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STUDY ON MATRIMONIAL PROPERTY REGIMES AND THE PROPERTY OF UNMARRIED COUPLES IN PRIVATE INTERNATIONAL LAW AND INTERNAL LAW

NATIONAL REPORT

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CHAPTER 1
MATRIMONIAL PROPERTY. INTERNAL LAW

1.1 GENERAL ISSUES

Under Irish Law 'Property' is defined as 'that which can be owned'. The term is subdivided into **real** property (realty) and **personal** property (personalty) under the Irish common law legal system. Property is also divided into movables and immovables similar to the Romano – Germanic legal system. According to the general principle of **separate property**, each spouse has equal and independent power to acquire and deal with his/her own property. This doctrine was not designed to promote community of property. It promotes the opposite in fact, supported by the provisions of Article 43 of the Constitution. The principal holds true, except in the context of the division of assets on marriage breakdown. In that context the doctrine can be displaced by reference to the Constitutional support for marriage in Article 41, and the criteria set out in Section 16 of the 1995 act and 20 of the 1996 Act. In addition certain 'presumptions' at common law which developed over the years to ameliorate the position of financially dependent wives who were not named on the title of property as co-owners. Unless property is acquired by a wife in her sole name or in joint or common ownership with her husband, a wife with no independent income of her own acquires no ownership rights or beneficial interest in either the family home or any other property acquired by her husband during his lifetime. However, Irish case law establishes that where a wife made a substantial direct or indirect monetary contribution to the acquisition of **Property** held by a husband in his sole name, she could acquire an ownership right in such property proportionate to the contribution made by her to its acquisition.

The Circuit Family Court has concurrent jurisdiction with the Irish High Court in Dublin to hear and determine questions between spouses in relation to property disputes (real and personal property including chattels)

1.1.1 Sources

1.1.1.1 Description of the general legislative sources

The general legislative sources in Ireland in relation to Matrimonial property include:

a) **Constitutional law – Bunreacht na hEireann 1937**

Generally, but especially article 41 ' the Family'. Article 41 of the Irish Constitution states the following:

1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a oral institution possessing inalienable and imprescriptable rights, antecedent and superior to all positive law.

1.2 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, a woman gives to the State a support without which the common good cannot be achieved.

2.2 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 within 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.

3.2 [No law shall be enacted providing for the grant of a dissolution of marriage].

3.3 A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that-

i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years.
ii. there is no reasonable prospect of reconciliation between the spouses.
iii. such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
iv. any further conditions prescribed by law are complied with.

3.4 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 that jurisdiction during the lifetime of the other party to the marriage so dissolved.

The Irish Constitution has been gradually interpreted as giving implied unenumerated constitutional rights as well as express rights to marital spouses in relation to the recognition of their relationships as well as the regulation of their mutual and / their respective matrimonial property rights.

b) **Statutory Law**

Since 1965, there has been a proliferation of Irish statutory Family Law. These laws emanate from the Irish Parliamentary system. Each Bill of Legislation has six stages- the *Dail* (Parliament) and there are five in the *Seanad* (Senate). Family Bills become Acts of Parliament when signed by the President. Family legislation is subsequently enacted by means of a Ministerial Statutory Instrument. These Bills are supposed to be interpreted by the Judiciary in the Courts according to the rules of statutory interpretation.

a) In relation to married couples, **section 36(1) of the Family Law Act 1995** provides that either spouse may apply to the **Circuit Family Court** or the **High Court** to determine any question relating to the title or possession of any property. This legislation is intended to represent the **Doctrine of Separate Property** which operates under Irish law which applies to the property acquired by a married person. On a purely abstract level, this system or doctrine gives some recognition to equality between married individuals of either sex. The separate property system, taken in isolation, does not adequately protect the weaker spouse (usually the wife).

b) **Section 9 of the Family Law Act 1995** allows the court on granting a decree of Judicial Separation or at any time during the lifetime of the respondent spouse to make a Property Adjustment Order. The court may grant one or more of these orders. (Section 9(1)) Such an order allows the court to adjust or transfer the capital assets of the parties in the context of marriage breakdown regardless of whose name the asset is held. The granting of such an order is made by the Court having regard to the list of criteria which a court must first taken into account when deciding whether or not to make such an order. It is not a judicial discretion ' at large'.

c) In the case of **Divorce** , **section 15 (1)(b) of the Family Law (Divorce) Act 1996** applies in the case of any dispute as to the ownership of property and assets. In the Irish common law system, spouses have no statutory right to claim a share of each others property upon divorce. As such, they are treated by the law largely as if they were legal strangers. (There are, however, some exceptions, notably with respect to the Family Home). A **Separate Property** system operates in that, *prima facie*, each spouse can take from the marriage the property that he or she brought into the marriage. At first glance, the separate property system appears just and fair. Property is divided into 'his' and 'hers'. However, in reality most assets tend to become mingled during the course of the marriage and if one spouse is a breadwinner, then most assets will tend to be in the chief breadwinner's name when the marriage has come to an end. Property division on divorce is not a rule – based one of law, having as its chief aim the goals of certainty and parity between one case and another. Divorce orders in relation to Property Adjustment are made within the framework of a statutory code which allows family courts to exercise broad discretionary powers and which at the same time 'fetters' the judicial discretion to some extent. Unpredictability is the key characteristic of the outcome of contested divorce cases.

d) **Section 21 of the Family Law (Maintenance of Spouses and Children) Act 1976** states that any allowance made by one spouse to the other spouse for the purpose of meeting household expenses, and any property or interest acquired out of such allowance, shall, in the absence of any agreement, whether express or implied between them to the contrary, belongs to the spouses as joint owners. Any savings accumulated from such allowances are also regarded as jointly owned. This clause is normally excluded in a Separation Agreement to prevent such a result. The Act curtails to a limited extent the rights of a spouse over real and personal property. This occurs when any property purchased by a spouse out of any allowance provided by the other spouse for household purposes is regarded as jointly owned, as are any savings accumulated from any such allowance.[1]

e) The **Family Home Protection Act 1976** was enacted in order to protect the occupancy rights of the non-owning spouse in relation to the family home. It inhibits the sale or other disposal (by mortgage or equitable deposit of title deeds) by the owner spouse, without first obtaining the written consent of the non-owning

[1] If a husband gave his wife as housekeeper money out of his own income, any money not spent by her on any property acquired by her with it, was, at common law regarded as belonging to her husband, unless it was his intention to make a gift to her.

spouse to the sale or mortgage. However, an innocent purchaser for value is protected from any ruse by such an owner, where the innocent purchaser has made all proper enquires to ensure that the Act does not apply to the transaction. The act also provides a mechanism for a non-owning spouse to register the existence of the marriage in the Land Registry or Registry of Deeds thereby protecting them and alerting any unsuspecting purchaser/ lending institution from any such mishap.

f) Under the **Succession Act 1965** there is provision for a legal right share for a spouse upon the death of the other spouse. Prior to the commencement of the Act, a testator had complete freedom to dispose, and could disinherit both his wife and children and leave them penniless if he so desired. The Act curtailed this freedom. If the Testator leaves a spouse and no children, then the surviving spouse is entitled to half the deceased's estate as a legal right share. (Section 111(1)) If the Testator dies leaving a spouse and children, then the spouse is entitled to one third of the estate. (Section 111(2)) If the husband dies intestate and they have issue, she automatically inherits two thirds of his estate or, if they have no children, she inherits all of her husband's estate. However section 14 of the Family Law Act 1995 allows the court on granting a decree of Judicial Separation, or at any time thereafter, the discretion to make an order extinguishing the 'legal right share of a spouse'. In order to make this Order the court must be satisfied that the spouse's succession rights have been or can adequately and reasonably be financially provided for under sections **8 – 13 of the Family Law Act 1995**. There is no equivalent provision to this under the **Divorce Act 1996**. Related to this, the court may, under **section 18(1) of the Divorce Act**, on the death of one spouse, make such provision for the surviving spouse as it considers appropriate having regard to the rights of any other person having an interest in the matter. However, the court must be satisfied that proper provision was not made for the applicant during the lifetime of the deceased spouse under sections 13,14,15,16 or 17 of the Family Law (Divorce) Act, 1996.
Section **18(2) of the Family Law (Divorce) Act 1996** prevents the court making an order under section 18(1) in favour of a spouse who has remarried since the granting of the divorce decree. Section 18(4) prohibits the court making an award to the applicant which exceeds the share in the estate which the applicant would have been legally entitled to under the Succession Act , if the marriage had not been dissolved.
Section 18(10) is a "blocking" order which allows the court to bar any application by either party on the death of the other for a share in the estate of the deceased. Upon Divorce, the parties are no longer regarded as spouses for the purposes of the Succession Act and are therefore not automatically entitled to a legal right share in the estate of the deceased spouses. in the context of divorce in practice, the Court normally grants an 18(10) Blocking Order preventing a former spouse who has not remarried from applying for relief out of the estate of a deceased former spouse at the time of the granting of the divorce.
However section **52(g) of the Divorce Act** inserts a section 15(a) into the Family Law Act 1995 which confers on the court jurisdiction to order provision for a divorced or separated spouse out of the estate of a deceased former spouse in specific circumstances.

g) **Section 14(1)(a) of the Divorce Act** provides for property adjustment orders. The court may provide for one or more of the following:

a) the transfer of specified property by one spouse to the other spouse, to any dependent child or to any specified person for the benefit of such child.
b) The settlement of such property for the benefit of the other spouse and or any dependent child
c) the variation for the benefit of either spouse and / or for the benefit of any dependent child of any ante – nuptial or post – nuptial settlement made by the spouses including by will or codicil
d) the extinguishment or reduction of the interest of either of the spouses under any such settlement.

