the date of any application to the court for a decree of divorce, or one or more of the grounds warranting the granting of such decree have existed for a period of at least two years before the date of any application to the court for a decree of divorce, and there is no reasonable possibility of reconciliation between the spouses.”

Commentary

In this case a divorce would not be granted unless the court was satisfied that the marriage was irretrievably broken down. This would be proved only (a) if a decree of judicial separation has been granted at least two years before the application for a divorce, or (b) one or more of the grounds warranting the granting of a decree of judicial separation has existed for more than two years before the application for divorce, and there was no prospect of a reconciliation.

A two-stage approach to divorce is a common feature of arrangements in some other jurisdictions (where there is, for example, a time lapse between the granting of a *decree nisi* and a *decree absolute*). It also appears common in some European Countries for divorce to be preceded by judicial separation.

In practice, a two year waiting period between the granting of a judicial separation and an application for divorce could represent a period of reflection which in some cases might lead to reconciliation. Where a judicial separation had been granted, custody, maintenance and property matters would have been settled but, before granting a divorce, the court could look at these matters again in the context of divorce with the advantage of being able to assess how the judicial separation arrangements had worked out in practice making whatever adjustments it considered were warranted.

In the Statement of the Government's Intentions at the time of the 1986 Referendum it was indicated that, except for transitional arrangements which were to apply in particular cases, a separation agreement would have had to be approved by a court or a judicial separation secured at least two years before an application for divorce could be made. However, the actual wording of the amendment at the time would not have imposed this requirement. The present amendment example would involve enshrining in the Constitution a requirement that a judicial separation had been granted at least two years previously, or that one or more of the grounds warranting the granting of a judicial separation had existed for a period of at least two years. The formulation has the further advantage that it avoids the need to spell out specific grounds for the granting of a decree and allows the Oireachtas a certain degree of flexibility to respond to changing

circumstances. While it might be argued that it would allow the Oireachtas to vary the grounds for divorce by liberalising further the grounds for judicial separation it has to be borne in mind that these grounds are, in fact, quite liberal as they are. In any event — as with the periods of time specified in other examples — the waiting period could be increased if this were considered desirable. In addition, the situation in which a divorce would be available could be confined to judicial separations granted or capable of being granted in certain (defined) circumstances only.

An alternative approach to this type of formulation might be to confine it to cases where a judicial separation had actually been granted (or a separation agreement had been made a Rule of Court under section 8 of the *Family Law (Maintenance of Spouses and Children) Act, 1976*). However, this approach would require someone seeking a divorce who had not already obtained a judicial separation to go through *two* sets of court proceedings: one for a judicial separation (or to have a separation agreement made a Rule of Court) and another, two years later, for a divorce.

Example 5: Irretrievable breakdown on proof of specified ‘fault’ and ‘no fault’ grounds

- 11.11 “Where, and only where, such court established under this Constitution as may be prescribed by law is satisfied that a marriage has irretrievably broken down and any other condition prescribed by law has been complied with the court may in accordance with law grant a dissolution of the marriage provided that the court is satisfied that adequate and proper provision, having regard to the circumstances, will be made for any dependent spouse and for any child of or any child who is dependent on either spouse. A marriage shall be regarded as having irretrievably broken down if, but only if,
- (i) a spouse has committed adultery
 - (ii) a spouse has behaved in such a way that the other spouse cannot reasonably be expected to live with that spouse
 - (iii) a spouse has deserted the other spouse for a continuous period of at least *three* years immediately preceding any application to the court
 - (iv) the spouses have lived apart from one another for a continuous period of at least *three* years immediately preceding any application to the court and both parties consent to a dissolution being granted
 - (v) the spouses have lived apart from one another for a continuous period of at least *five* years immediately preceding any application to the court or
 - (vi) the court is satisfied in all the circumstances that a normal marital relationship has not existed between the spouses for a period of at least *three* years immediately preceding the date of any application to the court, and
- there is no reasonable possibility of reconciliation between the spouses.”

Commentary

This example provides for irretrievable breakdown as the sole ground for the grant of a divorce; irretrievable breakdown would be proved by any of the matters from (i) to (vi) and, in addition, the court would have to be satisfied that there is no reasonable possibility

of reconciliation between the spouses. As in the case of judicial separation, adultery and unreasonable behaviour would be sufficient for the grant of a divorce with, however, the additional need to convince the court that there is no possibility of a reconciliation. The inclusion of these grounds would enable a spouse, having established fault on the part of the other spouse, to obtain a divorce without having to wait a specified time period as in grounds (iii) to (vi) of the amendment example. On the other hand, the absence of a time period might encourage spouses to divorce too quickly or to use fault rather than no fault grounds in order to obtain an earlier divorce. So as to provide protection against newly marrieds rushing into premature divorces Head 4 of the Scheme of the Family Law (No.2) Bill based on this amendment example contains a provision to the effect that no application for divorce shall be made before the expiration of the period of 3 years from the date of the marriage. (There would be a similar provision in the case of an amendment based on judicial separation — amendment example 4.) It would be possible to enshrine this in the amendment but its inclusion either in the amendment or (as proposed) the legislation might be open to the argument that it is unfair to “wronged” spouses. As against that, the absence of any time limit could tend to lead, in practice, to a situation where divorce is readily available to an unacceptable extent. In the case of the four other grounds in the Judicial Separation Act (desertion, separation where there is consent to a decree being granted, separation where there is not consent and absence of normal marital relationship) two years would be added to the periods stipulated in these grounds for the purposes of divorce i.e. from one year to three in the case of desertion, separation with consent and absence of normal marital relationship and from three to five years where there is separation but no consent to a decree. It would not of course be necessary to include all the grounds for the grant of a judicial separation for the purposes of divorce and the strictness of a divorce “regime” could be determined by the precise grounds to be included (or omitted).

The enshrinement of this level of detail in the Constitution is particularly open to the criticisms which were mentioned earlier in this Chapter: what may prove to be desirable changes in the circumstances in which divorce could be granted and which would normally be dealt with by way of amending legislation might not, in practice, be proceeded with if a referendum were necessary on each occasion and such an approach could be seen to represent a needlessly restrictive restraint on the legislature in responding to social changes. There is also the argument that a Constitution is more properly concerned with statements of fundamental principles and that the inclusion in it of this level of detail could be regarded as inappropriate.

Chapter 12



Commentary on the Scheme of the Family Law (No. 1) Bill

Chapter 12

Commentary on the Scheme of the Family Law (No. 1) Bill

Introduction

- 12.1 Appendix 1 contains the Scheme of the Family Law (No. 1) Bill which would enable the court for the first time: (a) to make financial provision orders following the granting of a decree of nullity and, subject to certain conditions, following the granting of foreign decrees of divorce, nullity and judicial separation which are entitled to recognition in the State; and (b) to provide for declarations of status. The Scheme also provides for the jurisdiction of the courts in relation to the matters outlined above and includes new provisions in relation to maintenance generally.

Part II: Ancillary orders in cases of nullity of marriage and judicial separation

- 12.2 Part II of the Scheme of the (No. 1) Bill provides for the financial, property, custody and other orders that may be made by a court following the grant of a decree of nullity of marriage or of judicial separation. Since the financial and related provisions in the case of nullity of marriage will be substantially the same as those for judicial separation both are dealt with in the Scheme of the (No. 1) Bill and in consequence Part II of the *Judicial Separation and Family Law Reform Act, 1989* would be repealed. As mentioned in section 8.6 Irish courts will now be empowered to make comprehensive financial provision orders following the granting of a decree of nullity of marriage. The giving of such power to our courts was recommended in "The Law of Nullity in Ireland" published by the Office of the Attorney General in 1976 and in the Law Reform Commission's Report on Nullity of Marriage (LRC 9-1984). A detailed description of the main powers which are available to the courts on the granting of a decree of judicial separation are given in section 8.14.
- 12.3 In the context of financial and related provisions, there are some differences as between nullity and judicial separation. The main difference relates to the treatment of succession rights in the case of nullity decrees. Section 8.16 explains the position on succession rights following the grant of a decree of judicial separation — a decree of judicial separation will not end succession rights but the court is empowered in certain circumstances to do so. In the case of nullity, succession rights must be ended unless one were to withdraw succession rights from a party to a second or subsequent marriage. The way around the possible hardship involved in the loss of succession rights for a party who is the subject of a nullity decree proposed in the Scheme of the (No. 1) Bill (heads 11 and 15), is that on the granting of a nullity decree, the succession rights of

each party in respect of the estate of the other will automatically cease (since the marriage has been found never to have been a valid marriage succession rights based on marriage do not arise) but

- (i) the loss of succession rights will be one of the matters to be taken into account when the court is making financial provision for the dependent party (section 15(2)(k)) and
- (ii) where the court did not for any reason succeed in making adequate provision for the dependent party (in a case where it would otherwise have done so) allow that spouse to apply for such provision out of the other spouse's estate (section 11).

The right under section 11 would be confined to cases where the surviving spouse has not remarried. Other changes from Part II of the 1989 Act are mentioned in the notes to the sections.

The specific questions of retaining an element of entitlement on the death of a divorced spouse and whether this should be confined as an entitlement only to spouses who have not remarried will be further considered in the light of responses to the White Paper.

Part III: Declarations of status

- 12.4 The purpose of this Part is to restate the law which enables a person to apply to court for a declaration as to the validity of his or her marriage and to abolish the action for jactitation of marriage. The proposed provisions implement, with certain changes, recommendations of the Law Reform Commission in their Sixth Report — Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6 — 1983) and are discussed in sections 8.26 and 9.3.

Part IV: Financial relief following foreign decrees of divorce, annulment and judicial separation

- 12.5 In its Report on recognition of foreign divorces and legal separations (LRC 10-1985) the Law Reform Commission recommended that in cases where a divorce is recognised in the State the court should have a discretionary power, acting on the principles of our domestic legislation, to protect the rights of a spouse with respect to maintenance, occupation and beneficial ownership of the family home and barring orders. The provisions in Part IV of the Scheme of the Bill are based on similar provisions in the U.K. *Matrimonial and Family Proceedings Act, 1984*. Detailed comments on the provisions are contained in the notes to the heads. However, there is one aspect of the proposals that deserves comment. The Court of Justice of the European Communities in interpreting the EC Judgments Convention (in force in Ireland since 1 June, 1988) has ruled that a maintenance order granted in one state on the basis of the obligation, arising out of marriage, of one spouse to maintain the other is irreconcilable with a decree divorcing the spouses granted in the state where enforcement of the maintenance order is sought. For example, if a wife had a maintenance order granted against her husband by an Irish court and her husband subsequently obtained a divorce in England, an English court would not then be in a position to enforce the maintenance order because it would be irreconcilable with the fact that a divorce had been obtained there. This decision is binding on all Contracting States and has been followed by the U.K. High Court in a recent decision involving an Irish maintenance order sent to the U.K. for enforcement.

At present the only avenue open to an Irish person seeking maintenance in such circumstances is to apply to the English courts in the divorce proceedings at the time of granting the decree or at any time thereafter to make financial provision for her. In the absence (for good reason) of so doing it will be possible for the maintenance creditor under the proposed provisions in Part IV where the divorce is recognised here to seek the leave of the Irish courts to apply to our courts for financial provision to be made in his or her favour. The thinking behind this proposal is that a maintenance order granted in such circumstances by the Irish court, since it would be granted *following* a divorce which is recognised here, would no longer be "a maintenance order granted on the basis of the obligation, arising out of marriage, of one spouse to maintain the other" and should, therefore, be capable of being enforced throughout the EC as it would no longer be irreconcilable with the decree of divorce.

Part V: Maintenance proceedings other than under this Act

- 12.6 This section provides, in proceedings other than judicial separation, nullity and divorce, for (a) having the maintenance order secured; (b) the payment of lump sums and (c) the making of attachment of earnings orders at the same time as the making of maintenance orders.

Part VI: Court jurisdiction

- 12.7 Part VI proposes to give concurrent jurisdiction in all proceedings under the Act to the Circuit Court and the High Court. Both courts already have concurrent jurisdiction in the case of judicial separation and it seems right that they should exercise a similar jurisdiction in the case of nullity. At present only the High Court has jurisdiction in nullity of marriage cases, and it would seem logical to confer jurisdiction on the Circuit Court, concurrently with the High Court. Part VI also provides that the courts shall only exercise jurisdiction in proceedings for nullity if either of the parties to the marriage is domiciled in the State on the date of the application or was ordinarily resident in the State throughout the period of one year ending on that date. There are similar provisions in the *Judicial Separation and Family Law Reform Act, 1989* in respect of proceedings for a judicial separation. Since proceedings in both cases essentially concern matters of status it is considered that the same rules should apply in those cases. In the U.K. the connecting factors used are domicile and habitual residence. The actual difference in practice between habitual and ordinary residence would be hard to pinpoint. The remaining provisions in Part VI follow similar provisions in Part III of the Judicial Separation Act.

Part VII: Miscellaneous provisions

- 12.8 There is nothing in this Part of the Scheme of the Bill which requires particular comment; notes on these — and other — provisions are included with the Scheme.



Chapter 13

Commentary on the Scheme of the Family Law (No. 2) Bill

Chapter 13

Commentary on the Scheme of the Family Law (No. 2) Bill

Introduction

- 13.1 Appendix 2 contains the Scheme of the Family Law (No. 2) Bill which sets out the type of legislation the Government would propose to introduce if a referendum were to be held on divorce and the decision of the people was to drop the prohibition on divorce. The Scheme of the Bill includes different options based on the example of amendments in Chapter 11. Only sections 3 and 4 of the Scheme need to be changed depending on the wording of the amendment; the rest of the Scheme stands irrespective of which example is used.
- 13.2 The purpose of the Scheme of the (No. 2) Bill is to set out the grounds on which the court would grant a decree of divorce and to enable the court to make financial provision orders following the granting of a divorce decree.

Part II: The obtaining of a decree of divorce

- 13.3 Part II of the Scheme of the (No. 2) Bill sets out the grounds for divorce. As already mentioned, the grounds depend on which wording of an amendment is selected and the Scheme of the Bill contains options based on the examples in Chapter 11. Even where the grounds for the granting of a divorce are present the court may still refuse to grant a divorce
- (a) unless the court is satisfied that such provision has been made or intends by order upon the granting of the decree to make such provision for the welfare of any dependent children as is proper in the circumstances or
 - (b) if in the case where divorce on grounds of separation without consent or absence of a normal marital relationship is sought the dissolution of the marriage would result in grave financial or other hardship to one of the spouses and that it would in all the circumstances be wrong to dissolve the marriage.
- 13.4 An identical provision to (a) is to be found in section 3(2) of the *Judicial Separation and Family Law Reform Act, 1989*. The purpose of (b) is to protect mainly older wives who as a result of divorce would lose entitlement as prospective future widows to, for example, occupational pensions which carry benefits for widows, or succession rights.
- 13.5 While there is a provision in head 19 of Part III of the Scheme of the Bill enabling the

court when making a financial provision order to take account of the value to a spouse of any benefit which, by reason of the dissolution of marriage, that party will lose the chance of acquiring, this may not constitute adequate protection in all cases and where grave hardship might result the court could refuse to grant a decree of divorce.

- 13.6 No means has yet been discovered in the neighbouring jurisdiction of dividing occupational pensions on divorce so as to mitigate the potential hardship involved. The English divorce legislation includes a bar to divorce similar to the one being proposed in the Scheme of the Bill. While the bar is rarely invoked and, apparently, even more rarely successful, it is regarded as providing an important protection for a small group of people who may still face serious hardship which the law is unable to redress in other ways.
- 13.7 A number of solutions have been canvassed in neighbouring jurisdictions to deal with the problem presented by occupational pensions which carry benefits for widows but these have been rejected as being unworkable or inappropriate. One such solution would be to enable the court where appropriate to order that an occupational pension should be paid in whole or in part to a divorced spouse. Such an order would have to be open to variation or revocation depending on any new responsibilities assumed by the other spouse and any change in the circumstances of the divorced spouse. The operation of such a system could present many problems and could, in certain circumstances, cause grave hardship to a second or subsequent spouse. Another possible solution would be to provide that an occupational pension would accrue to successive wives in proportion to the length of each marriage. Since this would operate automatically in all cases it could, apart from giving rise to complex problems in pension administration, result in trivial benefits being provided for young childless wives who might be in a position to build up their own pension entitlement. This problem does not arise in the case of judicial separation because the separated spouse remains a prospective widow and any right she may have to benefit from her husband's occupational pension are not affected.
- 13.8 The hardship involved in the loss of a prospective occupational pension can to some extent be met by secured maintenance where the payment of maintenance is so secured that it continues to be paid even after the death of the maintenance debtor. Alternatively, the maintenance debtor could be required by the court to purchase by means of a lump sum payment an annuity in favour of the other spouse which would compensate for loss of pension benefits. Also, where there is substantial property available a property adjustment order may provide sufficient compensation for loss of occupational pension benefits. The court will be enabled to order relief of this nature under Part III of the Scheme of the Bill, as it can at present on granting a decree of judicial separation.
- 13.9 However, it is where no adequate relief on the lines referred to is available that hardship may result, particularly in the cases where divorced spouses have remained at home to care for the family, are too old to take up employment of a pensionable nature and have acquired no occupational pension rights in their own right. It is to cater for cases of this nature that the court is being given discretion to refuse to grant a divorce decree. The position concerning a prospective widow's State pension will be a matter to be dealt with in the Social Welfare Code. (The question of possible hardship resulting from the loss of succession rights is discussed in the commentary on Part III of the Scheme of the Bill).

- 13.10 The remaining provisions in Part II of the Scheme of the Bill deal with alternatives to divorce and require a solicitor, if any, acting for either party to make them aware of: (a) counselling services with a view to reconciliation; (b) mediation services with a view to agreeing the terms of a separation or dissolution of the marriage; and (c) judicial separation as an alternative to divorce. The court would also be empowered to adjourn proceedings to enable spouses to address themselves to the possibility of reconciliation or, if reconciliation is not possible, to afford them an opportunity, if they wish, to agree on the terms of the dissolution of the marriage. There are similar provisions in the case of separation proceedings in the *Judicial Separation and Family Law Reform Act, 1989*. As indicated in the notes to the Scheme, certain of these provisions would not arise if a prerequisite for the granting of a decree of divorce was the existence of a decree of judicial separation.

Part III: Ancillary orders in cases of divorce

- 13.11 Part III of the Scheme of the Bill provides for the financial, property, custody and other orders that may be made by a court following the grant of a decree of divorce. These financial provisions will be substantially the same as those for judicial separation (and for cases of nullity under the proposals contained in the Scheme of the (No. 1) Bill). A detailed description of the main powers which are available to the courts on the granting of a decree of judicial separation are given in section 8.14.
- 13.12 Section 8.16 explains the position on succession rights following the grant of a decree of judicial separation — a decree of judicial separation will not end succession rights but the court is empowered in certain circumstances to do so. In the case of divorce, as in the case of nullity, succession rights must be ended unless one were to withdraw succession rights from a second or subsequent spouse. The Scheme of the Bill (sections 16 and 19), proposes that on the granting of a divorce the succession rights of each party in respect of the estate of the other will automatically cease *but*
- (i) the loss of succession rights will be one of the matters to be taken into account when the court is making financial provision for the dependent spouse (section 19(2)(k))
and
 - (ii) where the court did not for any reason succeed in making adequate provision for the dependent spouse (in a case where it would otherwise have done so) allow that spouse to apply for such provision out of the other spouse's estate (section 16).

Similar provisions in relation to nullity are included in the Scheme of the (No. 1) Bill. The right under section 16 would be confined to cases where the surviving spouse has not remarried. Other changes from Part II of the 1989 Act are mentioned in the notes to the sections.

The specific questions of retaining an element of entitlement on the death of a divorced spouse and whether this should be confined as an entitlement only to spouses who have not remarried will be further considered in the light of responses to the White Paper.

Part IV: Court jurisdiction

- 13.13 Part IV proposes to give concurrent jurisdiction in all proceedings under the Act to the Circuit Court and the High Court. Both courts already have concurrent jurisdiction in

the case of judicial separation and it seems right that they should exercise a similar jurisdiction in the case of divorce. It would seem logical in this case also to confer jurisdiction on the Circuit Court, concurrently with the High Court, particularly since, in certain cases, there might be cross-petitioning for a nullity decree by a spouse in response to an application for divorce by the other spouse and *vice versa* (the (No. 1) Bill proposes to give the Circuit Court jurisdiction in nullity cases). Part IV also provides that the courts shall only exercise jurisdiction in proceedings for divorce if either of the parties to the marriage is domiciled in the State on the date of the application or was ordinarily resident in the State throughout the period of one year ending on that date. There are similar provisions in the *Judicial Separation and Family Law Reform Act, 1989* in respect of proceedings for a judicial separation. Since proceedings in divorce, nullity and judicial separation essentially concern matters of status it is considered that the same rules should apply in all three cases. In the U.K. the connecting factors used are domicile and habitual residence. The actual difference in practice between habitual and ordinary residence would be hard to pinpoint. The remaining provisions in Part IV follow similar provisions in Part III of the Judicial Separation Act.