An identical provision to the above exists for separated couples under section 9 of the Family Law Act 1995 as amended by section 52(b) of the Family Law (Divorce) Act, 1996.

1.1.1.2 Description of principal sources in court decisions and in customary law

In relation to **Matrimonial Property** the following are the legal sources for the Judiciary/the courts:

a) Inherent **Common law** principles which are commonly regarded as judge - made laws. Judges through the Doctrine of Precedent and Stare Decisis are bound to follow the decisions of Superior Courts where the facts are similar and the same principles of law apply. Some of these are landmark decisions which cannot be deviated from. Decisions of the lower courts and those of equal jurisdiction are merely persuasive. In addition, judgments referred to from other common law jurisdictions are also merely treated as being of persuasive authority. Judges also refer to and apply customary international law where appropriate. Before the mid-nineteenth century, on marriage a woman's personal property and income became her husband's. During his lifetime the husband exercised the right of control and disposition of her real property and on his death her property was available for eventual inheritance by her family. This position was ameliorated by statute and reform was also linked to the development of 'equitable principals' to soften the harshness of pure law. This cane be seen in the development of property doctrines (The presumption of advancement/ the conversion doctrine in trusts for sale), which enabled women to share the title by manipulation of law.

b) **Equitable legal principles** are more flexible rules which are not as rigidly applied as common law principles and are also referred to as judge made law.

The case of **Ennis v. Butterly [1996] 1 IR 426** is a principle court decision in relation to cohabitees and the validity of Cohabitation Contracts. Kelly J held that the law in Ireland would lean heavily against Cohabitation Contracts considering the special position afforded to Marriage under the Constitution in particular **Article 41 on 'The Family'**. The Irish Constitution contains an entire Article dealing with 'the Family'. This is the Family unit based on the Institution of marriage. Therefore all family legislation and judicial determinations on matters associated with the family must not offend the letter and spirit of Article 41. **Cohabitation Contracts are illegal and unenforceable on grounds of public policy**. It remains to be noted that in the case of **Ennis v. Butterly [1996] 1 IR 426** Article 41.3.1of the Irish Constitution was found to reinforce the pre-

existing common law on the non - enforceability of certain contracts. Here the plaintiff and defendant were both married, though not to each other. They cohabited from 1985 to 1994, when the relationship broke down. The pla intiff sued for damages, *inter alia*, for breach of contract. The defendant sought to have the proceedings struck out as disclosing no reasonable cause of action. Kelly J. held that this application must succeed. Insofar as the breach of contract alleged was a breach of a promise to marry the plaintiff, the **Family Law Act 1981** had abolished actions for breach of promise. And insofar as it was a breach of a contract to cohabit with the plaintiff, any such contract would be enforceable as a matter of public policy. Kelly J. said (at pp.439 – 439):

> 'Given the special place of marriage and the family under the Irish Constitution, it appears to me that the public policy of this state ordains that non-marital cohabitation does not and cannot have the same constitutional status as marriage. Moreover, the State has pledged to guard with special care the Institution of marriage. But does this mean that agreements, the consideration for which is cohabitation, are incapable of being enforced? In my view it does since otherwise the pledge on the part of the state, of which this court is one organ, to guard with special care the institution of marriage would be diluted. To permit an express cohabitation contract (such as is pleaded here) to be enforced would give it a similar status in law as a marriage contract. It did not have such a status prior to the coming into the effect of the Constitution, rather such contracts were regarded as illegal and unenforceable as a matter of public policy. Far from enhancing the position at law of such contracts the Constitution requires marriage to be guarded with special care. In my view, this reinforces the existing common law doctrines concerning the non-enforceability of cohabitation contracts'.

Equity seeks to remedy the deficiencies of the Common Law. Where there is no Common Law governing a particular situation, the Irish courts look to equity for direction. There are two equitable presumptions that operate under Irish law in the context of property disputes between married spouses. These include the Purchase Money Resulting Trust and the Presumption of Advancement.

The Purchase Money Resulting Trust may be used where spouses decide to separate without obtaining a divorce, a judicial separation or a civil annulment. It may also be used where one spouse dies or is adjudicated bankrupt or when a judgment mortgage is registered against the interest of one spouse in the property.

Where the property has been purchased in the name of one spouse, and the other spouse has made direct or indirect contributions with an agreement towards the purchase price or towards the discharge of mortgage instalments, the latter party will be able to claim a proprietary or beneficial interest in the property. A party who has solely made indirect contributions will sometimes gain an interest also. The interest claimed will usually be proportionate to the contributions made. See L. v. L. [1992] 2 IR 77. In the latter case, Barr J. felt that Article 41's regard for the rights of the family and reference to the support given to the State by the activities of women within the home allowed the courts to take into account the value of a wife's work in running the home and caring for the family when calculating her contribution. This decision was reversed unanimously by the Supreme Court on the grounds that it did not constitute the development of an existing doctrine, but the introduction of a new right which only the Oireachtas could create.

The presumption of advancement is a rebuttable one and usually occurs where a husband puts the property into his wife's name. In the latter case, the property will be regarded as a gift to

the wife.

1.1.1.3 Description of any law reforms which are under way

These are presently being discussed by Politicians.

The Irish Law Reform Commission has made a commitment to examine certain branches of Family / Matrimonial law with a view to reform between the years 2000 and 2007. For present purposes, the areas identified for reform include

1) Succession Law and
2) Rights and Duties of Cohabitees. (*The Second Programme for examination of certain branches of the law with a view to their reform* :2000 –2007, The Law Reform Commission,2000)

1.1.2 Historic Development

1.1.2.1 Stages of the historic development

At Common Law , a married woman had no contractual capacity and any contract entered into by her prior to her marriage, automatically vested in her husband. Any property whether real or personal, owned by her at the time of the marriage or acquired thereafter became his. A husband's interest in his wife's freehold property only lasted during his lifetime and reverted back to his wife if she survived him or to her heir if she did not. An absolute disposition of the wife's freehold property could be made if both spouses joined in the disposition.

A husband had greater power in relation to his wife's leasehold property and he could make an absolute disposition of it during his lifetime without her consent. If he didn't dispose of it she could reclaim it on his death. A wife's personal property was absolutely owned by her husband except in relation to her 'paraphernalia', items of apparel including jewellery, suitable to her rank and social status. They belonged to the husband during his lifetime and only reverted to his wife upon his death.

Equity law finally stepped in and developed the doctrine of 'separate use'. This doctrine allowed property to be transferred to trustees or to a wife's husband to apply it for the wife's separate use and she could deal with it as if she were unmarried. The latter context was the first time a woman was conferred with a limited contractual capacity and this was extended in 1865 by the **Married Women's Property Acts 1865**. The married woman's liability remained proprietary and not personal. The **1882 Married Women's Property Act** provided that any property acquired by a wife after 1882 and all the property belonging to a woman who married after that date, should remain **her** property. It has been argued that the 1882 Act laid the foundation of a major portion of family law of and was an instrument of equality and non-discrimination and represented the beginning of the separate identities for husband and wife in the context of property ownership. On a reality level however women suffered inequality due to social and economic fetters notwithstanding the reforming legislation. The legislation was criticised for the notion that in emphasising equality before the law in a social situation that did not take into account very different material circumstances created new problems.

In addition, the first of the Settled Land Acts was also enacted in 1882. This gave a tenant for life under a settlement wide powers of dealing with land without the consent of the other beneficiaries. The combined effect of both pieces of legislation is to introduce a doctrine of separate property. Married Women's Status Act, 1957- continues the doctrine of separate property in Ireland against the background of Article 43 of the Constitution. The Act provided a modern mechanism for the resolution of property disputes between spouses- rest of paragraph is fine. After the insert of

section 36, I feel that there should be some comment upon the attempted introduction of a principal of 'community property' in substitution for the doctrine of separate property. Comparative analysis on the civil law systems which allow for an opt in or opt out of 'community property' in the context of a Pre-Nuptial Agreement. There may well be a danger of creating difficulties by introducing a concept of 'community of property' in place of the doctrine of 'separate property'. Some men's groups have argued that the combined effect of the barring/ exclusion order granted on marriage breakdown is to give a wife a life interest in his property- just as hers used to become his on marriage in times gone by. Both situations were contrived to provide protection for the wife. It also provided the wife with capacity to avail of some of the same civil remedies for the protection and security of her own property as a femme sole. Finally in 1893, every contract entered into by the wife, otherwise than in the capacity as an agent for her husband, was held to be binding upon her. However the patriarchal approach in relation to women was not annihilated completely as the equitable concept of restraint upon anticipation arose in order to protect a wife from making an improvident disposition of her separate property. Thus equity held that if a clause of alienation was inserted into a grant of property, restraining an alienation or anticipation in relation to that property, any disposition that she subsequently made was rendered void. This was mitigated to some extent by the Conveyancing Act 1881 which conferred a power on the courts to remove a restraint and authorise a disposition of the property, if the wife consented and it was for her benefit. A restraint also ceased to have effect on the death of her husband.

The **Married Women's Status Act 1957** was an innovative piece of legislation in that it implemented the doctrine of **Separate Property** into Irish law. It treats a husband and wife as two separate persons for the purpose of all acquisitions of property. Section 5 abolished the doctrine of restraint upon anticipation. A married woman will acquire, hold and dispose of property and is capable of contracting and being rendered personally liable for any contract entered into or debt incurred by her. Disputes in relation to matrimonial property or the family home and other property were determined by the courts in proceedings initiated under section 12 of the Married Women's Status Act 1957 through the application of the doctrine of separate property. The latter has been since replaced by **Section 36 of the Family Law Act 1995.** Section 36(1) provides that an application can be made to the Circuit Court or the High Court by 'either spouse to determine any question arising between them as to the title to or the possession of the property''. Section 36(2) states that: the court may

a) make an order with respect to the property in dispute (including an order that it be sold or partitioned) and as to the costs consequent upon the application, and
b) direct such enquiries, and give such other directions, in relation to the application, as the court considers proper.

The **Matrimonial Home Bill 1993** can be viewed as a further attempt to introduce more equal sharing into the Irish Separate Marital Property regime. Section 4 of the Bill provided that where a spouse was the sole owner of the Matrimonial Home on the commencement date, June 25, 1993, or became the sole owner after that date, the beneficial interest in the property would vest automatically in **both** spouses as joint tenants. The Bill was directly applicable to the Matrimonial home and household chattels. In ***In Re the Matter of Article 26 and the Matrimonial Home Bill,1993 [1994] 1 ILRM 241*** the Supreme Court unanimously held that the Matrimonial Home Bill was repugnant to the provisions of Article 41 of the Constitution. The court was of the opinion that it infringed the authority of the family, *i.e.* the right of a married couple to make a joint decision as to the ownership of the Matrimonial Home. Thus if the Bill became law, there would have been further restriction on a husbands' freedom of testation.

Articles 41 and 42 of Bunreacht na hÈireann (The Constitution of Ire land) recognise the family as the most important social unit within the State. As such, the State guarantees its protection and pledges itself to guard with special care the institution of marriage on which it states the family to be founded. Since 1937 the family has been placed on a constitutional pedestal. The fact that Article 41 expressly prohibited divorce prior to 17th of June 1996 reaffirmed this. On that date, following a referendum on the introduction of divorce in Ireland, the constitutional prohibition was replaced by a provision allowing for divorce, subject to constitutionally specified conditions.

a) Prior to this there had been a referendum on the introduction of divorce in Ireland in 1986 with the Tenth Amendment to the Constitution. However this was strongly opposed by the Roman Catholic Church as well as many religious and lay organisations but more predominantly the people of Ireland who rejected the proposal to amend the Constitution by 935,843 votes to 538,279 votes. The **Judicial Separation and Family Law Reform Act 1989** 'marked a watershed in Irish Family Law'. This Act was innovative in that it broadened the ancillary reliefs that had been available under the **decree of divorce *a mensa et thoro***, the only law that had been in place to deal with those couples who wished to separate in Ireland prior to 1989..

Under the Judicial Separation and Family Law Reform Act, married couples are relieved of the duty to cohabit and they are able to avail of a broad range of financial and property orders by way of Ancillary Relief for the benefit of dependent spouses and children upon granting such a separation decree. It also prescribed new grounds upon which such a decree could be granted. The two principle grounds upon which a decree of divorce *a mensa et thoro* could be granted were those of 1) cruelty and 2) adultery. In addition, the courts jurisdiction to make ancillary orders was limited to ordering that alimony be paid for the support of the dependent wife. There are now six grounds upon which you may obtain a judicial separation and there are a great deal of ancillary orders from which a separating spouse and dependents my claim. The six grounds upon which you can obtain a Judicial Separation include:

a) Adultery.
b) Behaviour.
c) Desertion.
d) Living apart continuously for one year with consent.
e) Living apart continuously for three years without consent.
f) Normal Marital Relationship non-existent.

The 1989 Judicial Separation and Family Law Reform Act laid the legislative foundations for Divorce which finally became part of Irish law in 1996. On 24 November 1995 the Second Divorce Referendum took place. The proposal to amend the Constitution was supported by 818,842 votes and opposed by 809,728. Article 41.3.2 was incorporated into the Constitution on 17th of June 1996 upon the Fifteenth Amendment to the Constitution being signed by the President. The **Family Law (Divorce) Act 1996** was enacted on the 27th of November to place divorce on the statute books. In order to obtain a divorce in Ireland the following conditions must be satisfied:

a) the spouses must have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years at the date of the proceedings,
b) there must be no reasonable prospect of reconciliation
c) such provision as the court thinks proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family.

1.1.2.2 Actual situation

Irish Law does not differentiate between primary and secondary regimes in relation to Matrimonial Property. Irish Matrimonial Property Law is regulated by the Irish Constitution 1937 and by Statute (see 1.1.1.1).

1.1.3 Primary Regime [See 1.1.1.1 – 1.1.1.2]

Generally marital property cannot be alienated without the consent of the other spouse. There is a duty on the spouses to maintain each other financially.

1.1.4 Secondary Regime

1.1.4.1 Existennce or not of special rules on matrimonial property regimes

None

1.1.4.2 Notion of 'matrimonial property regime': which issues are covered by this notion, provided the notion exists?

None

1.1.4.3 Legal 'matrimonial property regime'

None

1.1.4.4 Marriage contracts. Allowed or not? Frequently mae, or exceptional phenomenon? Advantages and disadvantages?

Statutory Law regulates marriages. Formalities and capacity are stipulated by Common Law and Statutory Law. The Marriage Contract as agreed at the time of marriage cannot be varied or altered during the marriage. The State adopts an overarching control over ensuring the recognition and legal certainty of a marriage contract.

1.1.4.5 Specific matrimonial property regimes regulated by law that can be chosen by the spouses

Section 113 of Succession Act, 1965 enables the renunciation of such rights before or after marriage. This is frequently done (quite legally) in second marriages where the parties have responsibilities to children from the first marriage and do not want their union to be fraught with anxiety from the children who fear their inheritance prospects because of the marriage.

1.1.4.6 Whether the matrimonial property regime can change or not during marriage

None

1.1.4.7 Particularities of the national system

None

1.2 TYPES OF REGIMES

1.2.1 Comments as to the primary regime

1.2.1.1 Presentation of the whole of the law regulating the fundamental rights and duties of spouses

None

1.2.1.2 Obligations to contribute to the costs and expenses of the household; property reserved for the household

None

1.2.1.3 Legal position of the marital residence, the marital home, housing of the family

A spouse cannot by acts or omissions under the **Family Home Protection Act 1976** make the family home unfit for human habitation with the intention of doing so. **Section 2 of the Family Home Protection Act 1976** defines the 'Family Home' as 'primarily a dwelling in which a married couple ordinarily reside. The 'Marital Residence' is regarded as the family home in Ireland. It can be leasehold real property or it can be freehold real property. Family home as a 'dwelling' is broadly defined. Section 2(2) of the Family Home Protection Act 1976 originally defined a **dwelling** to mean 'any building or part of a building occupied as a separate dwelling and includes any garden or other land usually occupied with the dwelling, being land that is subsidiary and ancillary to it, is required for amenity or convenience and is not being used or developed primarily for commercial purposes and includes a structure that is not permanently attached to the ground and a vehicle or, vessel, whether mobile or not, occupied as a separate dwelling'. Section 3(1) of the Family Home Protection Act 1976 provides that if a spouse without the prior written consent of the other spouse purports to convey any interest in a family home to any person except the other spouse, the purported conveyance is void subject to certain specified statutory exceptions. It will not apply where such interest is vested in either spouse. There are four specified exceptions to the need for prior written consent including:

a) A pre- nuptial agreement made by one of the spouses with a third party to sell the house in question that is alleged to be the family home
b) A conveyance by one spouse of an interest of the home to a **bona fide** purchaser for full value without notice of the fact of marriage
c) A conveyance by a person other than a spouse of the interest
d) A conveyance by one spouse after a decree of Judicial Separation in proceedings instituted after the coming into force of the Family law Act 1995 on August 1st 1996.