Part V: Miscellaneous provisions

- 13.14 There is nothing in this Part of the Scheme of the Bill which requires particular comment; notes on these — and other — provisions are included with the Scheme.



Appendix 1

Scheme of the Family Law (No. 1) Bill

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Scheme of the Family Law (No. 1) Bill

SCHEME OF FAMILY LAW (NO. 1) BILL

Arrangement of Heads

Part I

PRELIMINARY AND GENERAL

Head

1. Short title and commencement
2. Interpretation

Part II

ANCILLARY FINANCIAL, PROPERTY, CUSTODY AND OTHER ORDERS IN CASES OF NULLITY OF MARRIAGE AND JUDICIAL SEPARATION

3. Definitions (Part III).
4. Preliminary orders in nullity or judicial separation proceedings.
5. Making of applications for preliminary orders.
6. Maintenance pending suit, etc.
7. Periodical payments and lump sum orders.
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9. Miscellaneous ancillary orders.
10. Order extinguishing succession rights.

11. Application for financial assistance from estate of party to the marriage.
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33. Interim orders for maintenance.
34. Jurisdiction of the court.
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37. Matters to which the court is to have regard in exercising its powers under head 36.
38. Restriction of powers of court where jurisdiction depends on family home in the State.
39. Application to orders under heads 33 and 36 of certain provisions of Part II of this Act.
40. Avoidance of transactions intended to defeat applications for financial relief.
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42. Interpretation of Part IV.

Part V

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43. Secured maintenance orders.
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Part VI

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46. Court jurisdiction in nullity.
47. Exercise of jurisdiction in proceedings for nullity.

- 48. Privacy.
- 49. Costs.
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Part VII

MISCELLANEOUS

- 51. Discharge of orders under *Family Law (Maintenance of Spouses and Children) Act, 1976*.
- 52. Custody of dependent children following decrees of nullity.

Part I

PRELIMINARY AND GENERAL

Head 1: Short title and commencement

Provide that

(1) This Act may be cited as the Family Law (No. 1) Act, 199[].

(2) This Act shall come into operation on the day that is 6 months after the date of the passing of this Act.

Note

This head sets out the short title of the Act and its date of commencement.

Head 2: Interpretation

Provide that

In this Act, except where the context otherwise requires, “the court” means the court having jurisdiction under *Part VI* of this Act.

Note

By virtue of Head 46 the Circuit Court and High Court shall have concurrent jurisdiction, as is the case with proceedings under the *Judicial Separation and Family Law Reform Act, 1989*.

Part II

ANCILLARY FINANCIAL, PROPERTY, CUSTODY AND OTHER ORDERS

Head 3: Definitions (Part II)

Provide that

In this Part, save where the context otherwise requires—

“conveyance” includes a mortgage, lease, assent, transfer, disclaimer, release and any other disposition of property otherwise than by a will or a *donatio mortis causa* and also includes an enforceable agreement (whether conditional or unconditional) to make any such conveyance;

“dependent child of the family” in relation to a party or the parties to a marriage means any child—

- (a) of both parties or adopted by both parties under the Adoption Acts, 1952 to 1991 or in relation to whom both parties are in *loco parentis*, or
- (b) of either party or adopted by either party under the Adoption Acts, 1952 to 1991 or in relation to whom either party is in *loco parentis* where the other party being aware that he is not the parent of the child has treated the child as a member of the family,

who is under the age of 16 years or if he has attained that age—

- (i) is or will be or if an order were made under this Act providing for periodical payments for his support or for the provision of a lump sum would be receiving full-time education or instruction at any university, college, school or other educational establishment and is under the age of 21 years, or
- (ii) is suffering from mental or physical disability to such extent that it is not reasonably possible for him to maintain himself fully;

“dwelling” means—

- (a) any building, or
- (b) any structure, vehicle or vessel (whether mobile or not)

or part thereof, occupied as a separate dwelling and includes any garden or portion of ground attached to and usually occupied with the dwelling or otherwise required for the amenity and convenience of the dwelling;

“family home” means, primarily, a dwelling in which the parties to a marriage ordinarily reside and comprises, in addition, a dwelling in which a party to the marriage whose protection is in issue ordinarily resides or, if that party has left the other party, ordinarily resided before so leaving;

“household chattels” means furniture, bedding, linen, china, earthenware, glass, books and other chattels of ordinary household use or ornament and also consumable stores, garden effects and domestic animals but does not include any chattels used by either party to the marriage for business or professional purposes or money or security for money.

Note

Part II provides for ancillary financial, property, custody and other orders where a decree of nullity or judicial separation is granted. It will be the first time in our law that the court will be given power to make orders, other than maintenance pending suit orders, in the case of a nullity decree. Part II will replace in total Part II of the Judicial Separation Act which provides for the making of financial etc. orders in the case of judicial separation only. Head 3 is similar to section 10 in the Judicial Separation Act.

Head 4: Preliminary orders in nullity or judicial separation proceedings

Provide that

After an application for a decree of nullity or judicial separation has been issued, the court, before deciding whether to grant or refuse to grant such decree, may if it appears to the court proper to do so make any one or more of the following orders—

- (a) a barring or protection order pursuant to section 2 or section 3 of the *Family Law (Protection of Spouses and Children) Act, 1981*;
- (b) a custody or access order or other order on any question affecting the welfare of an infant pursuant to section 11 of the *Guardianship of Infants Act, 1964*;
- (c) an order for the protection of the family home or of any moneys realised from the conveyance of any interest in the family home pursuant to section 5 of the *Family Home Protection Act, 1976*;
- (d) an order for the protection of household chattels or any moneys realised from the sale thereof pursuant to section 9 of the *Family Home Protection Act, 1976*.

Note

This head is similar to section 11 in the Judicial Separation Act.

Head 5: Making of applications for preliminary orders

Provide that

A court may make orders under head 4 if sought by the applicant or the respondent without separate proceedings having to be instituted under the Acts referred to in the said section as preliminary orders in proceedings for nullity or judicial separation brought under this Act.

Note

This head is similar to section 12 of the Judicial Separation Act.

Head 6: Maintenance pending suit, etc.

Provide that

Where application is made for a decree of nullity or judicial separation the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her support and for the support of such (if any) dependent children of the family, for such period beginning not earlier than the date of the application and ending not later than the date of the determination of that application, as the court considers proper.

Note

This head is similar to section 13 of the 1989 Act.

Head 7: Periodical payments and lump sum orders

Provide that

(1) In granting a decree of nullity or judicial separation or at any time thereafter the court may, on application to it by either party to the marriage, make any one or more of the following orders—

(a) a periodical payments order, that is to say—

- (i) an order that either party to the marriage shall make to the other party such periodical payments of such amount and at such times as may be specified in the order; or
- (ii) an order that either party to the marriage shall make to such person as may be specified in the order for the benefit of a dependent child of the family such periodical payments of such amount and at such time as may be so specified;

(b) a secured periodical payments order, that is to say—

- (i) an order that either party to the marriage shall secure to the other party to the satisfaction of the Court, such periodical payments as may be so specified; or
- (ii) an order that a party to the marriage shall secure to such person as may be so specified for the benefit of such dependent child of the family such periodical payments to the satisfaction of the court as may be so specified;

(c) an order that either party to the marriage shall pay to the other party such lump sum or sums of such amount and at such time or times as may be so specified;

(d) an order that a party to the marriage shall pay to such person as may be specified for the benefit of a dependent child of the family such lump sum or sums of such amount and at such time or times as may be so specified.

(2) Without prejudice to the generality of *subhead (1)(c)* or *(d)* of this head—

(a) an order under this head that a party to the marriage shall pay a lump sum to the other

party may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her, before making an application for an order under this head in his or her favour, in maintaining himself or herself or any dependent child of the family;

- (b) an order under this head for the payment of a lump sum for the benefit of a dependent child of the family may be made for the purpose of enabling any liabilities or expenses reasonably incurred by or for the benefit of that child before the making of an application for an order under this head in his favour to be met; and
- (c) an order under this head for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court.

Note

This head is similar to section 14 of the 1989 Act.

Head 8: Property adjustment orders

Provide that

(1) On granting a decree of nullity or judicial separation or at any time thereafter, the court may, on application to it by either party to the marriage, make a property adjustment order, that is to say, any one or more of the following orders—

- (a) an order that a party to the marriage shall transfer to the other party, to any dependent child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;
- (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party and of any dependent child of the family or any or all of those persons;
- (c) an order varying for the benefit of the parties to the marriage and of any dependent child of the family or any or all of those persons any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;
- (d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement.

(2) An order under *paragraphs (b) to (d)* of this head may include a provision reserving power to the court to exercise power under *head 17* to vary the order (whether generally or in such respect as may be specified in the order).

Note

This head is similar to section 15 of the 1989 Act except that the provision in the 1989 Act prohibiting

the court from considering and determining whether an order should be made by it more than once is being omitted. There seems no good reason why on an application for a variation of a maintenance or secured maintenance order under head 17 that the court should be prohibited from making a property adjustment order instead.

Head 9: Miscellaneous ancillary orders

Provide that

(1) On granting a decree of nullity or judicial separation or at any time thereafter, the court may, where appropriate, on application to it by either party to the marriage, make any one or more of the following orders:

- (a) an order conferring on one party to the marriage either for life or for such other period (definite or contingent) as the court may specify the right to occupy the family home to the exclusion of the other party;
- (b) an order for the sale of the family home subject to such conditions as the court considers proper;
- (c) an order under *section 12 of the Married Women's Status Act, 1957*, determining any dispute between the parties to the marriage as to the title to or possession of any property;
- (d) an order under *section 4, 5 or 9 of the Family Home Protection Act, 1976*
- (e) an order under *section (2) or (3) of the Family Law (Protection of Spouses and Children) Act, 1981*
- (f) an order for the partition of property or under the Partition Acts 1868 and 1876;
- (g) an order under *section 11 of the Guardianship of Infants Act, 1964* concerning any dependent child of the family;

(2) The court in exercising its jurisdiction under *subheads (1)(a) and (b) of this head* shall have regard to the welfare of the family as a whole and in particular shall take into consideration—

- (a) that where a decree of judicial separation is granted it is not possible for the spouses to continue to reside together;
- (b) that proper and secure accommodation should, where practicable, be provided for a dependent party to the marriage and any dependent child of the family;
- (c) the matters referred to in *head 15 of this Act*.

Note

This head is similar to section 16 of the 1989 Act and in addition incorporates, in subhead (2), the provisions of section 19 of the 1989 Act. Since a number of the orders mentioned in subhead (1)(a) — (g) may not always be appropriate e.g. where a decree of nullity has been granted the lead in to the head states that the court may make any one or more of the orders “where appropriate”.

Head 10: Order extinguishing succession rights

(1) On granting a decree of judicial separation, or at any time thereafter, the court shall, on the application of either party to the marriage, consider whether it should make an order extinguishing the share that either party would otherwise be entitled to in the estate of the other party as a legal right or on intestacy under the *Succession Act, 1965*.

(2) The court shall make an order extinguishing the share that a party to the marriage would otherwise be entitled to in the estate of the other party as a legal right or on intestacy under the *Succession Act, 1965* if —

- (a) it is satisfied, having regard to the provisions of *head 15*, that adequate and reasonable provision of a permanent nature has been made to provide for the future security of the party to the marriage whose succession rights are in question, or
- (b) it is satisfied, having regard to the provisions of *head 15*, that the case is not one where provision of a permanent nature requires to be made for the future security of the party to the marriage whose succession rights are in question, or
- (c) the party to the marriage whose succession rights are in question is not a party for the support of whom the court, having had regard to the provisions of *head 15* (including *subheads (2)(i) and (3)*) made an order under *head 7, 8 or 9(a)*,
- (d) it is satisfied that the party to the marriage whose succession rights are in question is not a party for the support of whom the court would, having regard to the provisions of *head 15* (including *subheads (2)(i) and (3)*), make an order under *head 7, 8 or 9(a)* if an application were made to it in that regard.

Note

This head is similar to section 17 of the 1989 Act. In the case of a decree of nullity (which renders a marriage void *ab initio*) there will never have been succession rights. However special provision is being made in the following Head to enable a party to a marriage which has been annulled to apply for provision out of the estate of the other party where the first party continues, up to the date of death of the other party, to be dependent on that party.

Head 11: Application for financial provision from estate of party to the marriage

Provide that

(1) Subject to the provisions of this head where a decree of nullity is in force and a party to the marriage, the subject of the decree, dies the court may, on application to it by the other party (hereinafter referred to as the applicant), provided that party has not remarried, make an order for provision to be made for that party out of the deceased party's estate.

(2) The court may make an order under this head if it is satisfied, having regard to the provisions of *head 15*, that adequate and reasonable provision for the applicant was not for any reason, apart from the matter mentioned in *paragraph (i) of subhead (2) or in subhead (3) of head 15*, made up to the time of death of the deceased party and the case is one where provision of a permanent nature requires to be made for the future security of the applicant.

(3) The court in considering whether to make an order under this head shall have regard to all the circumstances of the case and, in particular to

- (a) an order or orders it has made under *subhead (1)(c) of head 7* or under *paragraph (a), (b), (c) or (d) of head 8* in favour of the applicant and
- (b) where relevant, the matters referred to in *subhead (2) of head 15* in so far as they relate to the applicant, and
- (c) where the deceased party died testate, any devise or bequest to the applicant.

(4) If the court decides to make an order under this head the provision made by such order shall, together with the provision made by any order or orders as are mentioned in *subhead (3)(a) of this head* (the value of which shall be reckoned as at the date of the making of the provision), not exceed

- (a) in the case where the deceased party died testate, the share, if any, as a legal right the applicant would otherwise have been entitled to under the *Succession Act, 1965* if the marriage had not been annulled, and
- (b) in the case where the deceased party died intestate, the share, if any, under the intestacy which the applicant would otherwise have been entitled to under the said Act of 1965 if the marriage had not been annulled.

(5) An order under this head shall not be made except on an application made within 12 months from the first taking out of representation of the deceased's estate.

(6) If the court is satisfied that a disposition, within the meaning of subsection (1) of *section 121 of the Succession Act, 1965*, was made for the purpose of defeating or substantially diminishing the provision which the court might otherwise make under this head in favour of the applicant, the provisions of the said section 121 shall apply as appropriate to enable the court to make such provision as it considers proper for the applicant under this section.

Note

In the case of annulment, succession rights must end automatically unless one were to withdraw succession rights from a spouse in a second or subsequent union. There appears to be only two ways out of this dilemma. Firstly, one could merely provide — see head 15(2)(k) following which will be applicable also to cater for loss of occupational pension rights — that the loss of succession rights would be one of the matters to be taken into account when the court was making financial provision for the dependent spouse. Secondly, one could provide, as this head does, that where the court has not for any reason succeeded in making adequate provision for a dependent spouse, that spouse should be enabled to apply for such provision out of the other spouse's estate. Under the head such application could only be made where the applicant has not remarried (thus acquiring new succession rights). This proposal is not, however, free from difficulty. *Ipsa facto* it means that where the court does make provision out of the estate of the deceased then there will be less to be distributed to the children of the first marriage and of any subsequent marriage and, of course, to any second or subsequent spouse.

Head 12: Orders for sale of property

Provide that

(1) Where the court makes a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order, then, on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in that order, being property in which or in the proceeds of sale of which either or both parties to the marriage has or have a beneficial interest, either in possession or reversion.

(2) The power to make an order for sale in the case of a property adjustment order shall not be exercised so as to interfere with a right to occupy the family home conferred by that order.

(3) An order under *subhead (1)* of this head may contain such consequential or supplementary provisions as the court thinks fit and, without prejudice to the generality of the foregoing provision, may include—

- (a) provision requiring the making of a payment out of the proceeds of sale of the property to which the order relates, and
- (b) provision requiring any such property to be offered for sale to a person, or class of persons, specified in the order.

(4) Where an order is made under *subhead (1)* of this head, the court may direct that the order, or such provision thereof as the court may specify, shall not take effect until the occurrence of an event specified by the court or the expiration of a period so specified.

(5) Where an order under *subhead (1)* of this head contains a provision requiring the proceeds of sale of the property to which the order relates to be used to secure periodical payments to a party to the marriage, the order shall cease to have effect on the death or remarriage of that party.

(6) Where a party to the marriage has a beneficial interest in any property, or in the proceeds of sale thereof, and some other person who is not one of the parties to the marriage also has a beneficial interest in that property or in the proceeds of sale thereof, then, before deciding whether to make an order under this head in relation to that property, it shall be the duty of the court to give that other person an opportunity to make representations with respect to the order; and any representations made by that other person shall be included among the circumstances to which the court is required to have regard under *head 15*.

Note

This head is similar to section 18 of the 1989 Act.

Head 13: Duration of continuing financial provision orders in favour of a party to a marriage, and effect of remarriage

Provide that

(1) The term to be specified in a periodical payments or secured periodical payments order

in favour of a party to a marriage shall be such term as the court thinks fit, except that the term shall not begin before or extend beyond the following limits, that is to say—

- (a) in the case of a periodical payments order, the term shall begin not earlier than the date of the issuing of an application for the order, and shall be so defined as not to extend beyond the death of either of the parties to the marriage or, where the order is made on or after the grant of a decree of nullity of marriage, the remarriage of the party in whose favour the order is made; and
- (b) in the case of a secured periodical payments order, the term shall begin not earlier than the date of the issuing of an application for the order, and shall be so defined as not to extend beyond the death or, where the order is made on or after the grant of such a decree, the remarriage of the party in whose favour the order is made.

(2) Where a periodical payments or secured periodical payments order in favour of a party to a marriage is made on or after the grant of a decree of nullity of marriage, the court may direct that that party shall not be entitled to apply under *head 17* below for the extension of the term specified in the order.

(3) Where a periodical payments or secured periodical payments order in favour of a party to a marriage is made otherwise than on or after a grant of a decree of nullity of marriage, and the marriage in question is subsequently annulled but the order continues in force, the order shall, notwithstanding anything in it, cease to have effect on the remarriage of that party, except in relation to any arrears due under it on the date of the remarriage.

(4) If after the grant of a decree annulling a marriage either party to that marriage remarries, that party shall not be entitled to apply, by reference to the grant of that decree, for a financial provision order in his or her favour, or for a property adjustment order, against the other party to that marriage.

Note

This head provides that in the case of a periodical payments maintenance order the order shall not extend beyond the death of either party or the remarriage of the party in whose favour the order was made, and in the case of a secured periodical payments order beyond the death or remarriage of the party in whose favour the order was made. Also on the remarriage of a party to an annulled marriage no application for a financial provision order will be entertained by the court.

Head 14: This Part to apply to nullity decrees granted only after the passing of this Act

Provide that the provisions of this Part of this Act shall apply to decrees of nullity granted only after the passing of this Act.

Note

The head provides that financial provision orders following a decree of nullity can arise only in respect of decrees granted after the coming into effect of the Act. While not to backdate the provisions on nullity might seem unfair the persons involved will have arranged their affairs on the basis of the absence of such provisions and it would seem wrong to affect such arrangements retrospectively.

Head 15: Provisions relating to maintenance, property and other orders

Provide that

(1) In deciding whether to exercise its powers under *head 6, 7, 8 or 9(1)(a) or (b)* of this Act and, if so, in what manner, the court shall seek to ensure that such provision is made for any party to the marriage and for any dependent child of the family as is adequate and reasonable having regard to all the circumstances of the case.

(2) As regards the exercise of the powers of the court under *head 6, 7, 8 or 9(1)(a) or (b)* of this Act in relation to a party to the marriage, the court shall in particular have regard to the following matters—

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before proceedings were instituted or before the parties to the marriage separated, as the case may be;
- (d) the age of each party to the marriage, the duration of the marriage and the length of time the parties lived together;
- (e) any physical or mental disability of either party;
- (f) the contributions which each of the parties to the marriage has made or is likely in the foreseeable future to make to the welfare of the family, including the contribution made by each party to the marriage to the income, earning capacity, property and financial resources of the other and any contribution made by looking after the home or caring for the family;
- (g) the effect on the earning capacity of each party to the marriage of the marital responsibilities assumed by each during the period when they lived together and, in particular, the degree to which the future earning capacity of a party to the marriage is impaired by reason of having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family;
- (h) any income or benefits to which either party to the marriage is entitled by or under statute;
- (i) the conduct of each of the parties to the marriage, if that conduct is such that in the opinion of the court it would in all the circumstances be repugnant to justice to disregard it;
- (j) the accommodation needs of either party to the marriage;
- (k) in the case of proceedings for nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the annulment of the marriage, that party will lose the chance of acquiring.