Case-law has established that **section 3 of the Family Home Protection Act 1976** has no application to the registering of a judgement mortgage against the family home pursuant to the provisions of the Judgment Mortgage (Irl) Acts 1850 and 1858 and therefore a spouse's written consent is not required in relation to such dispositions. Consent by a non-owning spouse to a disposition of the Family home must be based on a full, informed consent. The test for 'informed consent' is subjective. Attempts by financial institutions to seek sole ownership of a family home on the basis of failure to repay debts have had mixed results in the Irish courts. The courts have adopted a protective approach regarding the family home and banks have had a heavy burden of proof to show that a proper consent was given in relation to a spouses assent to the family home being used as 'collateral' in an outstanding financial debt. Consent may be dispensed with in some

circumstances.

1.2.1.4 Professional occupation of one of the spouses

One spouse cannot control the other spouse in relation to occupation. The husband cannot prevent his wife from working outside the home. However, the Irish Constitution does explicitly recognise that the woman's place is in the home.

> Article 41.2.1 stipulates
> 'In particular, the State recognises that by her life within the home, a woman gives to the State a support without which the common good cannot be achieved'.
>
> Article 41.2.2 asserts that
> '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 within the home'.

One spouse cannot prevent the other spouse from using their own surname. The Individual personality of a person is a presumed human characteristic under Irish law. In theory, articles 41.1 and 41.2 of the Constitution recognise the wife as the primary rearer and carer of the family within the home. However this would not be regarded as being too important in modern society.

1.2.1.5 Opening of bank accounts or safety deposit boxes

Where money is deposited into a bank account by one spouse in their joint names the presumption of a resulting trust in these circumstances may be rebutted by the presumption of advancement and prima facie the relationship between the parties will usually result in the survivor taking the balance remaining in the account beneficially. The presumption of advancement may be rebutted where it is proved that this was not the intention of the spouse who deposited the money. Where spouses separate and they had a joint bank account with the intention of pooling their resources, the monies in this account will not be divided in accordance with their respective contributions but rather on an equal basis. However, either spouse can acquire sole beneficial ownership of assets purchased with monies from such a joint account.

1.2.1.6 Representation by the spouses, e.g. for domestic purposes

None

1.2.1.7 Protection against acts of one of the spouses which may endanger the family property

Section 5 of the Family Home Protection Act 1976 confers on the Circuit Court and the High Court a general discretionary power to make orders to protect the right of a spouse to reside in the family home. Applications under this section can be brought in proceedings solely initiated under it or in proceedings initiated seeking a judicial separation or divorce. Sub-section 5(1) provides:

> 'Where is appears to the court, on the application of a spouse, that the other spouse is engaging in such conduct as may lead to the loss of any interest in the family home or may render it unsuitable for habitation as a family home with the intention of depriving the applicant spouse or a dependent child of the family of his residence in the family home, the court may make such order as it considers proper, directed to the other spouse or to any other person, for the protection of the family home in the interest of the applicant

spouse or such child'.

A wide variety of possible orders can be made by the Court when section 5(1) is judged to be applicable. The jurisdiction conferred by this section may be invoked by a wife if her husband;

(a) refuses or fails to pay any further mortgage repayments due or rent payable in respect of the home and can afford to make these payments, or he deliberately renders himself unable to afford to make such payments, for example, by giving up his employment
(b) breaches covenants in the lease of the home which could result in forfeiture; or
(c) advertises that the family home is for sale, or puts it onto an estate agents books: or
(d) suffers a judgment in collusive proceedings brought by a friend with the intention of ultimately being forced to sell the home to meet the award made in the judgment following upon the friend registering a judgment mortgage against the home, or deliberately fails to discharge a debt payable to a genuine creditor who has obtained judgment against him at a time when he can afford to discharge the debt due or is in a position to raise funds to discharge the debt due and so behaves in the hope that the judgment creditor will register a judgment mortgage against the family home to enforce a sale; or
(e) attempts to demolish part of the family home or remove slates from the roof; or
(f) cuts off or has cut off the electricity, gas, water or any other essential supplies.

The types of behaviour outlined in parts (a) – (d) could be regarded as conduct likely to lead to a loss of an interest in the family home, whilst (e) and (f) could be regarded as such as to render the home 'unsuitable for habitation as a family home'. Such conduct by itself will, however, be insufficient for a successful invocation of the court's jurisdiction. For the court to intervene in such circumstances, the section requires proof that a husband acted in such a fashion 'with the intention of depriving' his wife or a dependent child of the family of his or her residence in the family home. The deliberate conduct required under the section does not necessarily require that a spouse must actually do something in that it covers omissions of the husband in relation to payments involving the family home.

If the requisite intention has been proved, it is judicially accepted that section 5(1) of the Family Home Protection Act 1976 confers a wide discretion on the court to determine what type of order should be made and that this discretion may extend to ordering a spouse to transfer the family home or his interest in it to the other spouse or to the making of other orders to protect the home.

Section 5(2) of the Family Home Protection Act 1976 seeks to protect a spouse's right of residence in the family home through empowering the court to award a spouse compensation when they have been deprived of their right to reside in the family home and also confers on the court a general discretionary power to make such other orders as are 'just and equitable'. It provides:

Where it appears to the court, on the application of a spouse that the other spouse has deprived the applicant spouse or a dependent member of the family of his residence in the family home by conduct that resulted in the loss of any interest therein or rendered it unsuitable for habitation as a family home, the court may order the other spouse or any other person to pay to the applicant spouse such amount as the court considers proper to compensate the applicant spouse and any such child for their loss or make such other order directed to the other spouse or to any other person as may appear to the court to be just and equitable.

If a husband fails or refuses to pay mortgage instalments on the family home resulting in a bank or building society obtaining court orders whereby it takes possession of and sells the home, a wife may apply for a compensation or 'other order' under section 5(2) of the Family Home Protection Act 1976. However, if the mortgage arrears accumulated due to a husband being genuinely financially unable to make the payments, no such order will be made. A wife may seek an order for compensation if a judgment creditor sells the family home to obtain payment of monies due arising out of a judgment obtained against her husband if the husband could otherwise have discharged the monies due pursuant to the judgment.

There is no statutory guidance as to the amount of compensation that should be awarded and as to when orders other than compensation orders should be made. An anomaly has arisen in relation to subsection (1) and subsection (2) in that despite the fact that the court may not be able to act under sub-s (1) to prevent the loss of the family home or to prevent the husband rendering it uninhabitable due to the lack of proof of intention, the court may make a compensation order under sub-s (2) to make the husband compensate his wife for conduct they were powerless to prevent.

Section 3(1) of the Family Home Protection Act requires the prior written consent of a spouse where the other spouse purports to convey an interest in the family home to any person except the other spouse.

1.2.2 Matrimonial property regime provided by law (statutory regimes)

1.2.2.1 (Secondary) regime applicable to spouses in case they have not entered into a marriage contract. Whether or not the law provides in a regime.

Parties who have not entered into a formal marriage contract are treated in law as legal strangers. Then they own the property in relation to the quantum of monies paid.

1.2.2.2 In case a regime is provided by law: contents, organization, composition of property (assets, debts), rights of creditors

None

1.2.3 Marital Settlements (contractual regimes)

Succession Act may be contracted out of before and after marriage; right to seek spousal maintenance may not.

1.2.3.1 Description of the contents of well defined matrimonial property regimes (e.g. specified in legislation) which spouses may declare applicable to their relation (e.g. community property, separation of property; community of gains)

None

1.2.3.2 Marriage contracts: freedom of spouses in developing a regime? Admissability of the contract? Usefulness of a marriage contract? Conditions for validity (in contents and in form), capacity of spouses, agreement to enter into the marriage contract, effects of the marriage contract (the description should depart from the main rules)

Under Irish law, Marriage is a civil contract and for all contracts there must be 1) Capacity to Contract and 2) The Formalities to the Contract must be observed. Both requirements **must** be satisfied. Irish marriage contracts involve four conditions:

a) It must be voluntary

b) It must be potentially for life
c) It must be monogamous
d) It must be between parties of a different sex. Heterosexual marriage is regarded as being both a contract and a relationship based on partnership. Each party must be 18 years of age. Certain formalities are laid down by statute. **Section 32 of the Family Law Act 1995** requires that both parties to the marriage give a twelve week notification of the marriage to the registrar of marriages. Exceptions are possible for the age requirement and the twelve week notification requirement to the registrar of marriages.

1.3 CHANGE OF MATRIMONIAL PROPERTY REGIMES

1.3.1 Principles

None

1.3.1.1 Changeability (or not) of the matrimonial property regime during marriage

None

1.3.1.2 Justification of the principle

None

1.3.2 Modalities for change

1.3.2.1 Competent authorities

None

1.3.2.2. Substantive and fromal requirements

None

1.4 PUBLICATION OF THE REGIME

None

1.4.1 Principles

None

1.4.1.1 Existence (or not) of a system which makes publication of the matrimonial property regime possible

None

1.4.1.2 Justification of the existence (or not) of such a system: protection of third parties, notably of children of the household, of creditors of the household

None

1.4.2 Modalities for publication

None

1.4.2.1 Competent authorities

None

1.4.2.2 Substantive and formal requirements

None

1.4.2.3 Publication of the initial regime: actual manner in which the publication is organised, competent authorities, existence of public register for the publication

None

1.4.2.4 Publication of the initial regime: methods, conditions .....

None

1.5 ADMINISTRATION OF ESTATES

Chattels, Goods and Personal property

1.5.1 Under the Regime provided by law (statutory regime)

Property is defined as 'that which can be owned'. The term is subdivided into real property (realty) and personal property (personalty) under the Irish common law legal system. Property is also divided into movables and immovables similar to the Romano – Germanic legal system. Accor ding to the general principle of separate property, each spouse has equal and independent power to acquire and deal with his or her own property. The application of this principle in practice, however, did not result in wives achieving equality in property ownership due to the predominance of the husband as the sole or main income earner. Unless property was acquired by a wife in her sole name or in joint or common ownership with her husband, a wife with no independent income of her own acquired no ownership rights or beneficial interest in either the family home or any other property acquired by her husband during his lifetime. However, case law established that where a wife made a substantial direct or indirect monetary contribution to the acquisition of property held by a husband in his sole name, she could acquire an ownership right in such property proportionate to the contribution made by her to its acquisition.). A separate property system operates in that, *prima facie*, each spouse can take from the marriage the property that he or she brought into the marriage. At first glance, the separate property system appears just and fair. Property is divided into 'his' and 'hers'. However in reality most assets tend to become mingled during the course of the marriage and if one spouse is a breadwinner, then most assets will tend to be in the chief breadwinner's name when the marriage has come to an end.

Property division on divorce is not a rule – based one of law, having as its chief aim the goals of certainty and parity between one case and another. Divorce orders in relation to property adjustment are made within the framework of a statutory code which allows family courts to exercise broad discretionary powers and which at the same time 'fetters' the judicial discretion to some extent. Unpredictability is the key characteristic of the outcome of contested divorce cases.

1.5.1.1 Management of private, personal, community or separated property

The general legislative sources in Ireland in relation to Matrimonial Property include:
In relation to **married couples**, **section 36(1) of the Family Law Act 1995** provides that either spouse may apply to the Circuit Family Court or the High Court to determine any question relating to the title or possession of any property. This legislation is intended to represent the doctrine of

Separate Property which operates under Irish law which applies to the property acquired by a married person. On a purely abstract level, this system or doctrine gives some recognition to equality between married individuals of either sex. The separate property system taken in isolation does not adequately protect the weaker spouse (usually the wife).

Section 9 of the 1995 Act allows the court on granting a decree of Judicial Separation or at any time during the lifetime of the respondent spouse to make a property adjustment order. The court may grant one or more of these orders. (Section 9(1))

Section 21 of the Family Law (Maintenance of Spouses and Children Act 1976 states that any financial allowance made by one spouse to the other spouse for the purpose of meeting household expenses, and any property or interest acquired out of such allowance, shall, in the absence of any agreement, whether express or implied between them to the contrary, belongs to the spouses as joint owners. Any savings accumulated from such allowances are also regarded as jointly owned. The act curtails to a limited extent the rights of a spouse over real and personal property. This occurs when any property purchased by a spouse out of any allowance provided by the other spouse for household purposes is regarded as jointly owned, as are any savings accumulated from any such allowance.[1]

The **Family Home Protection Act 1976** was enacted in order to ensure that an owning spouse does not sell or otherwise dispose of any legal or beneficial interest in the family home behind the back of and without any prior consent of the non-owning spouse. (This consent must be a prior written consent)

Under the **Succession Act 1965** there is provision for a legal right share for a spouse upon the death of the other spouse. Prior to the commencement of the Act, a testator had complete freedom to dispose, and could disinherit both his wife and children and leave them penniless if he so desired. The Act curtailed this freedom. If the Testator leaves a spouse and no children, then the surviving spouse is entitled to half the deceased's estate as a legal right share. (Section 111(1)) If the Testator dies leaving a spouse and children, then the spouse is entitled to one third of the estate. (Section 111(2)) If the husband dies intestate and they have issue, she automatically inherits two thirds of his estate or, if they have no children, she inherits all of her husband's estate.

In the case of divorces, **section 15 (1)(b) of the Family Law (Divorce) Act 1996** applies in the case of any dispute as to the ownership of property and assets. In our common law system, spouses have no statutory right to claim a share of each others property upon divorce. As such they are treated by the law largely as if they were strangers. (There are, however, some exceptions, notably with respect to the family home). A separate property system operates in that, *prima facie*, each spouse can take from the marriage the property that he or she brought into the marriage. At first glance, the separate property system appears just and fair. Property is divided into 'his' and 'hers'. However in reality most assets tend to become mingled during the course of the marriage and if one spouse is a breadwinner, then most assets will tend to be in the chief breadwinner's name when the marriage has come to an end. Property division on divorce is not a rule – based one of law, having as its chief aim the goals of certainty and parity between one case and another. Divorce orders in relation to property adjustment are made within the framework of a statutory code which

[1] If a husband gave his wife as housekeeper money out of his own income, any money not spent by her on any property acquired by her with it, was, at common law regarded as belonging to her husband, unless it was his intention to make a gift to her.

allows family courts to exercise broad discretionary powers and which at the same time 'fetters' the judicial discretion to some extent. Unpredictability is the key characteristic of the outcome of contested divorce cases.

1.5.2 Under marital settlements

Parties can dispose of their own personal goods if they have complete ownership of the goods. Property ownership is determined according to the money spent on that property.

1.5.2.1 Management of private, personal, community or separated pporperty

1.5.2.2 Intervention by spouses

If one spouse to a marriage contract elects to sell or rent land they do not need to obtain the consent of the other spouse if it is his own separate property in use. However, if such selling or renting of land impinges on the Family Home, prior written consent of the other spouse will be required under section 3(1) of the Family Home Protection Act 1976. Section 3(1) of the Family Home Protection Act 1976 provides that if a spouse without the prior written consent of the other spouse purports to convey any interest in a family home to any person except the other spouse, the purported conveyance is void subject to certain specified statutory exceptions. It will not apply where such interest is vested in either spouse

1.5.3 Contracts between Spouses during marriage

1.5.3.1 Sales between spouses

Sales between spouses are restricted but they may be allowed under certain circumstances. There is a presumption in law that spouses do not intend to create legal relations in relation to interspousal agreements / arrangements. They are regarded as family transactions and the presumption is that they are not intended to be legally binding. This legal presumption may be rebutted. It is a presumption of fact rather than of law. The more formal the agreement, the easier it will be to rebut the presumption. In recent years, transactions between spouses have tended to be viewed as creating legal relations.

1.5.3.2. Gifts between spouses

The **Presumption of Advancement,** which is an equitable principle, operates in cases where a husband transfers his property into the sole name of his wife. It is presumed in the absence of evidence to the contrary that this was intended to be a gift to the wife. However, this presumption is gender specific in that it fails to operate in circumstances where the wife transfers property into her husband's name. Where a wife provides all or part of the purchase price for a house that is bought in her husband's name, he is regarded as holding all or part of the property on trust for her, by way of resulting trust. She owns a beneficial interest in the property, proportionate to her contribution to its purchase, although the whole title is vested in him. The Presumption of Advancement may be rebutted by evidence that the husband intended to retain the beneficial interest in a property all or a portion of which was placed by him in his wife's name. It remains applicable where subsequent to a particular transaction a voidable marriage is annulled or a marriage is validly dissolved, but is not applicable where the couples marriage is void.