(3) The court shall not make an order under *head 6, 7, 8 or 9(1)(a) or (b)* of this Act for the support of a party to the marriage where the party has deserted and has continued to desert the other party up to the time of the institution of proceedings for a decree of nullity of marriage or judicial separation unless, having regard to all the circumstances (including the conduct of

the other party), the court is of opinion that it would be repugnant to justice not to make such order or orders.

(4) As regards the exercise of powers of the court under *head 7, 8 or 9* of this Act in relation to any dependent child of the family, the court shall in particular have regard to the following matters—

- (a) the financial needs of the child;
- (b) the income, earning capacity (if any), property and other financial resources of the child;
- (c) any physical or mental disability of the child;
- (d) any income or benefits to which the child is entitled by or under statute;
- (e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;
- (f) the considerations mentioned in relation to the parties to the marriage in *subhead (2)(a), (b), (c) and (e)* of this head;
- (g) the accommodation needs of the child.

(5) In this head “desertion” includes conduct on the part of one party to the marriage that results in the other party, with just cause, leaving and living apart from that other party.

Note

Apart from *subhead (2)(k)* this head is similar to section 20 of the 1989 Act. *Subhead (2)(k)* is intended to cover, for example, loss of succession and occupational pension rights.

Head 16: Retrospective maintenance orders

Provide that

(1) The court may when making a periodical payments order under *head 7(1)(a)* provide that the sum ordered to be paid by it be backdated to the date when the nullity or judicial separation application was issued, but no earlier, where it is deemed appropriate that such order be made having regard to all the circumstances of the case and may in so doing order that any arrears of maintenance it accordingly deems to have accumulated be paid by way of a lump sum by a specified date and may in ordering the payment of such lump sum give credit to the party to the marriage ordered to make such payment for any relevant moneys paid by him to the party to whom such payment is to be made in the period between the dates when the nullity or separation proceedings were issued and a decree of nullity or separation was granted.

(2) The jurisdiction conferred on the court to make a lump sum order under *subhead (1)* of this head is without prejudice to the generality of the jurisdiction to make such order arising under *head 7(1)(c) and 7(1)(d)*.

Note

This head is similar to section 21 of the 1989 Act.

Head 17: Variation and discharge of financial and property orders

Provide that

(1) Where the court has made an order to which this head applies, then subject to the provisions of this head and of *head 15* of this Act, the court may, on application to it by either party to the marriage, if it considers it proper to do so having regard to any change in the circumstances and to any new evidence, vary or discharge the order or suspend any provision thereof temporarily, revive the operation of any provision so suspended, and in any appropriate case again vary any such order or again suspend or revive its operation.

(2) This head applies to the following orders—

- (a) an order for maintenance pending suit;
- (b) a periodical payments order;
- (c) a secured periodical payments order;
- (d) that part of an order for the payment of a lump sum which provides for the payment of that sum by instalments or requires the payment of such instalments to be secured;
- (e) any such order for the settlement of property or for the variation of a settlement as
 - (i) is mentioned in *head 8(1)(b) to (d)* and
 - (ii) contains provision reserving power to the court to exercise its power under this head to vary the order (whether generally or in such respect as may be specified in the order);
- (f) an order in relation to the occupation of the family home, and
- (g) an order for the sale of property.

(3) Without prejudice to the generality of *head 7* of this Act that part of an order which provides for the support of a dependent child shall stand discharged where the child ceases to be a dependent child of the family by reason of his attainment of the age of sixteen years or twenty-one years, as the case may be, and shall be discharged by the court, on application to it under *subhead (1)* of this head, if it is satisfied that the child has for any reason ceased to be a dependent child of the family.

(4) The powers exercisable by the court under this head in relation to an order shall be exercisable also in relation to any instrument executed in pursuance of the order.

(5) Where the party liable to make payments under a secured periodical payments order has died, an application under this head relating to that order (and to any order which requires the proceeds of sale of property to be used for securing those payments) may be made by the party to the marriage entitled to payment under the periodical payments order or by the personal representatives of the deceased party to the marriage, but no such application shall, except with

the permission of the court, be made after the end of the period of twelve months from the date on which representation in respect of the estate of the deceased is first granted.

(6) The personal representatives of a deceased party to a marriage against whom a secured periodical payments order was made shall not be liable for having distributed any part of the estate of the deceased after the expiration of the period of twelve months referred to in *subhead (5)* of this head on the ground that they ought to have taken into account the possibility that the court might permit an application under this head to be made after that period by the person entitled to payments under the order; but this subhead shall not prejudice any power to recover any part of the estate so distributed arising by virtue of the making of an order in pursuance of this head.

(7) The power of the court by virtue of subhead (2)(c) above to vary or discharge a property adjustment order shall be exercisable subject to any restriction contained in the order on the respects in which the power may be exercised and, if the order has taken effect, shall (subject to any such restriction) be a power—

- (a) to vary the settlement to which the order relates in any person's favour or to extinguish or reduce any person's interest under that settlement; and
- (b) to make such supplemental provision (including a further property adjustment order or an order for the payment of a lump sum) as the court thinks appropriate in consequence of any variation, extinguishment or reduction to be made under paragraph (a) above;

and head 12 above shall apply for the purposes of the exercise of the court's power under this subhead as it applies where the court makes a property adjustment order under head 8 above.

(8) The court shall not exercise its power by virtue of *subhead (2)(e)* above in relation to any property adjustment order unless it appears to the court that the provision to be made in exercise of that power will not prejudice the interests of any person who—

- (a) has acquired any right or interest in consequence of that order; and
- (b) is not a party to the marriage or child of the family.

Note

This head is similar to section 22 of the 1989 Act except that

- (1) it allows variation of a settlement made under head 8 where the court has indicated in making that order that it may subsequently be varied (*subhead (2)(e)*);
- (2) it omits the provision prohibiting the court from making a property adjustment order on an application for the variation of a periodical or secured periodical payments order.

Head 18: Child maintenance

Provide that

(1) A maintenance or a variation order shall specify each part of a payment under the order that is for the support of a dependent child and may specify the period during the lifetime of the person applying for the order for which so much of a payment under the order as is for the support of a dependent child shall be made.

(2) Conduct of the nature referred to in head 15(2)(i) or 15(3) or in head 17 shall not be a ground upon which a court shall refuse to make a maintenance order for the support of a dependent child and shall not be a ground for discharging or varying any part of a maintenance order that provides for the support of such child.

Note

This head is similar to section 23 of the 1989 Act.

Head 19: Transmission of periodical payments through District Court clerk

Provide that

Notwithstanding anything in this Act, the provisions of section 9 of the *Family Law (Maintenance of Spouses and Children) Act, 1976*, shall apply in relation to an order for maintenance pending suit, to a periodical payments order or a secured periodical payments order, subject to the modifications that the reference in subsection (4) of the said section 9 to the maintenance creditor shall be construed as a reference to the person to whom payments under the order would be made and the other references in the said section 9 to the maintenance creditor shall be construed as references to the person on whose application the periodical payments order was made.

Note

This head is similar to section 24 of the 1989 Act.

Head 20: Amendment of section 3 of Family Law (Maintenance of Spouses and Children) Act, 1976

Provide that

(1) Subject to subhead (2) of this head Section 3(1) of the *Family Law (Maintenance of Spouses and Children) Act, 1976*, is hereby amended by the deletion in the definition of “antecedent order” of—

“(i) an order for alimony pending suit”;

and the substitution of—

“(i) an order for payment of maintenance pending suit under the Family Law (No. 1) Act, 199[] or a periodical payments order under that Act.”.

(2) Subhead (1) of this head shall not affect the application of the said Act of 1976 to an order for payment of alimony pending suit in force at the commencement of this Act.

Note

This head is similar to section 25 of the 1989 Act. With the new provisions relating to the making of financial provision orders following the grant of nullity decrees orders for alimony pending suit in nullity proceedings (covered in the 1989 Act) will no longer be made.

Head 21: Payments to be made without deduction of income tax

Provide that

Payments of money pursuant to an order under this Part shall be made without deduction of income tax.

Note

This is similar to section 26 in the 1989 Act.

Head 22: Application of maintenance and periodical payments orders to members of Defence Forces

Provide that

The reference in *section 98(1)(h) of the Defence Act, 1954*, to an order for payment of alimony shall be construed as including references to an order for maintenance pending suit, a periodical payments order and a secured periodical payments order under this Act.

Note

This is similar to section 27 in the 1989 Act.

Head 23: Amendment of Enforcement of Court Orders Act, 1940

Provide that

The references in subsections (1) and (7) of *section 8 of the Enforcement of Court Orders Act, 1940* (as amended by *section 29 of the Family Law (Maintenance of Spouses and Children) Act, 1976*), to an order shall be construed as including references to an order for payment of maintenance pending suit and a periodical payments order under this Act.

Note

This is similar to section 28 in the 1989 Act.

Head 24: Voidance of transactions intended to prevent or reduce financial relief

Provide that

(1) For the purposes of this head, “financial relief” means relief under any of the provisions of heads 6, 7, 8, 9(1)(a), 9(1)(b), 16 and 17 (except subhead (5)) of this Act, and any reference in this head to defeating a person’s claim for financial relief is a reference to preventing financial relief from being granted to that person, or to that person for the benefit of a dependent child of the family, or reducing the amount of any financial relief which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at the instance of that person under any of those provisions.

(2) Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person—

- (a) if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition 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 the other party from so doing or otherwise for protecting the claim;
- (b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition;
- (c) if it is satisfied, in a case where an order has been obtained under any of the provisions mentioned in subhead (1) of this head by the applicant against the other party, that the other party has, with that intention, made a reviewable disposition, make an order setting aside the disposition;

and an application for the purposes of paragraph (b) shall be made in the proceedings for the financial relief in question.

(3) Where the court makes an order under subhead (2)(b) or (c) of this head setting aside a disposition it shall give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payments or the disposal of any property).

(4) Any disposition made by the other party to the proceedings for financial relief in question (whether before or after the commencement of those proceedings) is a reviewable disposition for the purposes of subhead (2)(b) and (c) of this head unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant’s claim for financial relief.

(5) Where an application is made under this head with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied—

- (a) in a case falling within subhead (2)(a) or (b) of this head, that the disposition or other dealing would (apart from this head) have the consequences, or
- (b) in a case falling within subhead (2)(c) of this head, that the disposition has had the consequence,

of defeating the applicant’s claim for financial relief, it shall be presumed, unless the contrary is

shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for the financial relief.

(6) In this head "disposition" does not include provision contained in a will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise.

Note

This is similar to section 29 in the 1989 Act.

Head 25: Interpretation of this Part and Parts III and IV

Provide that

In this Part and Parts III and IV where the context so requires, any reference to marriage, to remarriage or to a party who has, or has not, remarried includes a reference to a marriage which is by law void or voidable and to a party who has entered into a marriage which is void or voidable and a marriage shall be treated for the purposes of this head as a remarriage in relation to any party thereto, notwithstanding that the previous marriage of that party was void or voidable.

Note

For the purposes of the financial provisions in this Part and the declaration of status and financial provisions in Parts III and IV this head ensures that 'married' and 'remarried' includes the case where a party applies for and is granted a nullity decree and to such a party who 'remarries'. In law such a person was never married in the first place.

Head 26: Repeal of Part II of Judicial Separation and Family Law Reform Act, 1989

Provide that

Part II of the *Judicial Separation and Family Law Reform Act, 1989* is hereby repealed.

Note

Financial provisions orders following nullity and judicial separation decrees are being dealt with in Part II and will, *inter alia*, replace Part II of the 1989 Act which can be repealed.

Part III

DECLARATIONS OF STATUS

Head 27: Declarations as to marital status

Provide that

(1) A person may, subject to *subhead* (2) and to *head* 28, apply to the court for one or more of the following declarations in relation to a marriage specified in the application, being a marriage to which he is a party, that is to say—

- (a) a declaration that the marriage was at its inception a valid marriage;
- (b) a declaration that the marriage subsisted on a date specified in the application;
- (c) a declaration that the marriage did not subsist on a date so specified not being the date of inception of the marriage;
- (d) a declaration that the validity of a divorce, annulment or legal separation obtained under the civil law of any other State in respect of the marriage is entitled to recognition in the State;
- (e) a declaration that the validity of a divorce, annulment or legal separation so obtained in respect of the marriage is not entitled to recognition in the State.

(2) A court shall have jurisdiction to entertain an application under *subhead* (1) above if (and only if) either of the parties to the marriage to which the application relates—

- (a) is domiciled in the State on the date of the application, or
- (b) has been ordinarily resident in the State throughout the period of one year ending with that date, or
- (c) died before that date and either
 - (i) was at death domiciled in the State, or
 - (ii) had been ordinarily resident in the State throughout the period of one year ending with the date of death.

(3) The other party to the marriage shall, unless deceased, be joined in the proceedings.

(4) On an application under this head the court may at any stage of the proceedings, of its own motion or on the application of any party to the proceedings, direct that all necessary papers in the matter be sent to the Attorney General.

(5) Where on an application under this head the Attorney General requests to be made a party to the proceedings, the court shall order that he shall be added as a party, and, whether or not he so requests, the Attorney General may argue before the court any question in relation to the application which the court considers necessary to have fully argued and take such other steps in relation thereto as he thinks necessary or expedient.

(6) The court may direct that notice of any application under this Head shall be given to such other persons as the court thinks fit and where notice is so given to any person the court may,

either of its own motion or on the application of that person or any party to the proceedings, order that that person shall be added as a party to those proceedings.

(7) Provide that where any party to the proceedings alleges that the marriage is or was void or that it is voidable and should be annulled, the court may, if the circumstances are such that it would have jurisdiction to entertain an application for nullity from that party in respect of the marriage, for the purpose of dealing with the allegation treat the application under *subhead (1)* as an application for a decree of nullity of marriage and may forthwith proceed to determine the matter accordingly and may postpone thereto the determination of the application under *subhead (1)*.

(8) Any declaration made under this Head shall be binding on the parties to the proceedings and on any person claiming through a party to the proceedings, and where the Attorney General is made a party to the proceedings the declaration shall also be binding on the State.

(9) Any declaration made under this head shall not prejudice any person if it is subsequently proved to have been obtained by fraud or collusion.

Note

1. The Law Reform Commission consider (pages 24 and 25 of LRC 6 — Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters) that the present law regarding declarations as to status (Legitimacy Declaration Act (Ireland) 1868 and Order 19, Rule 29, Rules of the Superior Courts) would benefit from restatement in clear terms in modern legislation and they make certain recommendations.

2. The proposals in the head differ in the following respects from the recommendations of the Commission:

- (i) A person may apply under subhead (1) for more than one declaration, e.g. he may ask for a declaration that the marriage in question was initially valid and, in addition, or in the alternative, that it did or did not subsist on a particular date or dates or that a foreign divorce etc. is or is not recognised here. The subhead is based on section 55(1) of the English Family Law Act 1986.
- (ii) The basis of jurisdiction under the 1868 Act in proceedings for a declaration that a person's marriage was or is a valid marriage is that the petitioner is "a natural-born subject of the Queen or a person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy, being domiciled in England or Ireland or claiming any real or personal estate situate in Ireland" (section 1 of Act). A corresponding and updated provision similar to subsections (2)(a) and (c) of Section 55 of the English Act is proposed in subhead (2).
- (iii) The proposals involving the Attorney General (subheads (4) and (5)) follow provisions in the *Status of Children Act, 1987* rather than the recommendation of the Commission (or the 1868 Act).

3. A party will not under this head be able to obtain a declaration that his marriage was initially invalid, that is, the nullity jurisdiction of the Court is not being changed. If in reality the application is a nullity application subhead (7) will apply to convert the proceedings into nullity proceedings.

4. Proceedings under the 1868 Act are commenced by petition (see also Order 71 of the Rules of the Superior Courts). Head 50 provides that all proceedings in this Act shall be commenced in a summary manner.

5. As to the use of domicile and ordinary residence for the purpose of jurisdiction see note to head 34 (Part IV).

Head 28: Provisions supplementary to Head 27

Provide that

(1) Rules of Court may provide that any application for a declaration under *Head 27* shall contain such information as may be required including information as to any previous or pending proceedings with reference to any marriage in question or to the matrimonial status of either party to that marriage.

(2) Where any costs are incurred by the Attorney General in connection with any application for a declaration under *Head 27*, the Court may make such order as it considers just as to the payment of those costs by other parties to the proceedings.

(3) Subject to law and practice for the time being subsisting in regard to the recognition of foreign decrees, no proceedings on an application under *Head 27* shall affect any final judgment or decree already pronounced or made by any court of competent jurisdiction save where that judgment or decree is subsequently proved to have been obtained by fraud or collusion.

(4) Where a declaration (other than a declaration in relation to a legal separation) is made by the Court under *Head 27*, notification of that decision shall be given to an tArd-Chlaraitheoir.

Note

1. The English Law Commission in their Working Paper (No. 48) on Declarations in Family Matters considered that it should be made clear on every application for a declaration that the applicant is required to give particulars of any previous or pending proceedings with reference to any marriage in question or to the matrimonial status of either party to it. Information about "any marriage in question" in subhead (1) could, for example, relate to the applicant's own marriage or any foreign divorce decree in respect of a previous marriage (see page 64 of Working Paper No. 48).
2. Subhead (3) differs from both *section 36(3) of the Status of Children Act, 1987* and from *section 9 of the Act of 1868* in that it takes account of foreign decrees (e.g. of divorce) that are not granted recognition. (It is arguable that the provision included in relation to foreign decrees is unnecessary in as much as a decree that is not recognised cannot — by definition — be affected. Nevertheless it seems preferable not to leave the subhead open to another possible interpretation). The saver for cases of fraud or collusion is made necessary by head 27(9).
3. The Law Reform Commission recommend that a declaration obtained under head 27 should not be effective to the extent that it was inconsistent with a previous decree regarding the status of the petitioner in either annulment proceedings or proceedings for a declaration as to the validity of the petitioner's marriage. No argument is offered for this departure from *section 9 of the Act of 1868* (which is followed also by *section 36(3) of the Status of Children Act, 1987* and *section 60(3) of the English Act*.) Moreover the scope of head 27 now goes well beyond the recommendations of the Law Reform Commission.

Head 29: Amendment of Legitimacy Declaration Act (Ireland), 1868

Provide that

The words "and any such subject or person being so domiciled or claiming as aforesaid may

in like manner apply to such Court for a decree declaring that his marriage was or is a valid marriage" in section 1 of the *Legitimacy Declaration Act (Ireland), 1868* be deleted.

Note

This head is consequential on the provisions in head 27 replacing the provisions in the Legitimacy Declaration Act (Ireland), 1868 which enable a person to apply to the court for a declaration as to the validity of his or her marriage and which give the court jurisdiction to make a decree as to the validity or invalidity of the marriage.

Head 30: Abolition of right to petition for jactitation of marriage

Provide that

No person shall after the commencement of this Part be entitled to petition for jactitation of marriage.

Note

Abolition of the right to petition for jactitation of marriage (proceedings by way of jactitation of marriage are designed to prevent unwarrantable assertions that a marriage exists between the petitioner and the respondent) was recommended by the Law Reform Commission in their Report; LRC 6-1983. While the LRC recommended a replacement action it is proposed to abolish the action without replacement. The position is that there are no reported cases of suits for jactitation and the remedy, if it was ever used, seems to have fallen into disuse.

Part IV

APPLICATIONS FOR FINANCIAL RELIEF AFTER FOREIGN DIVORCE ETC.

Head 31: Applications for financial relief after foreign divorce etc.

Provide that

(1) Where—

- (a) after the passing of this Act a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in a country other than the State (in this Part hereinafter referred to as “in a foreign country”), and
- (b) the divorce, annulment or legal separation is entitled to be recognised as valid in the State,

either party to the marriage may apply to the court for an order for financial relief under this Part of this Act.

(2) If after a marriage has been dissolved or annulled in a foreign country one of the parties to the marriage remarries that party shall not be entitled to make an application in relation to that marriage.

(3) In this Part of this Act, (except *heads 40 and 41*) “order for financial relief” means an order under *head 36* below of a description referred to in that head.

Note

This head establishes for the first time the right of a party to a marriage which has been dissolved or annulled, or in respect of which a judicial separation has been granted abroad and that foreign decision is recognised here, to apply to the Irish courts for financial provision. The provisions are based generally on similar provisions in the British Matrimonial and Family Proceedings Act, 1984. Whether these provisions should apply to foreign decrees granted only after the coming into effect of this Act is a matter for consideration. While strong arguments could be advanced to the contrary it would seem wrong to apply this provision retrospectively. See discussion of similar situation as far as domestic nullity decrees are concerned in the note to head 14.