1.5.3.3 Companies – these are admitted.

Family owned private companies are not a separate statutorily recognised legal category of private company as devised under the **Companies Acts 1963-1990**, the 1963 Act being referred to as the ''Principal Act''. However, these family owned private companies are identified as being intrinsic to Irish business life. They meet the requirements of **section 33(1) of the Principal Act**. Section 33(1) of the Principal Act defines a private company as a company which has a share capital and which by its articles of association:

a) restricts the right to transfer its shares, and
b) limits the number of its members to fifty, not including persons who are in the employment of the company and persons who, having formerly been in the employment of the company, were, while in that employment, and have continued after the determination of that employment to be members of the company, and
c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

Family owned private companies meet these requirements but they are peculiar by virtue of the fact that they are exclusively, or predominantly, controlled by the members of the same family, whether of the nuclear or the extended variety, thus encapsulating marital spouses. What is particularly interesting about this type of company is that within these companies there is always potential for a shift in shareholdings due to death, sale, marriage or otherwise. Such a possible source of dispute may be prospectively catered for by strong pre-emption rights on the transfer or transmission of shares. Pre-emption rights may be contained in a company's articles of association or in a shareholders' agreement. Frequently, family owned private companies may also be characterised as being **quasi-partnership companies**, or closely – held companies. It is also possible for spouses to form *de-facto* and *de jure* **single member private companies** as implemented in Ireland by virtue of the European Communities (Single – Member Private Limited Companies) Regulations 1994 since October 1994. Prior to this date, many companies were in reality owned by one person. In such companies one person beneficially owned 100% of the shares in the company; that person holding 99% of the shares legally, his spouse or other nominee holding the remaining 1%.

1.5.3.4. Employment Contracts

Several of the Irish Employment Acts exclude employees who are close family relations of their employers. The Protection of Young Persons (Employment) Act 1996, and the three principal Acts dealing with dismissal from employment (the minimum Notice and Terms of Employment Act 1973, the Unfair Dismissals Acts 1977-93, and the Redundancy Payments Acts 1967-1979) do not apply where the employer is a relative as defined in those Acts and, additionally, where both parties dwell in the employer's house or on his farm. The legislative formula used for this purpose is that these Acts shall not apply to a person who is employed by his/her spouse, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother or half-sister who is a member of the employer's household, and whose place of employment is a private dwelling house or a farm in which the employer and employee reside.

1.6 DISSOLUTION, LIQUIDATION AND DIVISION OF THE MATRIMONIAL PROPERTY REGIME

1.6.1. Following the dissolution of the Matrimonial Bond

In relation to **Nullity**, the court has no power to order a former spouse to contribute to the other former spouse's support. The wife can only obtain *'alimony pendente lite'* (pending the hearing of a nullity case) from her husband. The only recourse left open to the parties is to seek an order under **section 36 of the Family Law Act 1995** in separate summary proceedings to have determined by the courts any dispute arising between them as to the title or the possession of the property. They may also at any time institute summary proceedings under the **Partition Acts 1868 – 1876** to seek orders for partition or sale in lieu of partition of any property held by the parties in their joint names. None of the protections available under the **Family Home Protection Act 1976** apply to the family home as where the marriage is annulled, it is no longer regarded as a 'family home'.

In the event of a **Judicial Separation**, the court may determine any question relating to title or possession of the property. It may also make a Property Adjustment Order upon granting a judicial separation during the lifetime of the respondent under section 9(1) of the Family Law Act 1995. This section empowers the court to order one spouse to transfer his or her interest in a property to the other spouse. The Property Adjustment Order may be made in favour of a dependent member of the family or to a specified person to be held by them for the benefit of a family member. According to section 14(3) of the Family Law (Divorce) Act 1996 this order cannot be made in favour of a spouse who has remarried. Section 14(7) contains a further restriction precluding the operation of the section in the context of the family home in which a remarried spouse ordinarily resides with his / her new spouse. Due to the no clean break jurisdiction that operates in Ireland, applications may be made for the Property Adjustment Order on many occasions unless the first order made specifically excludes or restricts any further applications in accordance with section 14(2) of the Family Law (Divorce) Act 1996. In practice, orders under section 14 are usually made by way of simple transfer of the property, usually the home and contents, from one spouse to another in consideration of a lump sum payment by the other spouse to the value of their interest in the property, or a portion thereof depending on the transferees ability to pay. The basic approach to be adopted by the court in deciding whether to make such orders is to attempt to ensure that proper provision exists or will be made for each spouse and for any dependent family member having regard to the circumstances of the case. In the context of divorce proceedings, the court will normally have regard to section 20 which contains the criteria for distribution within the Divorce Act 1996 when deciding whether or not to grant a Property Adjustment Order. **Section 16 of the Family Law Act 1995** is the equivalent provision to this, however it differs in the sense that the Family Law Act does not direct the court to have any regard to any Separation agreements made between the parties, as is laid down in section 20(3) of the Family Law (Divorce) Act 1996. Property is not defined so it is broad enough to include anything which can be owned and includes the Family Home, holiday home or investment property. It would include stocks, shares, any future interests or future inheritance. Orders when made usually relate to the family home but this does not preclude orders being made in relation to the other property. Many separating couples negotiate and agree the terms of their separation which are embodied in a deed of separation. The terms of the settlement are made orders of the court pursuant the Family Law Act 1995.

In relation to **Divorce**, section 15(1)(b) of the Family Law (Divorce) Act 1996 applies to the resolution of any dispute in relation to the ownership of any property or assets upon a divorce being granted. Section 14(1)(a) of the Divorce Act provides for property adjustment orders to be granted following a divorce being granted. The Property Adjustment Order may be made in favour of a dependent member of the family or to a specified person to be held by them for the benefit of a family member. According to section 14(3) of the Family Law (Divorce) Act 1996 this order cannot be made in favour of a spouse who has remarried. Section 14(7) contains a further restriction precluding the operation of the section in the context of the family home in which a remarried spouse ordinarily resides with his / her new spouse. Due to the no clean break jurisdiction that operates in Ireland, applications may be made for the Property Adjustment Order on many occasions unless the first order made specifically excludes or restricts any further applications in accordance with section 14(2) of the Family Law (Divorce) Act 1996. In practice, orders under section 14 are usually made by way of simple transfer of the property, usually the home and contents, from one spouse to another in consideration of a lump sum payment by the other spouse to the value of their interest in the property, or a portion thereof depending on the transferee's ability to pay. The basic approach to be adopted by the court in deciding whether to make such orders is to attempt to ensure that **proper provision** exists or will be made for each spouse and for any dependent family member having regard to the circumstances of the case. In deciding whether or not to make a property adjustment order, the court must have regard to the matters set out in section 20 of the Family Law (Divorce) Act 1996. Property is not defined so it is broad enough to include anything which can be owned and includes the Family Home, holiday home or investment property. Orders when made usually relate to the family home but this does not preclude orders being made in relation to the other property. Many separating couples negotiate and agree the terms of their separation which are embodied in a deed of separation. The terms of the settlement are made orders of the court pursuant the Family Law Act 1995.

1.6.1.1 Proof of ownership

In Ireland, there is quite a high level of home ownership. Due to the increase in the cost of housing, in alot of cases two or more people purchase a property together. The Irish Constitution 1937 gives protection to private property ownership. Marriage does not impose a matrimonial property regime. The property rights of spouses remain the same after marriage as they were before it. Any adjustments take place only in the event of an agreement between the spouses or such an adjustment is placed on the spouses by the court. The Family Home can be owned in the joint names of both spouses as joint tenants or as tenants in common. The property may be owned in the sole name of one spouse. This occurs in a number of situations, for example:

I. where the property has been inherited by one spouse – this applies in particular to residential farms and businesses.
II. where the property has been purchased by a spouse prior to marriage.
III. In some cases the spouses may have stated a preference that the property be registered in the sole name of one spouse.
IV. If one spouse has a serious health difficulty and may not get life assurance to underpin the mortgage.
V. To protect the home from business debts and creditors.

The Family Home Protection Act 1976 encourages spouses to place the Family Home in joint names as joint tenants and such transactions are relieved from all stamp duty and registration fees. Most lending institutions will readily give their consent to the vesting of a Family Home in joint names as husband and wife.