Head 32: Leave of the Court required for applications for financial relief

Provide that

(1) No application for an order for financial relief shall be made under this Part of this Act unless the leave of the court has been obtained and the court shall not grant leave unless it considers that there is a substantial ground for the making of the application for such an order.

(2) The court may grant leave under this head notwithstanding that an order has been made

by a court in a foreign country requiring the other party to the marriage to make any payment or transfer any property to the applicant or a dependent child of the family.

- (3) Leave under this head may be granted subject to such conditions as the court thinks fit.

Note

The requirement to obtain leave is intended to filter applications. Apart from establishing the *bona fides* of the application the court will also have to be satisfied that the decree in question is recognised in the State and that the court has jurisdiction to entertain the application under head 34.

Head 33: Interim orders for maintenance

Provide that

(1) Where leave is granted under *head 33* above for the making of an application for an order for financial relief and it appears to the court that the applicant or dependent child of the family is in immediate need of financial assistance, the court may make an order for maintenance pending suit, that is to say, an order requiring the other party to the marriage to make to the applicant such periodical payments for the support of the applicant and of such dependent child, for such period beginning not earlier than the date of the grant of leave and ending not later than the date of the determination of the application for an order for financial relief, as the court considers reasonable and subject to such conditions that the court considers proper.

(2) If it appears to the court that the court has jurisdiction to entertain the application for an order for financial relief by reason only of *paragraph (c) of head 34(1)* below the court shall not make an order for maintenance pending suit under this head.

Note

This head enables the court to make an order for maintenance pending suit in suitable cases. Head 34(1)(c) refers to the case where the court's jurisdiction is based solely on the fact that either or both of the parties to the marriage had a beneficial interest in property in the State which was at some time a family home. In such a case the court will only make an order relating to the ownership of that property i.e. it will not be making a periodical maintenance order.

Head 34: Jurisdiction of the court

Provide that

(1) Subject to *subhead (2)* below, the court shall have jurisdiction to entertain an application for an order for financial relief if any of the following jurisdictional requirements are satisfied

- (a) either of the parties to the marriage was domiciled in the State on the date of the

application for leave under *head 32* or was so domiciled on the date on which the divorce, annulment or judicial separation obtained in the foreign country took effect in that country;

- (b) either of the parties was ordinarily resident in the State throughout the period of one year ending with the date of application for leave or was so resident throughout the period of one year ending with the date the divorce, annulment or judicial separation obtained in the foreign country took effect in that country;
- (c) either or both of the parties to the marriage had at the date of the application for leave a beneficial interest in possession in a dwelling (as defined in Part II of this Act) situated in the State which was at some time during the marriage a family home of the parties to the marriage.

(2) Where the jurisdiction of the court to entertain proceedings under this Part of this Act would fall to be determined by reference to the jurisdictional requirements imposed by virtue of the *Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988* then—

- (a) satisfaction of the requirements of *subhead (1)* above shall not obviate the need to satisfy the requirements imposed by virtue of that Act; and
- (b) satisfaction of the requirements imposed by virtue of that Act shall obviate the need to satisfy the requirements of *subhead (1)* above.

Note

The requirements of the 1988 Act mentioned in *subhead (2)* above concern applications for maintenance. Under the 1968 Judgments Convention (to which the 1988 Act gave effect in this jurisdiction) an application for maintenance may be made in the courts for the place where the maintenance creditor is domiciled or habitually resident or where the debtor is domiciled. (Domiciled for the purposes of the 1988 Act means ordinarily resident).

On the general jurisdictional question it is noted that in the U.K. domicile or habitual residence of either party or the presence of a family home or former family home in the U.K. are the permitted grounds of jurisdiction. These seem reasonable for adoption in this country with the substitution as proposed in the head of ordinary residence for habitual residence.

Head 35: Duty of court to consider whether the State is appropriate venue for application

Provide that

(1) Before making an order for financial relief the court shall consider whether in all the circumstances of the case it would be appropriate for such an order to be made by a court in the State; and if the court is not satisfied that it would be appropriate, the court shall dismiss the application.

(2) The court shall in particular have regard to the following matters—

- (a) the connection which the parties to the marriage have with the State;
- (b) the connection which those parties have with the country in which the marriage was dissolved or annulled or in which they were legally separated;

- (c) the connection which those parties have with any other country outside the State;
- (d) any financial benefit which the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a country outside the State;
- (e) in a case where an order has been made by a court in a country outside the State requiring the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a dependent child of the family, the financial relief given by the order and the extent to which the order has been complied with or is likely to be complied with;
- (f) any right which the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any country outside the State and if the applicant has omitted to exercise that right the reason for that omission;
- (g) the availability in the State of any property in respect of which an order under this part of this Act in favour of the applicant could be made;
- (h) the extent to which any order made under this Part of this Act is likely to be enforceable;
- (i) the length of time which has elapsed since the date of the divorce, annulment or legal separation.

Note

This head, which is based on section 15 of the British Matrimonial and Family Proceedings Act, 1984, sets out the matters the court will have regard to when deciding whether or not it should make an order under this Part.

Head 36: Orders for Financial Provision and property adjustment

Provide that

(1) Subject to *head 38* below, the court on an application by a party to a marriage for an order for financial relief under this head, may make any one or more of the orders which it could make under Part II of this Act if a decree of nullity of marriage or a decree of judicial separation in respect of the marriage had been granted in the State.

(2) Subject to *head 38* below, where the court makes a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order under subhead (1) above, then, in making that order or at any time thereafter the court may make any order mentioned in *head 12(1)* of this Act (orders for sale of property) which the court would have power to make if the order under subhead (1) above had been made under Part II of this Act.

(3) The court, on an application under subhead (1) by a party whose marriage has been dissolved, may make one or more of the orders (with suitable modifications) which it could make under Part II of this Act if a decree of nullity in respect of the marriage had been granted in the State.

Note

This head permits the court to make any order for financial provision and property adjustment it could have made if a decree (of judicial separation or nullity) had been granted by a court in the State.

Head 37: Matters to which the court is to have regard in exercising its powers under head 36

Provide that

(1) In deciding whether to exercise its powers under the previous head and, if so, in what manner the court shall have regard to the matters mentioned in *head 15* of this Act as appropriate.

(2) Where an order has been made by a court outside the State for the making of payments or the transfer of property by a party to the marriage, the court in considering in accordance with this head the financial resources of the other party to the marriage or a dependent child of the family shall have regard to the extent to which that order has been complied with or is likely to be complied with.

Note

In deciding whether to make an order under the previous head the court will have regard to the same matters it would have to have regard to if it was making an order following the granting of a decree (of judicial separation or nullity) in the State.

Head 38: Restriction of powers of court where jurisdiction depends on family home in the State

Provide that

(1) Where the court has jurisdiction to entertain an application for an order for financial relief by reason only of the situation in the State of a dwelling which was a family home of the parties, the court may make, under *head 36* above, any one or more of the following orders (but no other) —

- (a) an order that either party to the marriage shall pay to the other such lump sum as may be specified in the order;
- (b) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of a dependent child of the family, such lump sum as may be so specified;
- (c) an order that a party to the marriage shall transfer to the other party, to any dependent child of the family or to such person as may be so specified for the benefit of such a child, the interest of the first-mentioned party in the dwelling or such part of that interest as may be so specified;
- (d) an order that a settlement of the interest of a party to the marriage in the dwelling, or such part of that interest as may be so specified, be made to the satisfaction of the court

for the benefit of the other party to the marriage and of the dependent children of the family or either or any of them;

- (e) an order varying for the benefit of the parties to the marriage and of the dependent children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage so far as that settlement relates to an interest in the dwelling;
- (f) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement so far as that interest is an interest in the dwelling;
- (g) an order for the sale of the interest of a party to the marriage in the dwelling.

(2) Where, in the circumstances mentioned in *subhead (1)* above, the court makes an order for the payment of a lump sum by a party to the marriage, the amount of the lump sum shall not exceed, or where more than one such order is made the total amount of the lump sums shall not exceed in aggregate, the following amount, that is to say—

- (a) if the interest of that party in the dwelling is sold in pursuance of an order made under *subhead (1)(g)* above, the amount of the proceeds of the sale of that interest after deducting therefrom any costs incurred in the sale thereof;
 - (b) if the interest of that party is not so sold, the amount which in the opinion of the court represents the value of that interest.
- (3) Where the interest of a party to the marriage in the dwelling is held jointly or in common with any other person or persons—
- (a) the reference in *subhead (1)(g)* above to the interest of a party to the marriage shall be construed as including a reference to the interests of that other person, or the interest of those other persons, in the dwelling, and
 - (b) the reference in *subhead (2)(a)* above to the amount of the proceeds of a sale ordered under *subhead (1)(g)* above shall be construed as a reference to that part of those proceeds which is attributable to the interest of that party to the marriage in the dwelling.

Note

This head provides for the orders that can be made where the jurisdiction of the court is based solely on the ground that either or both of the parties to the marriage have or had a beneficial interest in a dwelling in the State which at any time during the marriage was the family home. In essence the head provides that in such a case the only orders that can be made will relate to that property or the value thereof.

Head 39: Application to orders under heads 33 and 36 of certain provisions of Part II of this Act

Provide that

The following provisions of Part II of this Act (financial relief for parties to marriage and dependent children of family) shall apply in relation to an order made under *head 33* or *36* above as they apply in relation to a like order made under that Part of this Act, that is to say —

- (a) *Head 7(2)* (provisions as to lump sums);
- (b) *Head 12(3), (4), (5) and (6)* (provisions as to orders for sale);
- (c) *Head 13(1) and (2)* (duration of continuing financial provision orders in favour of party to marriage);
- (d) *Head 17* (variation, discharge etc. of certain orders for financial relief), except *subsection (2)(e)*;

Note

This head merely provides for the application to orders made under this Part of relevant provisions in Part II of the Act.

Head 40: Avoidance of transactions intended to defeat applications for financial relief

Provide that

(1) For the purposes of this head “financial relief” means relief under *head 33 or 36* above and any reference to defeating a claim by a party to a marriage for financial relief is a reference to preventing financial relief from being granted to that person or to that person for the benefit of a dependent child of the family or reducing the amount of relief which might be granted, or frustrating or impeding the enforcement of any order which might be or has been made under either of those provisions at the instance of that party.

(2) Where leave is granted under *head 32* above for the making by a party to a marriage of an application for an order for financial relief under *head 36* above, the court may, on an application by that party—

- (a) if it is satisfied that the other party to the marriage is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;
- (b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition.
- (c) if it is satisfied, in a case where an order has been obtained under *head 33 or 36* above by the applicant against the other party, that the other party has with that intention made a reviewable disposition, make an order setting aside the disposition.

(3) Where the court has jurisdiction to entertain the application for an order for financial relief by reason only of *subhead (1), paragraph (c) of head 34* above, it shall not make any order under *subhead (2)* above in respect of any property other than the dwelling concerned.

(4) Where the court makes an order under *subhead (2)(b) or (c)* above setting aside a disposition it shall give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payments or the disposal of any property).

(5) Any disposition made by the other party to the marriage (whether before or after the commencement of the application) is a reviewable disposition for the purposes of *subhead (2)(b) and (c)* above unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief.

(6) Where an application is made under *subhead (2)* above with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied—

(a) in a case falling within *subhead (2)(a) or (b)* above, that the disposition or other dealing would (apart from this section) have the consequence, or

(b) in a case falling within *subhead (2)(c)* above, that the disposition has had the consequence,

of defeating a claim by the applicant for financial relief, it shall be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief.

(7) In this section “disposition” does not include any provision contained in a will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise.

Note

This head is similar to *head 24* which concerns voidance of transactions intended to prevent or reduce financial relief being granted in the case of applications under Part II of this Act. *Head 40* repeats these provisions for the purposes of the granting of financial relief in the case of foreign decrees.

Head 41: Prevention of transactions intended to defeat prospective applications for financial relief

Provide that

(1) Where, on an application by a party to a marriage, it appears to the court—

(a) that the marriage has been dissolved or annulled, or that the parties to the marriage have been legally separated, by means of judicial or other proceedings in a foreign country; and

(b) that the applicant intends to apply for leave to make an application for an order for financial relief under *head 36* above as soon as he or she has been ordinarily resident in the State for a period of one year; and

(c) that the other party to the marriage is, with the intention of defeating a claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property,

the court may make such order as it thinks fit for restraining the other party from taking such action as is mentioned in *paragraph (c)* above.

(2) For the purposes of an application under subhead (1) above—

- (a) the reference to defeating a claim for financial relief shall be construed in accordance with *subhead (1) of head 40* above (omitting the reference to any order which has been made); and
- (b) *subheads (6) and (7) of head 40* above shall apply as they apply for the purposes of an application under that head.

Note

This head enables the court to take preventative action where a respondent in anticipation of an application being made under this Part seeks to transfer his assets out of the jurisdiction.

Head 42: Interpretation of Part IV

Provide that

In this Part of this Act—

“dependent child of the family” has the same meaning as in Part II of this Act

“dwelling” has the same meaning as in Part II of this Act

“family home” has the same meaning as in Part II of this Act

“order for financial relief” has the meaning given by *head 31(3)* above

“property adjustment order” means such an order as is specified in *head 8* above

“secured periodical payments order” means such an order as is specified in *head 7(1)(b)* above.

Note

This head provides definitions for Part IV of the Act.

Part V

MAINTENANCE PROCEEDINGS OTHER THAN UNDER THIS ACT

Head 43: Secured maintenance orders

Provide that

(1) Where in any proceedings, apart from proceedings under this Act, the High Court, the Circuit Court or the District Court makes an order that one spouse make to the applicant spouse periodical payments for the support of the applicant spouse the court may order that spouse to secure to the applicant spouse to the satisfaction of the court such periodical payments as may be so specified.

(2) Provide that where in any proceedings, apart from proceedings under this Act, the High Court, the Circuit Court or the District Court makes an order that one parent make to the applicant parent or to such person as may be specified in the order periodical payments for the support of a dependent child of those parents the court may order that parent to secure to the applicant parent or to such person as may be specified in the order for the benefit of such dependent child, to the satisfaction of the court, such periodical payments as may be so specified.

Note

This head proposes to extend to maintenance orders made in proceedings other than judicial separation and nullity (e.g. in proceedings under the Family Law (Maintenance of Spouses and Children) Act, 1976, the Guardianship of Infants Act, 1964 and the Status of Children Act, 1987) the facility in suitable circumstances of having the maintenance order secured. This would ensure that there would be no default in the payment of the maintenance ordered by the court. Of course, the court would only be in a position to make secured maintenance orders where there were assets available on which the payment could be secured. This may be a comparatively rare situation. Of 141 periodic maintenance orders made under the Judicial Separation Act (See Appendix 3.3) only 10 were for secured maintenance.

Head 44: Lump sum maintenance orders

Provide that

(1) Where in any proceedings, apart from proceedings under this Act, the maintenance of a spouse or of a child is in question the court may order in addition to, or instead of, periodical payments, the payment of a lump sum or sums, whether for specific purposes or generally, of such amount and at such time or times as may be so specified.

(2) Provide that where the proceedings to which subhead (1) refer are in the District Court the sum, or sums in aggregate, ordered shall not exceed £5,000.

(3) Payments of money pursuant to an order under this Head shall be made without deduction of income tax.

Note

As in the case of secured maintenance this head would extend the provision in the Judicial Separation Act enabling the court to grant lump sums following a decree of judicial separation to maintenance cases where there is no question of a separation decree being looked for. For example where a spouse in desertion receives a large redundancy payment or other windfall the court might deem it appropriate to substitute a lump sum payment for an existing periodical payments order in favour of the deserted spouse. Lump sum payments would be useful also to meet items of exceptional expenditure in the maintenance of a spouse or of dependent children.

Head 45: Attachment of earnings

(1) Provide for the insertion of the following subsection after subsection (1) of *section 10* of the *Family Law (Maintenance of Spouses and Children) Act, 1976*

“(1)(A) Where the court has made an antecedent order it may, at the same time or at any time thereafter on an application made under this section (which application may be made at the same time and in the same proceedings as the application for the relevant antecedent order or at any time thereafter), make an attachment of earnings order.”

(2) Provide for the substitution of the following subsection for subsection (3) of *section 10* of the above-mentioned 1976 Act

“(3) In deciding whether to make an order under this section the court shall give the maintenance debtor an opportunity to make representations and shall have regard to any representations made by the maintenance debtor”.

Note

One of the findings of the Combat Poverty Agency Report on the Financial Consequences of Marital Breakdown was that an attachment of earnings order doubled the chances of compliance with a maintenance order. Under existing legislation (section 10(3) of the 1976 Maintenance Act) an attachment of earnings order cannot be made without the consent of the maintenance debtor unless the court is satisfied that the maintenance debtor has, without reasonable excuse, defaulted in making the maintenance payments. This head proposes to delete that provision from the 1976 Act and thus enable the court to make an attachment of earnings order at the same time (or at any later time) that it makes a maintenance order. In considering the matter it will take into account representations the maintenance debtor may wish to make on the question.

Part VI

COURT JURISDICTION

Head 46: Courts, jurisdiction and venue

Provide that

(1) Subject to the other provisions of this head, the Circuit Court shall, concurrently with the High Court, have jurisdiction to hear and determine proceedings under this Act for a decree of divorce or nullity of marriage or a declaration of status under Part III of this Act.

(1)(A) Subject to the other provisions of this head the Circuit Court shall, concurrently with the High Court, have jurisdiction to hear and determine proceedings for a decree of nullity of marriage.

(2) Where in proceedings under this Act an order could be made in respect of land whose rateable valuation exceeds £200 and an application commencing those proceedings is made to the Circuit Court, that Court shall, if the respondent so requires before the hearing thereof, transfer those proceedings to the High Court, but any order made (including an interim order) or act done in the course of those proceedings before such transfer shall be valid unless discharged or varied by order of the High Court.

(3) The jurisdiction referred to in *subheads* (1) and (1)(A) of this head shall, in the Circuit Court, be exercised by the judge of the circuit where either party to the proceedings ordinarily resides or carries on any profession, business or occupation.

(4) The proceedings to which section 33 (conduct of family proceedings in the Circuit and High Courts), of the *Judicial Separation and Family Law Reform Act, 1989* apply shall be deemed to include proceedings under this Act.

Note

This head provides that the High and the Circuit Court shall have concurrent jurisdiction under this Act. These courts already have jurisdiction to grant decrees of judicial separation by virtue of section 31 of the 1989 Act. Giving jurisdiction to the Circuit Court to grant decrees of nullity represents a change in the law. At present only the High Court has jurisdiction to grant a decree of nullity of marriage.

The effect of subhead (4) is that High and Circuit Court proceedings under the Act will be as informal as is practicable and consistent with the administration of justice; neither judges nor barristers nor solicitors will wear wigs or gowns.

Head 47: Exercise of Jurisdiction

Provide that

(1) The court shall exercise jurisdiction in nullity proceedings if (and only if) either of the parties to the marriage—

(a) is domiciled in the State on the date of the application commencing proceedings, or

- (b) is ordinarily resident in the State throughout the period of one year ending on that date, or
- (c) died before that date and either—
 - (i) was at death domiciled in the State, or
 - (ii) had been ordinarily resident in the State throughout the period of one year ending with the date of death.

(2) The court shall, at any time when proceedings are pending in respect of which it is empowered to exercise jurisdiction by virtue of *subhead (1)* above, also be empowered to exercise jurisdiction in other proceedings, in respect of the same marriage, for divorce, judicial separation, or nullity of marriage, notwithstanding that the jurisdiction would not be exercisable under subheads (1) or (2) or *section 31(4)* of the *Judicial Separation and Family Law Reform Act, 1989*.

Note

The jurisdiction to grant a judicial separation (section 31(4) of the 1989 Act) is the same as that proposed in the head for nullity. The equivalent provisions in the U.K. are similar except that habitual residence is used rather than ordinary residence. Whether we use ordinary residence or habitual residence as a ground it would seem necessary to have the same jurisdictional grounds for nullity and judicial separation.

The Law Reform Commission (in their Report LRC 20 — 1985) recommended a more elaborate set of jurisdictional rules for nullity cases. However, it is considered that in the changed situation which would be brought about by the introduction of uniform rules in the case of nullity and judicial separation, these recommendations would no longer be entirely relevant.

The purpose of *subhead (2)* is to cater for the case where the jurisdiction may be present on the date of the application for a decree (e.g. ordinary residence) but may no longer exist at the time of a cross-application for another decree (e.g. the applicant may have moved residence, say, to Northern Ireland).

Head 48: Privacy

Provide that

Proceedings under this Act shall be heard otherwise than in public.

Note

This head is similar to section 34 of the 1989 Act.

Head 49: Costs

Provide that

The costs of any proceedings under this Act shall be at the discretion of the court.

Note

This head is similar to section 35 of the 1989 Act.

Head 50: Rules of court

Provide that

Rules of court shall provide for the documentation required for the commencement of proceedings under this Act in a summary manner.

Note

This head is similar to section 36(1) of the 1989 Act.

Houses of the Oireachtas

Part VII

MISCELLANEOUS

Head 51: Discharge of orders under Family Law (Maintenance of Spouses and Children) Act, 1976

Provide that

(1) Where, after the making of an order under *section 5, 6 or 7 of the Family Law (Maintenance of Spouses and Children) Act, 1976*, application is made for a decree of nullity of marriage or judicial separation between the parties to the proceedings in which that order was made, the court in which the application, or any application made under Part II or Part IV of this Act, is pending may, if it thinks fit, direct that the order made shall cease to have effect on such date as may be specified in the direction.

(2) *Section 39 of the Judicial Separation and Family Law Reform Act, 1989* is hereby repealed.

Note

Subhead (1) is similar to section 39 of the 1989 Act which in subhead (2) is being repealed and replaced with modifications (to cater for the new actions being introduced) by this head.

Head 52: Custody of dependent children

Provide that

(1) Where the court grants a decree of nullity of marriage it may declare either party to the marriage to be unfit to have custody of any dependent child of the family.

(2) Where a decree of nullity contains such a declaration, then, if the party to the marriage to whom the declaration relates is a parent of any child of the family, that party shall not, on the death of the other party, be entitled as of right to the custody of that child.

Note

This head is similar to section 41 of the 1989 Act.



Appendix 2

Scheme of the Family Law (No. 2) Bill

Appendix 2

Scheme of the Family Law (No. 2) Bill

SCHEME OF FAMILY LAW (NO. 2) BILL

Arrangement of Heads

Part I

PRELIMINARY AND GENERAL

Head

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2. Interpretation

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5. Safeguards to ensure applicant's awareness of alternatives to divorce proceedings and to assist attempts at reconciliation.
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11. Making of applications for preliminary orders.
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13. Periodical payments and lump sum orders.
14. Property adjustment orders.
15. Miscellaneous ancillary orders.
16. Application for financial assistance from estate of party to the marriage.
17. Orders for sale of property.
18. Duration of continuing financial provision orders in favour of party to marriage, and effect of remarriage.
19. Provisions relating to maintenance, property and other orders.
20. Retrospective maintenance orders.
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22. Child maintenance.
23. Transmission of periodical payments through District Court clerk.
24. Amendment of *section 3 of Family Law (Maintenance of Spouses and Children) Act, 1976*.
25. Payments to be made without deduction of income tax.
26. Application of maintenance and periodical payments orders to members of Defence Forces.
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30. Exercise of jurisdiction in proceedings for divorce.
31. Privacy.
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33. Rules of court.

Part V

MISCELLANEOUS

34. Discharge of orders under *Family Law (Maintenance of Spouses and Children) Act, 1976*.
35. Custody of dependent children following decrees of divorce.
36. Collusion, condonation, recrimination, connivance in applications for divorce.

Part I

PRELIMINARY AND GENERAL

Head 1: Short title and commencement

Provide that

(1) This Act may be cited as the Family Law (No. 2) Act, 199[].

(2) This Act shall come into operation on the day that is 6 months after the date of the passing of this Act.

Note

This head sets out the short title of the Act and its date of commencement.

Head 2: Interpretation

Provide that

In this Act, except where the context otherwise requires, “the court” means the court having jurisdiction under *Part IV* of this Act.

Note

By virtue of Head 29 the Circuit Court and High Court shall have concurrent jurisdiction, as is the case with proceedings under the *Judicial Separation and Family Law Reform Act, 1989*.

Part II

THE OBTAINING OF A DECREE OF DIVORCE

Head 3: Application for a decree of divorce (Option A)

[Option A: If grounds for divorce were to be specified in full]

Provide that

(1) An application by a spouse for a decree of divorce from the other spouse may be made to the court having jurisdiction to hear and determine proceedings under *Part IV* of this Act on the ground that the marriage has broken down irretrievably.

(2) The court hearing an application for divorce shall not hold the marriage to have broken down irretrievably unless the applicant satisfies the court of one or more of the following facts, that is to say—

- (a) that the respondent has committed adultery; or
- (b) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent; or
- (c) subject to *subhead (3)* of this head, that there has been desertion by the respondent of the applicant for a continuous period of at least 3 years immediately preceding the date of the application; or
- (d) subject to *subhead (3)* of this head, that the spouses have lived apart from one another for a continuous period of at least 3 years immediately preceding the date of the application and the respondent consents to a decree being granted; or
- (e) subject to *subhead (3)* of this head, that the spouses have lived apart from one another for a continuous period of at least 5 years immediately preceding the date of the application; or
- (f) that the marriage has broken down to the extent that the court is satisfied in all the circumstances that a normal marital relationship has not existed between the spouses for a period of at least [3][5] years immediately preceding the date of the application, and,

in addition, that there is no reasonable possibility of reconciliation between the spouses.

(3) In considering for the purposes of *subhead (1)* of this head, whether—

- (a) in the case of *paragraph (c)* of that subhead, the period for which the respondent has deserted the applicant, or
- (b) in the case of *paragraph (d)* or *(e)* of that subhead, the period for which the spouses have lived apart,

has been continuous, no account shall be taken of any one period (not exceeding 6 months) or of any two or more periods (not exceeding 6 months in all) during which the spouses resumed living with each other, but no such period or periods during which the spouses lived with each other shall count as part of the period of desertion or the period for which the spouses have lived apart, as the case may be:

Provided that this subhead shall only apply where the spouses are not living with each other at the time the application is made.

- (4) (a) In this head spouses shall be treated as living apart from each other unless they are living with each other in the same household, and references to spouses living with each other shall be construed as references to their living with each other in the same household.
- (b) In this head “desertion” includes conduct on the part of one spouse that results in the other spouse, with just cause, leaving and living apart from that other spouse.

Note

The grounds for a decree of divorce will depend on the terms of any Constitutional amendment. See Chapter 11 of the White Paper for drafts of possible Constitutional amendments. Following this head and head 4 are alternatives which reflect the provisions which might be included in a Bill on divorce depending on the type of amendment put to, and accepted by, the people.

It may need to be considered further whether it makes sense to have different time-scales in subhead 2(c) and (f). In particular it would seem that separation for 3 years would amount to the absence of a normal marital relationship for 3 years.

Head 4: Grant of decree of divorce, custody, etc. of children (Option A)

Provide that

(1) Where, on an application under *head 3* of this Act, the court is satisfied that the marriage has irretrievably broken down in so far as any of the facts referred to in *subhead (2)(a)-(f)* of that head which have been relied on by the applicant have been proved on the balance of probabilities and that there is no reasonable possibility of reconciliation between the spouses, the court shall, subject to *subheads (2), (3) and (5)* of this head and *heads 5 and 6* of this Act, grant a decree of divorce in respect of the spouses concerned.

(2) The respondent to an application for divorce in which the petitioner alleges 5 years' separation or [3][5] years' absence of a normal marital relationship may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage.

(3) Where the grant of a decree is opposed by virtue of this head, then—

- (a) if the court finds that the petitioner is entitled to rely, in support of his application, on the fact of 5 years separation or [3][5] years absence of a normal marital relationship and makes no such finding as to any other fact mentioned in *head 3(1)* above, and
- (b) if apart from this head the court would grant a decree on the application,

the court shall consider all the circumstances and if of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall refuse the application.

(4) For the purposes of this head hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved.

(5) (a) Where there are, in respect of the spouses concerned, any dependent children of the family, the court shall not grant a decree of divorce unless the court—

(i) is satisfied that such provision has been made, or

(ii) intends by order upon the granting of the decree to make such provision, for the welfare of those children as is proper in the circumstances.

(b) In this subhead—

“dependent children of the family” has the same meaning as it has for the purposes of Part III of this Act;

“welfare” comprises the religious and moral, intellectual, physical and social welfare of the children concerned.

(6) Upon the granting of a decree of divorce by the court, the court may, where appropriate, by order give such directions under section 11 of the *Guardianship of Infants Act, 1964*, as it thinks proper regarding the welfare or custody of, or right of access to, an infant (being an infant within the meaning of that Act) as if an application has been made under that section.

(7) No application for divorce shall be made to the court before the expiration of the period of 5 years from the date of the marriage (hereafter in this subhead referred to as “the specified period”): provided, however, that nothing in this subhead shall be deemed to prohibit the making of an application based upon matters which occurred before the expiration of the specified period.

Note

This head in part follows a similar provision in the 1989 (Judicial Separation) Act.

Subheads (2)-(4) are designed to cater for the case of a dependent spouse who could suffer grave hardship through the loss of her spouse's occupational pension or, indeed, succession rights. There is a similar provision in English legislation and, while used rarely, has offered protection to elderly spouses whose husbands might seek to divorce them. There is a full discussion of the question of occupational pensions and succession in the context of divorce in sections 13.3 to 13.12 of the White Paper.

Subhead (7) provides protection against newly marrieds rushing into a premature divorce. It is for consideration whether the court should be allowed make an exception for exceptional circumstances. On the face of it there would not appear to be any need to do so.

Subheads (5) and (6) repeat provisions in section 3(2) and (3) of the 1989 Act.

Head 3: Application for a decree of divorce (Option B)

[Option B: Heads 3 and 4 if ground for divorce were to be absence of normal marital relationship for 5 years]

Provide that

An application by a spouse for a decree of divorce from the other spouse may be made to the court having jurisdiction to hear and determine proceedings under Part IV on the ground that a

normal marital relationship has not existed between the spouses for a period of at least five years immediately preceding the date of the application and there is no reasonable possibility of such a relationship being resumed.

Note

See discussion on this approach in section 11.8 of the White Paper. Proof of absence of a normal marital relationship would normally include fault based grounds. However the wording of the decree itself would not apportion blame.

Head 4: Grant of decree of divorce, custody etc. of children (Option B)

Provide that

(1) Where on an application under *head 3* of this Act the court is satisfied that it has been proved on the balance of probabilities that a normal marital relationship has not existed between the spouses for a period of 5 years and that there is no reasonable possibility of such a relationship being resumed the court shall, subject to *subheads (2), (3) and (4)*, and *heads 5 and 6* of the Act, grant a decree of divorce in respect of the spouses concerned.

(2) The respondent to an application for divorce under *head 3* may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage.

(3) Where the grant of a decree is opposed by virtue of the previous subhead, then the court shall consider all the circumstances and if of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall refuse the application.

(4) For the purposes of this head hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved.

(5) (a) Where there are, in respect of the spouses concerned, any dependent children of the family, the court shall not grant a decree of divorce unless the court—

(i) is satisfied that such provision has been made, or

(ii) intends by order upon the granting of the decree to make such provision,
for the welfare of those children as is proper in the circumstances.

(b) In this subhead—

“dependent children of the family” has the same meaning as it has for the purposes of Part III of this Act;

“welfare” comprises the religious and moral, intellectual, physical and social welfare of the children concerned.

(6) Upon the granting of a decree of divorce by the court, the court may, where appropriate,

by order give such directions under section 11 of the Guardianship of Infants Act, 1964, as it thinks proper regarding the welfare or custody of, or right of access to, an infant (being an infant within the meaning of that Act) as if an application has been made under that section.

Note

See discussion on same provision in Option A.

Head 3: Application for a decree of divorce (Option C)

[Option C: Heads 3 and 4 if ground for divorce were to be separation for a period of 5 years]

Provide that

(1) Subject to *subhead (2)* an application by a spouse for a decree of divorce from the other spouse may be made to the court having jurisdiction to hear and determine proceedings under Part IV on the ground, that the spouses have lived apart from one another for a continuous period of at least 5 years immediately preceding the date of the application and there is no reasonable possibility of cohabitation being resumed.

(2) In considering for the purposes of *subhead (1)* whether the period for which the spouses have lived apart has been continuous, no account shall be taken of any one period (not exceeding six months) or of any two periods (not exceeding six months in all) during which the spouses resumed living with each other, but no such period or periods during which the spouses lived with each other shall count as part of the period for which the spouses have lived apart. Provided that this subhead shall only apply where the spouses are not living with each other at the time the application is made.

(3) In this head spouses shall be treated as living apart from each other unless they are living with each other in the same household, and references to spouses living with each other shall be construed as references to their living with each other in the same household.

Notes

See discussion on this approach in section 11.9 of the White Paper. *Subheads (2) and (3)* are taken from the Judicial Separation Act.

Head 4: Grant of decree of divorce, custody etc. of children (Option C)

Provide that

(1) Where on an application under *head 3* of this Act the court is satisfied that it has been proved on the balance of probabilities that the spouses have lived apart from one another for a continuous period of five years — as defined in *head 3* — and there is no reasonable possibility

of cohabitation being resumed the court shall, subject to *subheads* (2), (3) and (4) and *heads* 5 and 6, grant a decree of divorce in respect of the spouses concerned.

(2) The respondent to an application for divorce under head 3 may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage.

(3) Where the grant of a decree is opposed by virtue of the previous subhead then the court shall consider all the circumstances and if of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall refuse the application.

(4) For the purposes of this head hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved.

(5) (a) Where there are, in respect of the spouses concerned, any dependent children of the family, the court shall not grant a decree of divorce unless the court—

(i) is satisfied that such provision has been made, or

(ii) intends by order upon the granting of the decree to make such provision, for the welfare of those children as is proper in the circumstances.

(b) In this subhead—

“dependent children of the family” has the same meaning as it has for the purposes of Part III of this Act;

“welfare” comprises the religious and moral, intellectual, physical and social welfare of the children concerned.

(6) Upon the granting of a decree of divorce by the court, the court may, where appropriate, by order give such directions under *section 11* of the *Guardianship of Infants Act, 1964*, as it thinks proper regarding the welfare or custody of, or right of access to, an infant (being an infant within the meaning of that Act) as if an application has been made under that section.

Note

See discussion on the same provision in Option A.

Head 3: Application for a decree of divorce (Option D)

[Option D: Head 3 if ground for divorce were to be a judicial separation (or the existence of the grounds for a judicial separation) plus 2 years]

Provide that

(1) An application by a spouse for a decree of divorce from the other spouse may be made to

the court having jurisdiction to hear and determine proceedings under *Part IV* on the ground that the marriage has broken down irretrievably.

(2) The court hearing an application for divorce shall hold the marriage to have broken down irretrievably and shall, subject to *subheads* (2), (3) and (4) and *Heads* 5 and 6, grant a decree of divorce in respect of the spouse concerned if, but only if,

- (a) (i) (a) a decree of judicial separation in respect of the marriage has been granted by a court in the State at least two years before the date of the application,
 - (b) such a decree has not been rescinded, and
 - (c) the parties have not resumed cohabitation, or
- (ii) the court is satisfied that a decree of judicial separation would have been granted, if applied for, by a court in the State
 - (a) at least two years before the date of the application for a decree of divorce, and
 - (b) at the date of the application for the decree of divorce, the court is satisfied that there is no reasonable possibility of reconciliation between the spouses.

(3) The respondent to an application for divorce in which the petitioner alleges or in effect alleges 5 years separation or [3][5] years' absence of a normal marital relationship may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage.

(4) Where the grant of a decree is opposed by virtue of the previous subhead, then the court shall consider all the circumstances and if of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall refuse the application.

(5) For the purposes of this head, hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved.

- (6) (a) Where there are, in respect of the spouses concerned, any dependent children of the family, the court shall not grant a decree of divorce unless the court—
 - (i) is satisfied that such provision has been made, or
 - (ii) intends by order upon the granting of the decree to make such provision, for the welfare of those children as is proper in the circumstances.

(b) In this subhead—

“dependent children of the family” has the same meaning as it has for the purposes of Part III of this Act;

“welfare” comprises the religious and moral, intellectual, physical and social welfare of the children concerned.

(7) Upon the granting of a decree of divorce by the court, the court may, where appropriate, by order give such directions under *section 11* of the *Guardianship of Infants Act, 1964*, as it thinks proper regarding the welfare or custody of, or right of access to, an infant (being an infant within the meaning of that Act) as if an application has been made under that section.

(8) No application for divorce shall be made to the court before the expiration of the period of 5 years from the date of the marriage (hereafter in this subhead referred to as 'the specified period'): provided however, that nothing in this subhead shall be deemed to prohibit the making of an application based upon matters which occurred before the expiration of the specified period.

Note

See discussion on this approach in section 11.10 of White Paper. *Subheads (3) to (8)* repeat provisions in Option A.

[Head 4A: Divorce not precluded by previous judicial separation]

Provide that

(1) A person shall not be prevented from applying for divorce, or the court from granting a decree of divorce, by reason only that the applicant or respondent has at any time, on the same facts or substantially the same facts as those proved in support of the application, been granted a decree of divorce *a mensa et thoro* or of judicial separation.

(2) On an application for divorce in such a case as is mentioned in subhead (1) above, the court may treat the decree as sufficient proof of any adultery, desertion or other fact by reference to which it was granted but shall not grant a decree of divorce without receiving evidence from the applicant.

(3) Where an application for divorce in such a case follows a decree of judicial separation, for the purposes of that application a period of desertion immediately preceding the institution of the proceedings for the decree shall, if the parties have not resumed cohabitation and the decree has been continuously in force since it was granted, be deemed immediately to precede the presentation of the application.]

Note

This head would be required if Option A (i.e. if grounds for divorce similar to those for judicial separation were to be specified in full) were accepted.

[Head 4B: Supplemental provisions as to proof of adultery and unreasonable behaviour]

Provide that

(1) Where the spouses have lived with each other for more than 1 year after it became known to the applicant that the respondent had committed adultery the applicant shall not be entitled to rely on that adultery for the purposes of head 3(2)(a) [or head 3(2)(a)(ii) in so far as the ground alleged supporting the application is adultery] although that adultery may be one of the factors that the applicant may rely on for the purposes of head 3(2)(b) [or head 3(2)(a)(ii) in so far as

the ground alleged supporting the application is the unreasonable behaviour of the respondent] together with other matters.

(2) Where the applicant alleges that the respondent has behaved in such a way that the applicant cannot reasonably be expected to cohabit with him but the spouses have cohabited for a period or periods after the date of the occurrence of the final incident relied on by the applicant and held by the court to support his allegation, such cohabitation shall be disregarded in determining for the purpose of *head 3(2)(b)* [or *head 3(2)(a)(ii)* in so far as the ground alleged supporting the application is the unreasonable behaviour of the respondent] of this Act whether the applicant cannot be reasonably expected to live with the respondent if the length of the period or of those periods of cohabitation together was or were 6 months or less.]

Note

This head would be required if Option A or D [parts in brackets are for Option D] were accepted.

Head 5: Safeguards to ensure applicant's awareness of alternatives to divorce proceedings and to assist attempts at reconciliation

Provide that

(1) A solicitor, if any, acting for an applicant for a decree of divorce shall, prior to the making of an application for a decree of divorce—

- (a) discuss with the applicant the possibility of reconciliation and give to him the names and addresses of persons and organisations qualified to help effect a reconciliation between spouses who have become estranged, and
- (b) discuss with the applicant the possibility of engaging in mediation to help effect a separation or dissolution on an agreed basis with an estranged spouse and give to him the names and addresses of persons and organisations qualified to provide a mediation service, and
- (c) discuss with the applicant the possibility of effecting a separation by the negotiation and conclusion of a separation deed or written separation agreement, and
- (d) discuss with the applicant the possibility of proceedings for a decree of judicial separation.

(2) An application for a decree of divorce shall be accompanied by a certificate by the solicitor, if any, acting on behalf of the applicant that he has complied with the provisions of *subhead (1)* of this head and, where a solicitor does not so certify, the court may adjourn the proceedings for such period as it deems reasonable for the applicant's solicitor to discuss with the applicant the matters referred to in that subhead.

(3) Provision shall be made by rules of court for the certification required for the purposes of *subhead (2)* of this head.

Note

This head is similar to section 5 of the Judicial Separation Act with modifications in *subhead (1)(b)* — reference to dissolution — and *(1)(d)* which is new. *Subhead 1(d)* would not be applicable if a prerequisite

for the granting of a decree of divorce was the existence of a decree of judicial separation. It would be for consideration if heads 5 and 6 should be retained at all if a judicial separation decree were to be a prerequisite for divorce.

Head 6: Safeguards to ensure respondent's awareness of alternatives to divorce proceedings and to assist attempts at reconciliation

Provide that

(1) A solicitor, if any, acting for a respondent in an application for a decree of divorce shall, as soon as possible after receiving instructions from the respondent—

- (a) discuss with the respondent the possibility of reconciliation and give to him the names and addresses of persons and organisations qualified to help effect a reconciliation between spouses who have become estranged, and
- (b) discuss with the respondent the possibility of engaging in mediation to help effect a separation or dissolution on an agreed basis with an estranged spouse and give to him the names and addresses of persons and organisations qualified to provide a mediation service, and
- (c) discuss with the respondent the possibility of effecting a separation by the negotiation and conclusion of a separation deed or written separation agreement, and
- (d) discuss with the respondent the possibility of proceedings for a decree of judicial separation.