Upon Divorce or separation, the court calls for a pooling of the assets of the couple in question. In essence the parties can settle their property upon the termination of their relationship by referring the dispute to the court or through the mediation process. The solicitors acting on behalf of each party also presents an **Affidavit of Means** to the court from which the Judge decides how the property is to be divided. **Order 78, rule 18 and Form 2 of the Circuit Court Rules** set out the contents and the format of the Affidavit of Means. The Affidavit of Means contains 5 schedules. The following details are to be contained in the affidavit, which is to be sworn by each party to the proceedings in the case where financial relief is being sought:

i. details of the party's **income** [from whatever source. State the income on a gross and net basis. Detail all the deductions made from the gross income on a regular basis.] **Assets** [all assets, including those in which the applicant or respondent may have only an equitable interest, should be mentioned], **debts** [List all institutions to whom monies are owed], **expenditure** [list the outgoings of the applicant and respondent on either a weekly, monthly or annual basis] and other liabilities wherever situated and from whatever source;
ii. Similar details in relation to any **dependent member** of the family;
iii. If a pension adjustment order is sought, the affidavit should wherever possible include the nature of the scheme, the benefits payable thereunder, the normal pensionable age and the period of reckonable service of the member spouse. In this regard, Order 78, rule 18 only deals with these details insofar as they relate to an order being sought under section 12 of the Family Law Act 1995 but presumably the same criteria apply. In the case of **L.(J) v. L(J)** [1996] 1 Fam. L.J, Justice McGuinness reminded the solicitors involved in the case that the swearing of the Affidavits of Means was mandatory under the rules of the Circuit Court. An Affidavit of Means should be based on full and frank disclosure of all the assets, income, benefits-in kind and emoluments of the person swearing the affidavit, and should also comprehensively disclose all liabilities, outgoings and pension and information.

1.6.1.2 Methods of Division

The Judge in the Circuit Family Court or the High Court will decide the ways in which the property will be distributed in the case of divorce having regard to section 20 of the Family Law (divorce) Act 1996. Property (real and personal) can be divided by a Consent Order – an agreement between the parties which is subsequently made an Order of the Court. In the absence of consent, the parties take proceedings in the courts. The proceedings are adversarial and the model of adjudication is largely a discretionary one. The legislation permits such general and particular discretion.

1.6.1.3. Possibilies for compensation, equitable rights

Under Irish Divorce Law, the concept of compensation does not expressly apply. Nor is the concept of equitable rights applicable. The Courts have full and absolute discretion to divide the assets. Judicial discretion is paramount in spite of the express statutory criteria for distribution of the assetsUnder the purchase money resulting trust, direct or indirect contributions by one spouse to the family home may merit a beneficial interest in the family home according to equitable principles. Coupled with this, the equitable presumption of advancement may operate to the

detriment of the husband whereupon he transfers the property into the name of the wife and as a result it will presumed to be a gift to her. However the latter may be rebutted.

1.6.1.4. Competent authorities

A sole Judge in the Circuit Family Court has the jurisdiction to divide the marital assets. A Justice of the High Court also has concurrent jurisdiction to make such divisions if the value of the land is over and above a certain amount or if the parties opt for it.

1.6.2. Following the death of one of the Spouses

1.6.2.1. Proof of ownership

The assets are distributed according to the testator's directions in a will that is made in accordance with the provisions of the Succession Act 1965. They may also be distributed according to the 'legal right shares', depending on who survives the deceased – A spouse and issue, in which case the spouse would be entitled to one third of the testator's estate or, merely a spouse, whereby she would be entitled to half of the deceased's estate.

1.6.2.2. Methods of division

A member of the Judiciary would determine how the property is to be divided most predominantly in a case where the spouse dies intestate, i.e. in the absence of a will. In the situation where a will has been made, the executor, as named under the will must divide the property up according to the testators wishes as stated in the will. Where a gift by will in favour of the surviving spouse of the deceased, is not expressed to be in addition to the legal right share, the spouse has a right of election under section 115(1)(a) to choose either the gift or the legal right share. In addition, if the deceased died partially testate, the spouse can elect between the legal right share on the one hand and the gift under the will on the other together with his entitlement under the rules of intestacy on the other.

1.6.2.3. Possibilities for compensation

Equity intervenes where no will has been made and the rules of intestacy are applied. In addition, under section 117 of the Succession Act 1965, where the court is of the opinion that a testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by will or otherwise, the court may order that such provision will be made for the child out of the estate as the court thinks just. Where a child claims that such a failure has occurred, the court must consider the application from the point of view of a just and prudent parent, while taking into account the position of each of the testator's children so as to be as fair as possible to the child who is making the application and the other children. The compensation issue as applies in France does not apply in Ireland.

1.6.2.4. Competent authorities

The Judiciary is the appropriate authority for dealing with these issues. If the will is unclear, the Courts of Equity will adjudicate on the interpretation of the will.

1.7 OTHER REMARKS

None

CHAPTER 2.
MATRIMONIAL PROPERTY. PRIVATE INTERNATIONAL LAW

2.1 GENERAL REMARKS

Worldwide, there are several different types of marital property systems in operation. They range from 'separate property' systems, which historically have commanded support in most common law jurisdictions, to 'community property' systems mainly favoured by civil law jurisdictions. In relation to conflict rules in the area of matrimonial property law, policies affecting marriage, property and contract converge. In the past, marriage was regarded as a lifelong commitment, the primary maintenance obligations fell on the husband and where relationships essentially fell outside marriage, few, if any mutual legal responsibilities and entitlements existed. However, in he recent past, marriage has come to be regarded as involving an essentially revocable commitment, with the presence of divorce and wives do not possess as many maintenance entitlements. The long-term trend in countries with liberal divorce is toward a separate property regime. It is against this background that the conflict rules concerning family property must be examined. In Ireland specifically, several policy goals may come into consideration. These include support for marriage, protection of the economically disadvantaged spouse, promotion of sex equality, respect for the individual autonomy of the spouses, protection of third parties including creditors and reducing legal complexities resulting from connections between the spouses and the property laws of different countries.

2.1.1 Sources

2.1.1.1 Principal international sources

The Hague Convention on the Law applicable to Matrimonial Property Regimes of 14 March 1978.In relation to Marriage Recognition there are many multilateral and bilateral treaties in place. These include the 1889 and 1940 **Montevideo Treaties on International Civil law,** which generally adopt the general principle of *lex loci celebrationis* to determine marriage validity.

The Jurisdiction of the Courts and Enforcement of Judgments Acts 1988 and 1993 (The Brussels and Lugano Conventions) – these Acts give domestic effect to European Union Conventions [The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1969); The Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1988)] which provide for the reciprocal recognition and enforcement of civil and commercial judgments, including maintenance orders by the Courts of the Members States of the European Union and the European Free Trade Association (EFTA). In effect, these measures allows Irish Maintenance Orders to be recognised in all EU and EFTA countries which have ratified the relevant Conventions and maintenance orders made by those countries are enforceable under Irish Domestic Law. However, recognition and enforcement does not extend to all ancillary orders made in matrimonial and family proceedings. Article 1.1 expressly excludes their application from 'the legal status or capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession'. Thus, a lump sum order made to compensate a spouse for contributions, monetary and non-monetary, made to a marriage or for the loss of marital status does not fall within the scope of the Convention. Property Adjustment orders

arising out of a marital relationship made upon the granting of a decree of judicial separation or divorce are also excluded from its ambit.

Brussels II Convention – Council Regulation (EC) No.1347/2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial matters (signed May 29,2000) – this will govern the matter of recognition of court judgments regarding marital status obtained in other member states. **Article 293 of the EC Treaty** - This requires states to take measures, *inter alia,* to simplify the formalities governing the reciprocal recognition and enforcement of judgments. This was formerly a multilateral agreement between states. It has now been incorporated into EU law by a Council Regulation which means that its provisions will be directly and uniformly applicable to all member states.

Bilateral Treaties: Maintenance Orders Act 1974 – This Act came into force in 1975, providing for the reciprocal recognition of maintenance orders between Ireland and a 'reciprocating jurisdiction', that is Northern Ireland, Scotland, England and Wales. It also provides for the making of maintenance orders in the State against persons residing in any of those jurisdictions.

2.1.1.2 Principal statutory sources

Statutory sources include **section 22(b) of the Maintenance Act 1994** which provides that an order made by a foreign court may be recognised in this jurisdiction as long as the maintenance claimant was resident in the foreign jurisdiction at the date of the commencement of the proceedings. The Maintenance Act 1994 allowed Ireland to ratify the 1990 Rome Convention between the Member States of the EU on the Simplification of Procedures for the Recovery of Maintenance Payments and the 1956 New York Convention between Member States of the United Nations on the Recovery of Maintenance Abroad. Both Conventions provide for the establishment of a central authority in each signatory state. Under the 1990 Convention, a person who has already obtained a maintenance order may apply for its enforcement through the central authority of his or her resident State. Under the New York Convention, the Central Authority may initiate original maintenance proceedings where required on behalf of a maintenance claimant. The maintenance claimant's Central Authority transfers the necessary documentation to the Central Authority of the State where the Maintenance Debtor is living. That Central Authority then becomes responsible for the recovery of the maintenance that is sought.