(2) An Entry of Appearance or a Notice of Intention to Defend an application for divorce shall be accompanied by a certificate by the solicitor, if any, acting on behalf of the respondent, that he has complied with the provisions of *subhead (1)* of this head and, where a solicitor does not so certify, the court may adjourn the proceedings for such period as it deems reasonable for the respondent's solicitor to discuss with the respondent the matters referred to in that subhead.

(3) Provision shall be made by rules of court for the certification required for the purposes of this head.

Note

This head is similar to section 6 of the Judicial Separation Act with the same modifications as in head 5.

Head 7: Adjournment of proceedings to assist reconciliation or agreements on the terms of the divorce

Provide that

(1) Where an application is made under this Act to the court for a decree of divorce, the court shall give consideration to the possibility of a reconciliation of the spouses concerned and,

accordingly, may adjourn the proceedings at any time for the purpose of affording the spouses an opportunity, if they both so wish, to consider a reconciliation between themselves with or without the assistance of a third party.

(2) If during any adjournment of proceedings to which *subhead (1)* of this head relates the spouses resume living with each other, no account shall be taken of that fact for the purposes of those proceedings.

(3) Where on an application made under this Act for a decree of divorce it appears to the court that no reconciliation of the spouses concerned is possible, it may adjourn or further adjourn the proceedings for the purpose of affording the spouses an opportunity, if they both so wish, to establish agreement (with or without the assistance of a third party) on the terms, so far as is possible, of the divorce.

(4) If an adjournment has taken place by virtue of *subhead (1)* or *(3)* of this head, either or both of the spouses may request that the hearing of the application be proceeded with and, without prejudice to *subhead (5)* of this head, the court shall resume hearing the application as soon as is practicable.

(5) The power of adjournment exercisable under *subheads (1)* and *(3)* of this head is in addition to and not in substitution for any other power of adjournment exercisable by the court.

(6) Where the court adjourns proceedings under *subhead (1)* or *(3)* of this head, it may at its discretion advise the spouses concerned to seek the assistance of a third party for the purpose set out in the appropriate subhead.

(7) Any oral or written communication between either spouse and any third party to whom *subhead (1)*, *(3)* or *(6)* of this head relates (whether or not made in the presence of the other spouse) and any record of such communication caused to be made by such third party, shall not be admissible as evidence in any court.

Note

This head is similar to section 8 of the Judicial Separation Act.

Head 8: Effect of divorce

Provide that

Where the court grants a decree of divorce the marriage, the subject of the decree, is thereby dissolved and a party to the marriage may marry again.

Note

This head is self-explanatory.

Part III

ANCILLARY FINANCIAL, PROPERTY, CUSTODY AND OTHER ORDERS

Head 9: Definitions (Part III)

Provide that—

In this Part, save where the context otherwise requires—

“conveyance” includes a mortgage, lease, assent, transfer, disclaimer, release and any other disposition of property otherwise than by a will or a *donatio mortis causa* and also includes an enforceable agreement (whether conditional or unconditional) to make any such conveyance;

“dependent child of the family” in relation to a party or the parties to a marriage means any child—

- (a) of both parties or adopted by both parties under the Adoption Acts, 1952 to 1991 or in relation to whom both parties are in *loco parentis*, or
- (b) of either party or adopted by either party under the Adoption Acts, 1952 to 1991 or in relation to whom either party is in *loco parentis* where the other party being aware that he is not the parent of the child has treated the child as a member of the family,

who is under the age of 16 years or if he has attained that age—

- (i) is or will be or if an order were made under this Act providing for periodical payments for his support or for the provision of a lump sum would be receiving full-time education or instruction at any university, college, school or other educational establishment and is under the age of 21 years, or
- (ii) is suffering from mental or physical disability to such extent that it is not reasonably possible for him to maintain himself fully;

“dwelling” means—

- (a) any building, or
- (b) any structure, vehicle or vessel (whether mobile or not),

or part thereof, occupied as a separate dwelling and includes any garden or portion of ground attached to and usually occupied with the dwelling or otherwise required for the amenity and convenience of the dwelling;

“family home” means, primarily, a dwelling in which the parties to a marriage ordinarily reside and comprises, in addition, a dwelling in which a party to the marriage whose protection is in issue ordinarily resides or, if that party has left the other party, ordinarily resided before so leaving.

“household chattels” means furniture, bedding, linen, china, earthenware, glass, books and other chattels of ordinary household use or ornament and also consumable stores, garden effects and domestic animals but does not include any chattels used by either party to the marriage for business or professional purposes or money or security for money.

Note

Part III provides for ancillary financial, property, custody and other orders where a decree of divorce is granted. Head 9 is similar to section 10 in the Judicial Separation Act.

Head 10: Preliminary orders in divorce proceedings

Provide that

After an application for a decree of divorce has been issued, the court, before deciding whether to grant or refuse to grant such decree, may if it appears to the court proper to do so make any one or more of the following orders—

- (a) a barring or protection order pursuant to *section 2 or section 3 of the Family Law (Protection of Spouses and Children) Act, 1981*;
- (b) a custody or access order or other order on any question affecting the welfare of an infant pursuant to *section 11 of the Guardianship of Infants Act, 1964*;
- (c) an order for the protection of the family home or of any moneys realised from the conveyance of any interest in the family home pursuant to *section 5 of the Family Home Protection Act, 1976*;
- (d) an order for the protection of household chattels or any moneys realised from the sale thereof pursuant to *section 9 of the Family Home Protection Act, 1976*.

Note

This head is similar to section 11 in the Judicial Separation Act.

Head 11: Making of applications for preliminary orders

Provide that

A court may make orders under *head 10* if sought by the applicant or the respondent without separate proceedings having to be instituted under the Acts referred to in the said section as preliminary orders in proceedings for divorce, brought under this Act.

Note

This head is similar to section 12 of the Judicial Separation Act.

Head 12: Maintenance pending suit, etc.

Provide that

Where application is made for a decree of divorce, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her support and for the support of such (if any) dependent children of the family, for such period beginning not earlier than the date of the application and ending not later than the date of the determination of that application, as the court considers proper.

Note

This head is similar to section 13 of the 1989 Act.

Head 13: Periodical payments and lump sum orders

Provide that

(1) In granting a decree of divorce, or at any time thereafter the court may, on application to it by either party to the marriage, make any one or more of the following orders—

(a) a periodical payments order, that is to say—

- (i) an order that either party to the marriage shall make to the other party such periodical payments of such amount and at such times as may be specified in the order; or
- (ii) an order that either party to the marriage shall make to such person as may be specified in the order for the benefit of a dependent child of the family such periodical payments of such amount and at such time as may be so specified;

(b) a secured periodical payments order, that is to say—

- (i) an order that either party to the marriage shall secure to the other party to the satisfaction of the court, such periodical payments as may be so specified; or
 - (ii) an order that a party to the marriage shall secure to such person as may be so specified for the benefit of such dependent child of the family such periodical payments to the satisfaction of the court as may be so specified;
- (c) an order that either party to the marriage shall pay to the other party such lump sum or sums of such amount and at such time or times as may be so specified;
- (d) an order that a party to the marriage shall pay to such person as may be specified for the benefit of a dependent child of the family such lump sum or sums of such amount and at such time or times as may be so specified.

(2) Without prejudice to the generality of *subhead (1)(c) or (d)* of this head—

- (a) an order under this head that a party to the marriage shall pay a lump sum to the other party may be made for the purpose of enabling that other party to meet any liabilities

- or expenses reasonably incurred by him or her, before making an application for an order under this head in his or her favour, in maintaining himself or herself or any dependent child of the family;
- (b) an order under this head for the payment of a lump sum for the benefit of a dependent child of the family may be made for the purpose of enabling any liabilities or expenses reasonably incurred by or for the benefit of that child before the making of an application for an order under this head in his favour to be met; and
 - (c) an order under this head for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court.

Note

This head is similar to section 14 of the 1989 Act.

Head 14: Property adjustment orders

Provide that

(1) On granting a decree of divorce, or at any time thereafter, the court may, on application to it by either party to the marriage, make a property adjustment order, that is to say, any one or more of the following orders—

- (a) an order that a party to the marriage shall transfer to the other party, to any dependent child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;
- (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party and of any dependent child of the family or any or all of those persons;
- (c) an order varying for the benefit of the parties to the marriage and of any dependent child of the family or any or all of those persons any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;
- (d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement.

(2) An order under *paragraphs (b) to (d)* of this head may include a provision reserving power to the court to exercise power under *head 21* to vary the order (whether generally or in such respect as may be specified in the order).

Note

This head is similar to section 15 of the 1989 Act except that the provision in the 1989 Act prohibiting the court from considering and determining whether an order should be made by it more than once is

being omitted. If an application for divorce follows a decree of judicial separation it would seem right that the court should be allowed look at the question of making a property adjustment order, or a further such order; also there seems no good reason why on an application for a variation of a maintenance or secured maintenance order under head 21 that the court should be prohibited from making a property adjustment order instead.

Head 15: Miscellaneous ancillary orders

Provide that

(1) On granting a decree of divorce, or at any time thereafter, the court may, where appropriate, on application to it by either party to the marriage, make any one or more of the following orders:

- (a) an order conferring on one party to the marriage either for life or for such other period (definite or contingent) as the court may specify the right to occupy the family home to the exclusion of the other party;
- (b) an order for the sale of the family home subject to such conditions as the court considers proper;
- (c) an order under *section 12 of the Married Women's Status Act, 1957*, determining any dispute between the parties to the marriage as to the title to or possession of any property;
- (d) an order under *section 4, 5 or 9 of the Family Home Protection Act, 1976*
- (e) an order under *section 2 or 3 of the Family Law (Protection of Spouses and Children) Act, 1981*
- (f) an order for the partition of property or under the Partition Acts 1868 and 1876;
- (g) an order under *section 11 of the Guardianship of Infants Act, 1964* concerning any dependent child of the family;

(2) The court in exercising its jurisdiction under *subhead (1)(a) and (b)* of this head shall have regard to the welfare of the family as a whole and in particular shall take into consideration—

- (a) that proper and secure accommodation should, where practicable, be provided for a dependent party to the marriage and any dependent child of the family;
- (b) the matters referred to in *head 19* of this Act.

Note

This head is similar to section 16 of the 1989 Act and in addition incorporates, in subhead (2), the provisions of section 19 of the 1989 Act. Since a number of the orders mentioned in subhead (1)(a) — (g) may not always be appropriate the lead in to the head states that the court may make any one or more of the orders “where appropriate”.

Head 16: Application for financial provision from estate of party to the marriage

Provide that

(1) Subject to the provisions of this head where a decree of divorce or nullity is in force and a party to the marriage, the subject of the decree, dies the court may, on application to it by the other party (hereinafter referred to as the applicant), provided that party has not remarried, make an order for provision to be made for that party out of the deceased party's estate.

(2) The court may make an order under this head if it is satisfied, having regard to the provisions of *head 19*, that adequate and reasonable provision for the applicant was not for any reason, apart from the matter mentioned in *paragraph (i) of subhead (2)* or in *subhead (3) of head 19*, made up to the time of death of the deceased party and the case is one where provision of a permanent nature requires to be made for the future security of the applicant.

(3) The court in considering whether to make an order under this head shall have regard to all the circumstances of the case and, in particular to

- (a) an order or orders it has made under *subhead (1)(c) of head 13* or under *paragraph (a), (b), (c) or (d) of head 14* in favour of the applicant and
- (b) where relevant, the matters referred to in *subhead (2) of head 19* in so far as they relate to the applicant, and
- (c) where the deceased party died testate, any devise or bequest to the applicant.

(4) If the court decides to make an order under this head the provision made by such order shall, together with the provision made by any order or orders as are mentioned in *subhead (3)(a) of this head* (the value of which shall be reckoned as at the date of the making of the provision), not exceed

- (a) in the case where the deceased party died testate, the share, if any, as a legal right the applicant would otherwise have been entitled to under the *Succession Act, 1965* if the marriage had not been dissolved, and
- (b) in the case where the deceased party died intestate, the share, if any, under the intestacy which the applicant would otherwise have been entitled to under the said *Act of 1965* if the marriage had not been dissolved.

(5) An order under this head shall not be made except on an application made within 12 months from the first taking out of representation of the deceased's estate.

(6) If the court is satisfied that a disposition, within the meaning of subsection (1) of *section 121 of the Succession Act, 1965*, was made for the purpose of defeating or substantially diminishing the provision which the court might otherwise make under this head in favour of the applicant, the provisions of the said *section 121* shall apply as appropriate to enable the court to make such provision as it considers proper for the applicant under this section.

Note

In the case of divorce succession rights must end automatically unless one were to withdraw succession rights from a second or subsequent spouse. There appears to be only two ways out of this dilemma. Firstly one could merely provide — see *head 19(2)(k)* following which will be applicable also to cater for loss of occupational pension rights — that the loss of succession rights would be one of the matters to be taken

into account when the court was making financial provision for the dependent spouse. Secondly one could provide, as this head does, that where the court has not for any reason succeeded in making adequate provision for a dependent spouse, that spouse should be enabled to apply for such provision out of the other spouse's estate. Under the head such application could only be made where the applicant has not remarried (thus acquiring new succession rights). This proposal is not, however, free from difficulty. *Ipsa facto* it means that where the court does make provision out of the estate of the deceased then there will be less to be distributed to the children of the first marriage and of any subsequent marriage and, of course, to any second or subsequent spouse. There is also the possibility of applications in respect of the one estate from more than one ex-spouse.

The only other option open to the courts would be to refuse to grant a divorce decree under *Head 4(2)* "on the ground that the dissolution of the marriage would result in grave financial or other hardship" to the respondent — the hardship in the case being the loss of succession rights. It would, however, be a very rare case where the provision in this head and *head 19(2)(k)* together failed to provide adequate protection in so far as relates to the issue of succession.

Head 17: Orders for sale of property

Provide that

(1) Where the court makes a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order, then, on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in that order, being property in which or in the proceeds of sale of which either or both parties to the marriage has or have a beneficial interest, either in possession or reversion.

(2) The power to make an order for sale in the case of a property adjustment order shall not be exercised so as to interfere with a right to occupy the family home conferred by that order.

(3) An order under *subhead (1)* of this head may contain such consequential or supplementary provisions as the court thinks fit and, without prejudice to the generality of the foregoing provision, may include—

- (a) provision requiring the making of a payment out of the proceeds of sale of the property to which the order relates, and
- (b) provision requiring any such property to be offered for sale to a person, or class of persons, specified in the order.

(4) Where an order is made under *subhead (1)* of this head, the court may direct that the order, or such provision thereof as the court may specify, shall not take effect until the occurrence of an event specified by the court or the expiration of a period so specified.

(5) Where an order under *subhead (1)* of this head contains a provision requiring the proceeds of sale of the property to which the order relates to be used to secure periodical payments to a party to the marriage, the order shall cease to have effect on the death or re-marriage of that party.

(6) Where a party to the marriage has a beneficial interest in any property, or in the proceeds of sale thereof, and some other person who is not one of the parties to the marriage also has a beneficial interest in that property or in the proceeds of sale thereof, then, before deciding whether to make an order under this head in relation to that property, it shall be the duty of the

court to give that other person an opportunity to make representations with respect to the order; and any representations made by that other person shall be included among the circumstances to which the court is required to have regard under *head 19*.

Note

This head is similar to section 18 of the 1989 Act.

Head 18: Duration of continuing financial provision orders in favour of party to marriage, and effect of remarriage

Provide that

(1) The term to be specified in a periodical payments or secured periodical payments order in favour of a party to a marriage shall be such term as the court thinks fit, except that the term shall not begin before or extend beyond the following limits, that is to say—

- (a) in the case of a periodical payments order, the term shall begin not earlier than the date of the issuing of an application for the order, and shall be so defined as not to extend beyond the death of either of the parties to the marriage or, where the order is made on or after the grant of a decree of divorce or nullity of marriage, the remarriage of the party in whose favour the order is made; and
- (b) in the case of a secured periodical payments order, the term shall begin not earlier than the date of the issuing of an application for the order, and shall be so defined as not to extend beyond the death or, where the order is made on or after the grant of such a decree, the remarriage of the party in whose favour the order is made.

(2) Where a periodical payments or secured periodical payments order in favour of a party to a marriage is made on or after the grant of a decree of divorce or nullity of marriage, the court may direct that that party shall not be entitled to apply under *head 21* below for the extension of the term specified in the order.

(3) Where a periodical payments or secured periodical payments order in favour of a party to a marriage is made otherwise than on or after a grant of a decree of divorce, and the marriage in question is subsequently dissolved but the order continues in force, the order shall, notwithstanding anything in it, cease to have effect on the remarriage of that party, except in relation to any arrears due under it on the date of the remarriage.

(4) If after the grant of a decree dissolving a marriage either party to that marriage remarries that party shall not be entitled to apply by reference to the grant of that decree for a financial provision order in his or her favour, or for a property adjustment order, against the other party to that marriage.

Note

This head provides that in the case of a periodical payments maintenance order the order shall not extend beyond the death of either party or the remarriage of the party in whose favour the order was made, and in the case of a secured periodical payments order beyond the death or remarriage of the party in whose

favour the order was made. Also on the remarriage of a party to a dissolved marriage no application for a financial provision order will be entertained by the court.

Head 19: Provisions relating to maintenance, property and other orders

Provide that

(1) In deciding whether to exercise its powers under *heads 12, 13, 14* or *15(1)(a)* or *(b)* of this Act and, if so, in what manner, the court shall seek to ensure that such provision is made for any party to the marriage and for any dependent child of the family as is adequate and reasonable having regard to all the circumstances of the case.

(2) As regards the exercise of the powers of the court under *heads 12, 13, 14* or *15(1)(a)* or *(b)* of this Act in relation to a party to the marriage, the court shall in particular have regard to the following matters—

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before proceedings were instituted or before the parties to the marriage separated, as the case may be;
- (d) the age of each party to the marriage, the duration of the marriage and the length of time the parties lived together;
- (e) any physical or mental disability of either party;
- (f) the contributions which each of the parties to the marriage has made or is likely in the foreseeable future to make to the welfare of the family, including the contribution made by each party to the marriage to the income, earning capacity, property and financial resources of the other and any contribution made by looking after the home or caring for the family;
- (g) the effect on the earning capacity of each party to the marriage of the marital responsibilities assumed by each during the period when they lived together and, in particular, the degree to which the future earning capacity of a party to the marriage is impaired by reason of having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family;
- (h) any income or benefits to which either party to the marriage is entitled by or under statute;
- (i) the conduct of each of the parties to the marriage, if that conduct is such that in the opinion of the court it would in all the circumstances be repugnant to justice to disregard it;
- (j) the accommodation needs of either party to the marriage;

- (k) the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

(3) The court shall not make an order under *heads 12, 13, 14 or 15(1)(a) or (b)* of this Act for the support of a party to the marriage where the party has deserted and has continued to desert the other party up to the time of the institution of proceedings for a decree of divorce, nullity of marriage or judicial separation unless, having regard to all the circumstances (including the conduct of the other party), the court is of opinion that it would be repugnant to justice not to make such order or orders.

(4) As regards the exercise of powers of the court under *heads 13, 14 or 15* of this Act in relation to any dependent child of the family, the court shall in particular have regard to the following matters—

- (a) the financial needs of the child;
- (b) the income, earning capacity (if any), property and other financial resources of the child;
- (c) any physical or mental disability of the child;
- (d) any income or benefits to which the child is entitled by or under statute;
- (e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;
- (f) the considerations mentioned in relation to the parties to the marriage in *subheads (2)(a), (b), (c) and (e)* of this head;
- (g) the accommodation needs of the child.

(5) In this head “desertion” includes conduct on the part of one party to the marriage that results in the other party, with just cause, leaving and living apart from that other party.

Note

Apart from subhead (2)(k) this head is similar to section 20 of the 1989 Act. Subhead (2)(k) is intended to cover, for example, loss of succession and occupational pension rights.

Head 20: Retrospective maintenance orders

Provide that

(1) The court may when making a periodical payments order under *head 13(1)(a)* provide that the sum ordered to be paid by it be backdated to the date when the divorce was issued, but no earlier, where it is deemed appropriate that such order be made having regard to all the circumstances of the case and may in so doing order that any arrears of maintenance it accordingly deems to have accumulated be paid by way of a lump sum by a specified date and may in ordering the payment of such lump sum give credit to the party to the marriage ordered to make such payment for any relevant moneys paid by him to the party to whom such payment is to be made in the period between the dates when the divorce proceedings were issued and a decree of divorce was granted.

(2) The jurisdiction conferred on the court to make a lump sum order under *subhead (1)* of this head is without prejudice to the generality of the jurisdiction to make such order arising under *head 13(1)(c)* and *13(1)(d)*.

Note

This head is similar to section 21 of the 1989 Act.

Head 21: Variation and discharge of financial and property orders

Provide that

(1) Where the court has made an order to which this head applies, then subject to the provisions of this head and of *head 19* of this Act, the court may, on application to it by either party to the marriage, if it considers it proper to do so having regard to any change in the circumstances and to any new evidence, vary or discharge the order or suspend any provision thereof temporarily, revive the operation of any provision so suspended, and in any appropriate case again vary any such order or again suspend or revive its operation.

(2) This head applies to the following orders—

- (a) an order for maintenance pending suit;
- (b) a periodical payments order;
- (c) a secured periodical payments order;
- (d) that part of an order for the payment of a lump sum which provides for the payment of that sum by instalments or requires the payment of such instalments to be secured;
- (e) any such order for the settlement of property or for the variation of a settlement as
 - (i) is mentioned in *head 14(1)(b) to (d)* and
 - (ii) contains provision reserving power to the court to exercise its power under this head to vary the order (whether generally or in such respect as may be specified in the order);
- (f) an order in relation to the occupation of the family home, and
- (g) an order for the sale of property.

(3) Without prejudice to the generality of *head 13* of this Act that part of an order which provides for the support of a dependent child shall stand discharged where the child ceases to be a dependent child of the family by reason of his attainment of the age of sixteen years or twenty-one years, as the case may be, and shall be discharged by the court, on application to it under *subhead (1)* of this head, if it is satisfied that the child has for any reason ceased to be a dependent child of the family.

(4) The powers exercisable by the court under this head in relation to an order shall be exercisable also in relation to any instrument executed in pursuance of the order.

(5) Where the party liable to make payments under a secured periodical payments order has

died, an application under this head relating to that order (and to any order which requires the proceeds of sale of property to be used for securing those payments) may be made by the party to the marriage entitled to payment under the periodical payments order or by the personal representatives of the deceased party to the marriage, but no such application shall, except with the permission of the court, be made after the end of the period of twelve months from the date on which representation in respect of the estate of the deceased is first granted.

(6) The personal representatives of a deceased party to a marriage against whom a secured periodical payments order was made shall not be liable for having distributed any part of the estate of the deceased after the expiration of the period of twelve months referred to in *subhead* (5) of this head on the ground that they ought to have taken into account the possibility that the court might permit an application under this head to be made after that period by the person entitled to payments under the order; but this subhead shall not prejudice any power to recover any part of the estate so distributed arising by virtue of the making of an order in pursuance of this head.

(7) The power of the court by virtue of *subhead* (2)(e) above to vary or discharge a property adjustment order shall be exercisable subject to any restriction contained in the order on the respects in which the power may be exercised and, if the order has taken effect, shall (subject to any such restriction) be a power—

- (a) to vary the settlement to which the order relates in any person's favour or to extinguish or reduce any person's interest under that settlement; and
- (b) to make such supplemental provision (including a further property adjustment order or an order for the payment of a lump sum) as the court thinks appropriate in consequence of any variation, extinguishment or reduction to be made under paragraph (a) above;

and *head* 17 above shall apply for the purposes of the exercise of the court's power under this subhead as it applies where the court makes a property adjustment order under *head* 14 above.

(8) The court shall not exercise its power by virtue of *subhead* (2)(e) above in relation to any property adjustment order unless it appears to the court that the provision to be made in exercise of that power will not prejudice the interests of any person who—

- (a) has acquired any right or interest in consequence of that order; and
- (b) is not a party to the marriage or child of the family.

Note

This head is similar to section 22 of the 1989 Act except that

- (1) it allows variation of a settlement made under head 14 where the court has indicated in making that order that it may subsequently be varied (*subhead* (2)(e));
- (2) it omits the provision prohibiting the court from making a property adjustment order on an application for the variation of a periodical or secured periodical payments order.

Head 22: Child maintenance

Provide that

(1) A maintenance or a variation order shall specify each part of a payment under the order that is for the support of a dependent child and may specify the period during the lifetime of the person applying for the order for which so much of a payment under the order as is for the support of a dependent child shall be made.

(2) Conduct of the nature referred to in *head 19(2)(i)* or *19(3)* or in *head 21* shall not be a ground upon which a court shall refuse to make a maintenance order for the support of a dependent child and shall not be a ground for discharging or varying any part of a maintenance order that provides for the support of such child.

Note

This head is similar to section 23 of the 1989 Act.

Head 23: Transmission of periodical payments through District Court clerk

Provide that

Notwithstanding anything in this Act, the provisions of *section 9* of the *Family Law (Maintenance of Spouses and Children) Act, 1976*, shall apply in relation to an order for maintenance pending suit, to a periodical payments order or a secured periodical payments order, subject to the modifications that the reference in subsection (4) of the said *section 9* to the maintenance creditor shall be construed as a reference to the person to whom payments under the order would be made and the other references in the said *section 9* to the maintenance creditor shall be construed as references to the person on whose application the periodical payments order was made.

Note

This head is similar to section 24 of the 1989 Act.

Head 24: Amendment of section 3 of Family Law (Maintenance of Spouses and Children) Act, 1976

Provide that

(1) Subject to *subhead (2)* of this head *section 3(1)* of the *Family Law (Maintenance of Spouses and Children) Act, 1976*, is hereby amended by the addition in the definition of "antecedent order" of—

“(k) an order for payment of maintenance pending suit under the *Family Law (No. 2) Act, 1991*] or a periodical payments order under that Act.”.

Note

This head is similar to section 25 of the 1989 Act.

Head 25: Payments to be made without deduction of income tax

Provide that

Payments of money pursuant to an order under this Part shall be made without deduction of income tax.

Note

This is similar to section 26 in the 1989 Act.

Head 26: Application of maintenance and periodical payments orders to members of Defence Forces

Provide that

The reference in section 98(1)(h) of the *Defence Act, 1954*, to an order for payment of alimony shall be construed as including references to an order for maintenance pending suit, a periodical payments order and a secured periodical payments order under this Act.

Note

This is similar to section 27 in the 1989 Act.

Head 27: Amendment of Enforcement of Court Orders Act, 1940

Provide that

The references in subsections (1) and (7) of section 8 of the *Enforcement of Court Orders Act, 1940* (as amended by section 29 of the *Family Law (Maintenance of Spouses and Children) Act, 1976*), to an order shall be construed as including references to an order for payment of maintenance pending suit and a periodical payments order under this Act.

Note

This is similar to section 28 in the 1989 Act.

Head 28: Voidance of transactions intended to prevent or reduce financial relief

Provide that

(1) For the purposes of this head, “financial relief” means relief under any of the provisions of *heads 12, 13, 14, 15(1)(a), 15(1)(b), 20 and 21* (except subhead (5)) of this Act, and any reference in this head to defeating a person’s claim for financial relief is a reference to preventing financial relief from being granted to that person, or to that person for the benefit of a dependent child of the family, or reducing the amount of any financial relief which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at the instance of that person under any of those provisions.

(2) Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person—

- (a) if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition 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 the other party from so doing or otherwise for protecting the claim;
- (b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition;
- (c) if it is satisfied, in a case where an order has been obtained under any of the provisions mentioned in *subhead (1)* of this head by the applicant against the other party, that the other party has, with that intention, made a reviewable disposition, make an order setting aside the disposition;

and an application for the purposes of *paragraph (b)* shall be made in the proceedings for the financial relief in question.

(3) Where the court makes an order under *subhead (2)(b)* or *(c)* of this head setting aside a disposition it shall give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payments or the disposal of any property).

(4) Any disposition made by the other party to the proceedings for financial relief in question (whether before or after the commencement of those proceedings) is a reviewable disposition for the purposes of *subhead (2)(b)* and *(c)* of this head unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant’s claim for financial relief.

(5) Where an application is made under this head with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied—

- (a) in a case falling within *subhead (2)(a)* or *(b)* of this head, that the disposition or other dealing would (apart from this head) have the consequences, or
- (b) in a case falling within *subhead (2)(c)* of this head, that the disposition has had the consequence,

of defeating the applicant’s claim for financial relief, it shall be presumed, unless the contrary is

shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for the financial relief.

(6) In this head "disposition" does not include provision contained in a will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise.

Note

This is similar to section 29 in the 1989 Act.

Houses of the Oireachtas

Part IV

COURT JURISDICTION

Head 29: Courts, jurisdiction and venue

Provide that

(1) Subject to the other provisions of this head, the Circuit Court shall, concurrently with the High Court, have jurisdiction to hear and determine proceedings under this Act for a decree of divorce.

(2) Where in proceedings under this Act an order could be made in respect of land whose rateable valuation exceeds £200 and an application commencing those proceedings is made to the Circuit Court, that Court shall, if the respondent so requires before the hearing thereof, transfer those proceedings to the High Court, but any order made (including an interim order) or act done in the course of those proceedings before such transfer shall be valid unless discharged or varied by order of the High Court.

(3) The jurisdiction referred to in *subhead (1)* of this head shall, in the Circuit Court, be exercised by the judge of the circuit where either party to the proceedings ordinarily resides or carries on any profession, business or occupation.

(4) The proceedings to which section 33 (conduct of family proceedings in the Circuit and High Courts) of the *Judicial Separation and Family Law Reform Act, 1989* apply shall be deemed to include proceedings under this Act.

Note

This head provides that the High and the Circuit Court shall have concurrent jurisdiction under this Act. The effect of subhead (4) is that the High and Circuit Court proceedings under the Act will be as informal as is practicable and consistent with the administration of justice; neither judges nor barristers nor solicitors appearing in those proceedings will wear wigs or gowns.

Head 30: Exercise of Jurisdiction

Provide that

(1) The court shall exercise jurisdiction in proceedings for divorce if (and only if) either of the parties to the marriage—

- (a) is domiciled in the State on the date of the application commencing proceedings, or
- (b) is ordinarily resident in the State throughout the period of one year ending on that date.

(2) The court shall, at any time when proceedings are pending in respect of which it is empowered to exercise jurisdiction by virtue of *subheads (1) or (2)* above, also be empowered to exercise jurisdiction in other proceedings, in respect of the same marriage, for divorce, judicial separation, or nullity of marriage, notwithstanding that the jurisdiction would not be exercisable under subheads (1) or (2) or *section 31(4)* of the *Judicial Separation and Family Law Reform Act, 1989*.

Note

The jurisdiction to grant a judicial separation (section 31(4) of the 1989 Act) is the same as that proposed in the head for divorce. The equivalent provisions in the U.K. are similar except that habitual residence is used rather than ordinary residence. Whether we use ordinary residence or habitual residence as a ground it would seem necessary to have the same jurisdictional grounds for divorce and judicial separation. It would also seem desirable to have a uniform set of rules applying to both nullity and divorce so that, if necessary, a cross-application may be brought and all litigation relating to the marriage may be disposed of at the same time [see Scheme of No. 1 Bill].

The Law Reform Commission (in their Report LRC 20 — 1985) recommended a more elaborate set of jurisdictional rules for nullity cases. However, it is considered that in the changed situation which would be brought about by the introduction of a divorce jurisdiction, and in the light of the desirability of having uniform rules in the case of nullity, divorce and judicial separation, these recommendations would no longer be entirely relevant.

The purpose of *subhead (2)* is to cater for the case where the jurisdiction may be present on the date of the application for a decree (e.g. ordinary residence) but may no longer exist at the time of a cross-application for another decree (e.g. the applicant may have moved residence, say, to Northern Ireland).

Head 31: Privacy

Provide that

Proceedings under this Act shall be heard otherwise than in public.

Note

This head is similar to section 34 of the 1989 Act.

Head 32: Costs

Provide that

The costs of any proceedings under this Act shall be at the discretion of the court.

Note

This head is similar to section 35 of the 1989 Act.

Head 33: Rules of court

Provide that

Rules of court shall provide for the documentation required for the commencement of proceedings under this Act in a summary manner.

Note

This head is similar to section 36(1) of the 1989 Act.

Part V

MISCELLANEOUS

Head 34: Discharge of orders under Family Law (Maintenance of Spouses and Children) Act, 1976

Provide that

Where, after the making of an order under *section 5, 6 or 7 of the Family Law (Maintenance of Spouses and Children) Act, 1976*, application is made for a decree of divorce between the parties to the proceedings in which that order was made, the court in which the application, or any application made under Part III of this Act, is pending may, if it thinks fit, direct that the order made shall cease to have effect on such date as may be specified in the direction.

Note

This head is similar to section 39 of the 1989 Act.

Head 35: Custody of dependent children

Provide that

(1) Where the court grants a decree of divorce it may declare either party to the marriage to be unfit to have custody of any dependent child of the family.

(2) Where a decree of divorce contains such a declaration, then, if the party to the marriage to whom the declaration relates is a parent of any child of the family, that party shall not, on the death of the other party, be entitled as of right to the custody of that child.

Note

This head is similar to section 41 of the 1989 Act.

Head 36: Collusion, condonation, recrimination, connivance

Provide that

(1) Collusion between the parties to the marriage in connection with an application for a decree of divorce or, subject to *subhead (2)* of this head, any conduct (including condonation or recrimination) on the part of the applicant shall not be a bar to the grant of a decree of divorce.

(2) Where an application for a decree of divorce is made on the ground of adultery and the respondent proves that the adultery was committed with the connivance of the applicant the court may refuse the application.

Note

This head is similar to section 44 of the 1989 Act.

Appendix
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Appendix 3

Appendix 3

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Appendix 3.1

Labour Force Surveys 1986 to 1991

Numbers of separated persons and their labour force participation rates during the period 1986 to 1991 are as follows:

<i>Separated (including divorced)</i>	1986	<i>In labour force</i>	1987	<i>In labour force</i>	1988	<i>In labour force</i>	1989	<i>In labour force</i>
	000's	000's	000's	000's	000's	000's	000's	000's
Male	9.7	8.0	11.2	8.9	11.9	9.2	12.8	10.1
Female	19.3	7.1	20.6	7.9	24.7	9.2	25.0	8.8
Totals	28.9	15.1	31.9	16.8	36.5	18.4	37.8	18.9

<i>Separated (including divorced)</i>	1990	<i>In labour force</i>	1991	<i>In labour force</i>
	000's	000's	000's	000's
Male	14.2	10.7	17.1	12.9
Female	25.5	8.5	29.6	11.5
Totals	39.7	19.2	46.7	24.4

Appendix 3.2

Family Law Proceedings 1986 to 1990

	<i>Divorce a Mensa et Thoro</i>				<i>Judicial Separation*</i>	
	1986-87	1987-88	1988-89	1989-90	1989-90	1/8/90 to 14/1/91
<i>Circuit Court</i>						
Applications	226	217	203	68	528	190
Decrees	51	92	68	43	155	67
<i>High Court</i>						
Applications	7	7	4	Nil	27	17
Decrees	0	0	3	2	2	1
Total Applications	233	224	207	68	555	207
Decrees	51	92	71	43	157	68

*Judicial Separation and Family Law Reform Act, 1989 came into operation on 19 October, 1990.

Nullity

	1986-87	1987-88	1988-89	1989-90
<i>High Court</i>				
Petitions	40	41	46	48
Decrees	20	13	21	30

	1985/1986 (1)		1989/1990 (2)	
	Applications	Orders/Decrees	Applications	Orders/Decrees
<i>District Court</i>				
Maintenance	1,942	959	2,273	846
Barring Orders	3,473	1,476	3,474	1,329
Guardianship	933	630	1,928	1,320
Total	6,348	3,065	7,675	3,495
<i>Circuit Court</i>				
Maintenance	242	214	212	132
Barring Orders	136	128	159	104
Guardianship	234	227	416	192
*M. W's S.A., 1957	179	66	139	67
** F.H.P.A., 1976	147	82	133	92
Total	938	717	1,059	587

	1985/1986 (1)		1989/1990 (2)	
	Applications	Orders/Decrees	Applications	Orders/Decrees
<i>High Court</i>				
Maintenance	77	75	115	115
Guardianship	17	10	7	6
*M.W.'s S.A., 1957	8	3	3	2
**F.H.P.A., 1976	3	2	2	2
Total	105	90	127	125

*Married Women's Status Act, 1957

**Family Home Protection Act, 1976

Note:

In relation to statistics on court proceedings contained in the White Paper the number of decrees granted or orders made do not relate directly to the number of applications in any one year for a number of reasons e.g. a number may not be decided in the same year as which they are made; some applications may be withdrawn.

Appendix 3.3

Judicial Separation and Family Law Reform Act, 1989

Survey of applications under Act

A survey of applications for a decree of judicial separation in the Circuit Family Court and the High Court in the period 19 October, 1989 (when the 1989 Act came into operation) and the end of December 1990 indicated the following.

There were 916 applications and 354 decrees had been granted as follows:

<i>Grounds</i>	<i>No. of decrees</i>	<i>%</i>
Adultery	40	10
Behaviour	83	21
Desertion	26	7
Separation (1 year)	30	8
Separation (3 years)	32	8
Breakdown	189*	47
Total	400**	

*In many of these cases the grounds of the application for a decree included one or more of the facts of adultery, behaviour, desertion or separation.

**In some cases the decree was granted on more than one ground.

Ancillary financial property etc. orders made

	<i>No. of orders</i>
Periodical payments	131
Secured periodical payments	10
Lump sum payment to spouse	32
Lump sum payment to children	2
Property transfer	97
Property settlement	19
Property settlement variation	1
Property variation	8
Residence in family home	96
Sale of family home	36
Married Women's Status Act, 1957	24
Family Home Protection	33
Protection of spouses and children	64
Partition of property	11
Custody	162

	No. of orders
Extinguishment of succession rights	169*
Sale Order (property generally)	9
Avoidance of disposition	12

*[This figure of 169 represents orders made extinguishing the succession rights of applicants and respondents. The number of such orders made in the 354 cases in which a decree of judicial separation was granted was approximately 85 which signifies that where an order extinguishing the succession rights of one spouse was granted a similar order was made in respect of the succession rights of the other spouse].

Appendix 3.4

Combat Poverty Agency Report

1. The Report on the Financial Consequences of Marital Breakdown (1990) published by the Combat Poverty Agency presented the results of surveys of applications for: (a) maintenance in the District Court; and (b) deserted wife's allowance and benefit. The Report highlights the uncertainty of payment of family maintenance despite a court order to pay. The survey found that 60% of maintenance awards by the court in support of a spouse were for amounts less than supplementary welfare allowance. In a further 21% of cases the amount awarded was less than the maximum personal rate of deserted wife's benefit. In only 20% of cases was the wife awarded more than she might receive if she qualified for the highest relevant social welfare payment (deserted wife's benefit). In 6% of cases no award of maintenance was made.
2. As regards dependent children the survey found that in 45% of child maintenance cases the court ordered an amount less than the amount payable under supplementary welfare allowance for a dependent child. In 76% of cases the maintenance was less than the child dependant allowance under deserted wife's benefit.
3. The Report tends to confirm the experience in other countries — which have a similar modern code to ours relating to family maintenance — that long term reliance on state support is an inevitable consequence for many couples who separate.

Other features of the survey were the following:

 - 72% of maintenance orders were made payable through the District Court clerk;
 - 75% of maintenance orders had substantial arrears (of at least six months);
 - 42% of maintenance creditors had to resort to enforcement measures and of these 43% had used the procedures more than once;
 - an attachment of earnings order doubled the chances of compliance with a maintenance order;
 - the maintenance debtor left his employment in 26% of cases in which an attachment of earnings order was made;
 - in no case surveyed was an order made for enforcement of arrears of maintenance by distress and sale of the goods of the maintenance debtor;
 - maintenance debtors were sentenced to a term of imprisonment in one-fifth of cases where enforcement was sought. Arrears of maintenance was paid in 18% of the cases (55) in which a committal order was made. The debtor was imprisoned in 5% of committal cases.
4. The highest success rate for maintenance orders applies in the category of better paid maintenance debtors. This would seem to suggest that often the most likely reason for default is the inability of the husband to pay. In any event the result is that a large majority of wives who are granted maintenance orders cannot be assured of either an adequate or a secure income from her husband. The separation of the spouses exposes them and their children to the risks of poverty.

5. As regards the survey of applications for deserted wife's allowance and benefit it was found that
- the single largest group (25%) among the applicants were married to unemployed men;
 - 85% of applicants had dependent children;
 - 6% of the applicant wives were being maintained by their husbands at the time of application for deserted wife's payments; the majority were already receiving some other welfare payment.
 - 57% of applicants for a deserted wife's payment were successful;
 - 24% had instituted court proceedings for maintenance.

Appendix 3.5

Grants paid to Organisations Providing Marriage Counselling Services

<i>Health Board</i>	<i>1988</i>	<i>1989</i>	<i>1990</i>
	£	£	£
<i>Eastern Health Board</i>			
(1) C.M.A.C. (10 centres EHB areas)	25,000	25,200	25,200
Central Services, All Hallows	57,000	57,000	57,000
Family Planning Services	33,000	33,000	33,000
Lottery funding	10,000	16,000	25,000
	(Central Services)	(Psycho Therapy Service)	(Blanchardstown Service)
(2) Marriage Counselling Services Ltd.	11,000	11,000	12,000
Lottery funding 1990 — £30,000 towards refurbishing of premises.			
(3) Marriage and Family Institute			
Clanwilliam Institute	10,000	10,000	10,000
1988 Once off grant of £2,500 towards computer			
(4) Northside Counselling Service	—	—	4,000
(cost shared by Community Care and Special Hospitals Programmes.)			
<i>Southern</i>			
C.M.A.C.			
Cork	500	500	500
Cobh	500	500	500
Bantry	500	500	500
Killarney	500	500	500
(Grants also paid to CMAC in respect of family planning service)			
<i>South Eastern</i>			
CMAC			
Waterford	400	400	400
Tipperary	400	400	450
Clonmel	400	400	450
Wexford	400	400	600
Carlow	500	500	500
Kilkenny	500	500	600

<i>Health Board</i>	<i>1988</i>	<i>1989</i>	<i>1990</i>
	£	£	£
<i>North Eastern</i>			
CMAC			
Drogheda	400	400	400
Dundalk	400	400	—
Monaghan	450	450	—
Cavan	450	500	500
Navan	400	—	450
<i>North Western</i>			
CMAC	4,000	4,000	4,000
<i>Midland</i>			
CMAC	4,150	3,525	3,525
<i>Mid Western</i>			
CMAC	4,500	4,500	4,500
<i>Western</i>			
(1) CMAC			
Galway	9,300	9,300	9,300
Castlebar	1,800	1,800	1,800
Ballina	400	400	400
Roscommon	800	600	600
(2) Galway Family Guidance Institute	10,000	10,000	10,000

Appendix 3.6

Pilot Family Mediation Service Statistics

The following statistics show the number of couples who commenced mediation, the number who reached agreement on a separation or were reconciled and the number who did not complete mediation.

Number of new couples who commenced Mediation	1/9/86 — 31/12/86	76
	1/1/87 — 31/12/87	222
	1/1/88 — 31/12/88	209
	1/1/89 — 31/12/89	207
	1/1/90 — 31/12/90	187
	Total	901
Number of couples who reached Agreement or who returned to Marriage	1/9/86 — 31/12/86	27
	1/1/87 — 31/12/87	132
	1/1/88 — 31/12/88	142
	1/1/89 — 31/12/89	139
	1/1/90 — 31/12/90	120
	Total	560
Number of couples who did not complete Mediation	1/9/86 — 31/12/86	49
	1/1/87 — 31/12/87	90
	1/1/88 — 31/12/88	67
	1/1/89 — 31/12/89	68
	1/1/90 — 31/12/90	67
	Total	341

Appendix 3.7

Reports of Law Reform Commission in Family Law area

1. The recommendations in the *First Report on Family Law* (LRC 1-1981) regarding the Abolition of the action for criminal conversation and the action for breach of promise of marriage have been dealt with in the *Family Law Act, 1981*.
2. The *Report on Illegitimacy* (LRC 4-1982) was dealt with in the *Status of Children Act, 1987*.
3. The *Report on the Age of Majority* (LRC 5-1983) was dealt with in the *Age of Majority Act, 1985*.
4. The recommendation for the abolition of the action for restitution of *conjugal rights* (LRC 6-1983) was dealt with in the *Family Law Act, 1988*.
5. The *Report on Divorce a Mensa et Thoro* and related matters (LRC 8-1983) was dealt with in the *Judicial Separation and Family Law Reform Act, 1989*.
6. Areas covered by the *Report on Foreign Adoption* (LRC 29-1989) were dealt with in the *Adoption Act, 1991*.
7. The *Criminal Evidence Act, 1992* dealt with recommendations contained in the *Report on the Competence and Compellability of Spouses* (LRC 13-1985) to give evidence and the *Report on Child Sexual Abuse* (in so far as it contains recommendations to facilitate the giving of evidence by children in sex abuse cases).
8. Matrimonial property was one of the subjects dealt with in the *First Report on Family Law* of the Law Reform Commission. As indicated in section 6.31 the Government proposes to introduce legislation to give each spouse equal right of ownership in the family home (and its contents).
9. There are proposals to deal with the *Report on Jactitation of Marriage and Declarations of Status* (LRC 6-1983). As indicated in section 9.3 legislation will be introduced to abolish the action for jactitation of marriage. In section 8.26 proposals are set out in relation to declarations of status.
10. As to the *Report on Recognition of Foreign Divorces and Legal Separations* (LRC 10-1985), section 8.21 sets out legislative developments which have taken place in this area.
11. As to the *Report on Nullity of Marriage* (LRC 9-1984), this matter is dealt with in sections 8.2 to 8.6.
12. The Reports on *Private International Law Aspects of Capacity to Marry and Choice of Law in proceedings for Nullity of Marriage* (LRC 19-1985) and on *Jurisdiction in Proceedings for Nullity of Marriage, recognition of Foreign Nullity decrees and the Hague Convention on the Celebration and Recognition of the Validity of Marriages* (LRC 20-1985) are still under consideration. Apart from questions relating to jurisdiction in proceedings of Nullity of Marriage (see section 8.5) no decisions have been taken yet with regard to their implementation

13. In its 1983 *Report on Domicile and Habitual Residence* (LRC 6-1983) the Law Reform Commission recommended the substitution of habitual residence for domicile as a connecting factor in the various areas where domicile is relevant in cases which have international dimensions e.g., validity of marriage; recognition of foreign divorces, legal separation or nullity decrees; legitimacy; succession and taxation matters.

Under the Commission's proposals the habitual residence of one spouse would not depend upon that of the other spouse, but the habitual residence of one could be taken into account in determining the habitual residence of the other. Where the spouses were residing together they would each be presumed to have the same habitual residence.

The Commission's proposals included a definition of habitual residence. The most important features were that the habitual residence of a person was to be determined having regard to the centre of his personal, social and economic interests and that account should be taken of the duration of these interests and of the intentions of the person relating thereto; and that a person may have his habitual residence only in one State.

As regards the Recognition of Foreign Divorces and Legal Separations the Commission's Report (LRC 10-1985) proposed new rules, acceptance of which would enable this country to ratify the 1970 Hague Convention on the Recognition of Divorces and Legal Separation.

The Commission's recommendations take account of the fact that, because of Constitutional considerations, it would be difficult to justify very liberal rules of recognition which would allow divorces obtained abroad by persons with close connections with Ireland to be recognised by Irish courts. Accordingly, the Commission proposed that special rules (which are permissible under the terms of the Convention) should apply in such cases and that habitual residence as defined in its earlier Report should be used as the test of close connection. In regard to other cases, where there is no such connection with Ireland, the Commission proposed that the general rules of the Hague Convention should apply.

Following consideration of these reports the Government of the day opted for an amendment of the law of domicile relating to abolition of the domicile of dependency of married women and the consequential changes that were necessary, as a result, in the rules governing the recognition of foreign divorces. These changes were effected by the *Domicile and Recognition of Foreign Divorces Act, 1986*, the main provisions of which are discussed in section 8.21 of this Paper.

As to the question of ratification of the Hague Convention on the Recognition of Foreign Divorces and Legal Separations, this is a matter that will be looked at again in the context of whatever proposals are being considered in the light of the response to this White Paper.

Appendix 3.8

Nullity of Marriage in the Catholic Church in Ireland

Year	Applications	Judgements	Decree of Nullity
1986	733	195	198
1987	882	233	209
1988	926	216	188
1989	915	256	212
1990	1,043	250	216

Explanatory Notes:

1. The above figures relate to the 32 counties.
2. The number of judgments in a particular year relate to applications made in previous years. Increased efficiency has meant that more cases can now be dealt with than in the past.
3. Only a minority of applications persist beyond the preliminary stages. About a third are found to have no *prima facie* case for nullity and do not reach the stage of formal investigation, a further third are withdrawn or abandoned by the applicants.
4. In about 75 per cent of cases ending with a nullity decree a prohibition — called a vetitum (cf. veto) — on marriage in the Church is imposed on one or both parties. This is because the defect which caused the nullity is judged to be serious enough to put at risk the validity of a future marriage. The vetitum may be lifted by the local bishop only if he is satisfied, after investigation, of the person's fitness for marriage in all essential respects. The purpose of the vetitum is to prevent the sacrament of marriage being brought into disrepute and to protect the genuine interest of any future spouse.
5. There are about 20,000 marriages in the Catholic Church in Ireland (32 counties) each year.
[Source: Catholic Press and Information Office.]

Appendix 3.9

Information relating to some jurisdictions where divorce is permitted

1. Northern Ireland

Irretrievable breakdown is the ground for divorce and must be proved by one or more of the following facts: adultery; unreasonable behaviour; desertion for at least 2 years; separation for at least 2 years where there is consent to the granting of a decree; separation for at least 5 years. A petition for divorce is not allowed to be presented to the court before the expiration of a period of 3 years from the date of the marriage except where the court decides that the case is "one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent".

The number of divorce decrees granted in the period 1983 to 1989 was as follows:

1983	1,513
1984	1,611
1985	1,656
1986	1,490
1987	1,453
1988	1,742
1989	2,047

In practice separation is the most common ground for divorce. In 1989 50% of decrees were granted on the basis of 2 years separation and 20% on the basis of 5 years separation. About 70% of all decrees were granted to wives.

2. England and Wales

Irretrievable breakdown is the ground for divorce which must be proved by one or more of the following facts: adultery; unreasonable behaviour; desertion for at least 2 years; separation for at least 2 years where there is consent to the granting of a decree; separation for at least 5 years. Divorce cannot be applied for before the expiration of a period of one year from the date of the marriage.

The number of divorces granted in England and Wales and the rate this represented per 1,000 married couples is set out below at 5 yearly intervals from 1965 to 1985.

<i>Year</i>	<i>No. of divorces</i>	<i>Rate per 1,000 married couples</i>
1965	38,000	3.1
1970	58,000	4.7
1975	120,000	9.6
1980	148,000	12.0
1985	160,000	13.4

A liberalisation of divorce law occurred in England and Wales in 1969. The number of

divorces granted there in 1987 was 151,000. Most of the applicants for divorce are women (72% in 1985).

3. Denmark

Among the main grounds for divorce are (i) if the spouses because of disagreement have not lived together for 2 years; (ii) if one spouse is unfaithful and this is not accepted by the other; (iii) if either spouse is very violent to the other or to the children. Most people get legally separated before they get divorced. The spouses can get legally separated if either feels they cannot continue the relationship. Divorce is possible later, after one year of separation or, if both spouses agree, after 6 months of separation.

The rate of divorce per 1,000 existing marriages for the years set out below was

Year	Rate
1965	5.4
1970	7.6
1975	10.6
1980	11.2
1985	12.6
1989	13.7

4. France

Divorce is available by mutual consent where both parties at least 6 months after the date of the marriage submit to a magistrate a written agreement dealing with such issues as custody of and access to children and financial/property arrangements. If both parties reiterate their demand after a "cooling off" period (3 months minimum; 9 months maximum) the divorce decree is granted. Divorce can be obtained on *fault-based* grounds which involve facts attributable to one spouse constituting a serious or recurring breach of the duties and obligations resulting from marriage (for example, adultery or violence). An application for divorce can be made under the heading of *marital breakdown* when both spouses have lived apart for at least 6 years or when the mental condition of the other spouse has been affected to such an extent over a period of 6 years that normal married life no longer exists and is not likely to return in the future.

The figures below indicate the average number of divorces granted per annum for the five-yearly periods shown.

Period	(000's) No. of divorces
1966-70	37.5
1971-75	48.5
1976-80	73.2
1981-85	98.3

Actual figures (in 000s) for 1980, 1985 and 1988 were 81.1, 107.5 and 106.1 respectively.

The rate of divorce per 1,000 existing marriages for the years set out below was

<i>Year</i>	<i>Rate</i>
1961	2.9
1971	3.5
1981	6.8
1984	8.1

5. Germany

Breakdown of marriage is the ground for divorce and this is taken as having occurred if the spouses are no longer on living terms and it is not to be expected that they can re-establish the society that they have lost. There is an irrebuttable presumption that the marriage has broken down if the spouses have lived apart for one year where there is consent by both spouses to a divorce being granted and for three years in the absence of the consent of one of the spouses. The actual number of divorces for the years set out below was

<i>Year</i>	<i>No. of divorces</i>
1965	58,728
1970	76,520
1975	106,829
1980	96,222
1985	128,124

The rate of divorce per 1,000 existing marriages for the years set out below was

<i>Year</i>	<i>Rate</i>
1961	3.6
1971	5.2
1981	7.2
1985	8.6

6. Greece

The grounds for divorce are (a) absence; (b) irretrievable breakdown of marital bond. There is a rebuttable presumption that irretrievable breakdown exists in circumstances which include adultery, desertion or an attempt on the life of the spouse. There is an irrebuttable presumption that irretrievable breakdown exists where the spouses have been separated for at least 4 years.

The rate of divorce per 1,000 existing marriages for the years set out below was

<i>Year</i>	<i>Rate</i>
1961	1.5
1971	1.7
1981	2.5

7. The Netherlands

Irretrievable breakdown of the marriage is the ground for divorce. Grounds such as adultery, desertion or abuse no longer appear in the divorce law but these circumstances can form an indication that the marriage has irretrievably broken down. The court can be requested to dissolve a marriage after a legal separation. Where both spouses request the marriage to be dissolved this can be done immediately after separation. The right of one of the spouses to request the marriage to be dissolved exists first when separation has lasted 3 years and, only in very exceptional circumstances, this period can be reduced to one year.

The rate of divorce per 1,000 existing marriages for the years set out below was

<i>Year</i>	<i>Rate</i>
1961	2.2
1971	3.7
1981	8.3
1985	9.9

8. Italy

The grounds on which a divorce may be granted include

- where the spouses have been legally separated for at least 3 years
- where the other spouse, being a foreign national, has obtained an annulment or dissolution abroad or has remarried abroad
- where the other spouse has been convicted of certain offences
- where the marriage has not been consummated

The total number of divorces in each of the years shown below was

<i>Year</i>	<i>No. of divorces</i>
1971	17,134
1975	10,618
1980	11,844
1985	15,650
1989	30,309

Divorce was allowed in Italy for the first time in 1970. The grounds for a divorce were liberalised in 1987. The rate of divorce per 1,000 existing marriages for the years set out below was

<i>Year</i>	<i>Rate</i>
1971	2.5
1981	0.9
1985	1.1

9. Luxembourg

A number of grounds for divorce are allowed. Where the two parties agree, divorce is a matter of declaring that they are separated. Divorce is also obtainable where one party

claims there is marital breakdown for a specific reason (violence, alcoholism, adultery etc.). A *de facto* separation of 3 years or more is also a ground for divorce.

The number of divorces for the years set out below was

<i>Year</i>	<i>No. of divorces</i>
1970	217
1975	229
1980	582
1985	665

The rate of divorce per 1,000 existing marriages for the years set out below was

<i>Year</i>	<i>Rate</i>
1970	2.6
1981	5.9
1985	7.2

10. Portugal

Portuguese law provides for divorce

- By mutual consent
- Where a spouse claims that the other spouse has failed to comply with the obligations of a spouse (these are defined as respect, fidelity, cohabitation, co-operation and support)
- Where there has been effective breakdown of marriage due to *de facto* separation or reduced mental capacity of one partner

The number of divorces in the years set out below was

<i>Year</i>	<i>No. of divorces</i>
1960	749
1965	695
1970	509
1975	1,522
1985	8,988
1989	9,657

There was significant liberalisation of divorce provisions after the political changes in 1974.

The rate of divorce per 1,000 existing marriages for the years set out below was

<i>Year</i>	<i>Rate</i>
1961	0.4
1971	0.3
1981	2.8
1985	3.7

11. Spain

Generally before applying for a divorce it is necessary to have separated previously. The one exception is where there is an attempt on the life of the spouse, the children or the parents or father-in-law or mother-in-law (with a sentence having been subsequently imposed).

The period of separation before a divorce can be applied for varies:

One year from the date of bringing a petition for legal separation by mutual agreement

One year from the date of bringing a petition for legal separation for cause

Two years of separation are necessary when it is the matter of an actual separation, voluntary, and on the part of both parties

Two years when once the separation has been requested by one of the spouses the other agrees to an actual separation

Two years of actual separation where one spouse alleges that the other has given him or her sufficient cause for a judicial separation

Two years from when one of the spouses has been declared missing

Five years of actual separation whatever the motive and although one of the spouses did not desire it.

In 1981 — the year divorce was introduced into Spain for the first time — the rate of divorce per 1,000 married couples was 1.1.

The numbers of actual divorces in Spain for the years shown below were

	<i>Total</i>	<i>By Agreement</i>	<i>Not by agreement</i>
1983	19,306	7,500	11,766
1984	17,656	7,154	10,502
1985	18,291	7,431	10,860
1986	19,232	7,877	11,357
1987	21,326	8,629	12,697
1988	22,449	9,683	12,766
1989	23,063	9,935	13,128

Appendix 3.10

Tenth Amendment of the Constitution Bill, 1986

Article 41.3.2° of the Constitution provides as follows:

“2° No law shall be enacted providing for the grant of a dissolution of marriage.”

The 1986 Bill proposed that this provision should be deleted and replaced with a new section 3.2° (see words underlined below), and Article 41 would, if the proposal had been accepted in the Referendum, have read as follows:

“1. 1° The State recognises the Family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2. 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3. 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

2° Where, and only where, such court established under this Constitution as may be prescribed by law is satisfied that—

i. a marriage has failed,

ii. the failure has continued for a period of, or periods amounting to, at least five years,

iii. there is no reasonable possibility of reconciliation between the parties to the marriage, and

iv. any other condition prescribed by law has been complied with,

the court may in accordance with law grant a dissolution of the marriage provided that the court is satisfied that adequate and proper provision having regard to the circumstances will be made for any dependent spouse and for any child of or any child who is dependent on either spouse.

3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within the jurisdiction during the lifetime of the other party to the marriage so dissolved.”

Appendix 3.11

Details of Social Welfare Payments

TABLE 1

Recipients Under Deserted Wife's Schemes 1986 to 1990

Year	DW Benefit	DW Allow.	Lone Parents (See Notes)	Totals
1986	6,165	4,445		10,610
1987	7,302	4,870		12,172
1988	8,492	5,135		13,627
1989	9,400	5,271		14,671
1990	10,462	1,793	3,717	15,972

Notes:

Lone Parent's Allowances are payable to persons bringing up children on their own including persons who are unmarried or widowed. The latter groups have been excluded and the figure given (3,717) is the number of *women* with children who were deserted or separated. There were also 342 deserted or separated *men* receiving these allowances because they were bringing up children.

The total (15,972) is the number of women who have been deserted or separated with or without children who are receiving social welfare payments.

TABLE 2

Recipients under Selected Schemes, June 1991

Deserted Wife's Benefit	10,945
Deserted Wife's Allowance	1,818
Lone Parents:	
Unmarried	20,209
Separated	4,881

Note:

The figures for Lone Parents includes recipients of both sexes.

TABLE 3
Expenditure on Selected Schemes 1986-1990

Year	Deserted Wife's Benefit	Deserted Wife's Allowance	Unmarried Mother's Allowance	Prisoner's Wife's Allowance	Lone Parent's Allowance
	(£000's)	(£000's)	(£000's)	(£000's)	(£000's)
1986	23,449	14,815	36,668	1,225	—
1987	28,035	16,792	43,443	1,353	—
1988	34,022	18,070	48,635	1,163	—
1989	39,250	19,262	54,244	1,052	—
1990	45,248	4,650	—	27	83,370

Notes:

Lone Parent's Allowances are paid to persons bringing up children on their own. When this scheme was launched in November, 1990 it subsumed parts of the widow's NC Pension, DWA, UMA and PWA schemes as well as including some new categories (separated spouses, unmarried fathers and deserted fathers).

The amount shown excludes widow's pensions. A breakdown of the amount is given in Table 4.

SWA: Substantial amounts are disbursed under the Supplementary Welfare Allowances Scheme on claims arising from marriage breakdown e.g. payments for exceptional needs (ENPS) and in rent/mortgage supplementation. However, the information available does not allow the expenditure attributable to marriage breakdown to be estimated.

TABLE 4
Lone Parents Allowances (excluding widows pensions)

	1990
	(£000's)
Unmarried parents	64,487
Separated spouses	17,777
Prisoner's spouses	1,106
Totals	83,370

allowance

(V's)

370

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