2.1.1.3 Principal sources in case law and in customary law

In addition to providing for the reciprocal enforcement of Maintenance Orders, it has been held by the European Court of Justice in F v.L [20th March 1997 (Case no. 295/95)]that the Brussels Convention can be utilised by an applicant domiciled or resident in one of the EU Member State to apply for a maintenance order against a respondent domiciled or resident in another member state.

2.1.1.4 Reforms

None

2.1.2 Historic Development

2.1.2.1

The conflicts of laws is part of Irish Law. Patterns of trade and emigration inevitably present questions in relation to conflict of laws situations. The fact that Ireland was an important object of attention of the English courts has presented several questions before the Irish Courts in

relation to title to land or other property owned in Ireland by the English, Welsh and Scottish domiciliaries or residents.

The **Irish Constitution 1937** is the basic law of the State and all statutory and non-statutory Irish law is subject to its provisions. However, by their nature, conflicts rules embrace reference to the laws of other countries, and it might be considered that they should be permitted to operate freely and without constitutional constraint.

The Irish Constitution recognises the right of all people, not just Irish citizens, to the right to life, as well as to marry and own property. The Conflicts rules have been regarded as simply neutral, formal provisions-rules of expediency, devoid of substantive justice. It has been argued that the existence of the rules of Private International Law were presupposed in drafting the individual country's Constitution. Since the constitutional provisions were adopted within the framework of existing conflicts law, the argument runs that constitutional law should be considered subject to private international law in the hierarchy of norms. However, in many instances, the conflicts rules, as they have been developed, will afford such significant protection that recourse to constitutional principles will be otiose; but there is no reason to suppose that the two approaches will always necessarily coincide.

The Hague Conference has twice promulgated Conventions dealing with matrimonial choice of law rules. The first, enacted in 1905, dealing with the effects of marriage generally was ratified by ten nations, two of whom withdrew. In 1976, the Conference promulgated the Convention on the law applicable to matrimonial property regimes. The 1968 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters in proceedings relating to maintenance. In the same year-1968, the Conference promulgated the **Convention on Celebration and Recognition of the Validity of Marriages .** In 1990 a Convention was signed between member states on the Simplification of Procedures for the Recovery of Maintenance payments. In 1970, the Hague Convention on the Recognition of Divorces and Legal Separations was enforced to try and counteract the problem of 'limping marriages'.

2.1.3. General Notions of Private International law

2.1.3.1 Characterisation

In legal proceedings, the courts are constantly characterising the raw facts of human interrelationships. Yet facts of themselves have no particular legal significance. That legal significance can only come from a hierarchy or hierarchies of intermeshing legal norms. If we think of any human occurrence, we can properly examine its possible legal significance for the purposes of Irish law only if we are familiar with the entire corpus of Irish law.

These problems of characterisation are complex in our internal law and are multiplied when we consider the conflicts of laws. The choice of law rules in the conflict of laws ''require mutually exclusive classes of rules''. The conflict of laws has tried to confront the totality of human experience and break it down into discrete categories and subcategories to which particular choice of law rules apply. An example, under conflicts rules, is the formal requirements for marriage which are to be governed by the law of the place where the marriage is celebrated. (*Lex loci celebrationis)*

There are a number of approaches in relation to characterisation in the context of the conflict of laws. The first approach would be for the court of the forum to characterise legal rules in accordance with the concepts of its internal law as it makes it easy for the court to apply its own choice of law rules. However, it can cause difficulties where the foreign law finds no counterpart in the forum's internal law. The second approach involves applying the *lex causae* which is 'the appropriate foreign law'. It has been argued that this approach avoids the danger of distorting a foreign rule by reflecting it in the mirror of its own legal concepts. The problem with this approach is that it is impossible to know what the *lex causae* is until a process of characterisation has resulted in its identification . The third approach was proposed by Beckett and stated that characterisation should be performed in accordance with analytical jurisprudence, "that general science of law, based on the results of the study of comparative law, which extracts from this study essential general principles of professionally universal application, not principles based on or applicable to, the legal system of one country only". Irish courts have tended to view **Domicile** in accordance with the ***lex fori***, that the ***lex situs*** should determine whether property is moveable or immoveable, that the ***lex fori*** should characterise matters as procedural or substantive.

2.1.3.2. Renvoi and legislative text or court decision relating thereto

'Renvoi– (1) When Irish law refers to a person's **lex domicilii**, it intends that the internal law of a country should be applied, without regard to their conflicts rules, on the basis that, by becoming domiciled in the country, the person has become integrated into its internal social and legal framework.

(2) **Partial renvoi** requires the Irish court, when interpreting the law of a foreign country, to be guided by the choice of law rule of private international law where the choice of law rule refers such a case either to **Irish law** **(remission)** or to the law of a **third country (transmission).**

(3) The third approach requires the Irish court to refer to the relevant foreign law, but if that foreign law proceeds on a different basis than Irish law, as for example referring to the **lex patriae** rather than the **lex domicilii**, the Irish court should apply Irish internal law in default.

(4) If the Irish court is referred by our conflict of law rules to the law of another country, the Irish court should find out, and apply, the law that the foreign court would apply to the case in question. If a French court would apply French internal law, then the Irish court should also apply French internal law. If the French court would apply the law of a third country then the Irish court should follow suit.

(5) Renvoi as part of the Common law.

2.1.3.3. Notion of Public Policy

Public policy – an Irish court will not enforce or recognise a foreign decision if it is manifestly contrary to public policy. Our law reserves the right not to apply a foreign law where the conflicts rules would otherwise call for its application if to do so would be contrary to Irish public policy which is clearly enshrined under the basic law of Ireland under the Irish Constitution. In **Buchanan Ltd. v. McVey**, [1954] I.R. 89 at 106, Kingsmill Moore J said that 'in deciding cases between private persons in which there is present such a foreign element as would ordinarily induce

the application of the principles of a foreign law, Courts have always exercised the right to reject such law on the ground that it conflicted with public policy or affronted the accepted the accepted morality of the domestic forum". This right will not be exercised lightly as otherwise private international law will lose its effectiveness.

The notion of public policy was well established under the common law, but it has been modified and developed in light of the Irish Constitution. It would appear that a foreign judgment would not be recognised here if it falls foul of our fundamental principles of justice. Thus, the denial of an opportunity to a party to present his case to the foreign court would offend against our principles of natural justice. Issues of public policy arise in the economic context. Decisions of both the High Court and the Supreme Court have held that where an Exchange Control Order is in force preventing the payment of funds outside the scheduled territories, it is not possible for the court to enforce payment through a judgment. In the area of sexual morality and family life, public policy also plays an important role. The Irish Courts have addressed the issue of public policy in a number of cases relating to the recognition and enforcement of foreign divorces. (**Buchanan ltd v. McVey** [1954] I.R. 106, **Namlooze Venootschap de Faam v. Dorset Manufacturing Co**.[1949] I.R. 203, **Fibretex Lte v. Beleir Ltd** [89 I.L.T.R. 141])

2.1.3.4. Fraud and legal text or court decision

A purely domestic judgment may be set aside upon the ground of fraud or collusion since it is an abuse of process of the court. The jurisdiction to set aside a judgment does not depend on the rules of the court but it is part of the inherent jurisdiction of the Court. Fraud must be clearly alleged and clearly proved. The judgment may be set aside on motion otherwise there should be an issue to try the question of fraud. In relation to a foreign judgment, a foreign judgment may also be impeached for fraud. In such circumstances, enforcement of it will be refused in Ireland. The fraud may have been perpetrated by the foreign court itself but usually it will have been perpetrated by one or more of the parties. It has long been recognised that foreign decrees contrary to ''natural justice'' and ''substantial justice'' may **not** be recognised here. In **L.B v. H.B** [1980] I.L.R.M. 257, Barrington J implied that recognition may be denied to a foreign judgment on the basis that false evidence as to any facts where that evidence was tendered by both, or perhaps one of the parties.

2.1.4. General Problems of private international law

2.1.4.1 Connecting Factors

These are factors which are considered to link a person and a legal system and the rules that will apply to them in specific contexts. These include domicile (domicile of choice and domicile of origin), nationality, habitual residence and ordinary residence.

Domicile, generally refers to a long-term relationship between a person and place, a person may be said to be domiciled in the country where one intends to live permanently or indefinitely. A **domicile of choice** is acquired by a person by residing in a country with the intention of continuing to do so permanently or indefinitely. Therefore two elements must be established in order to acquire a domicile of choice, namely, a) residence and b) intention. **Residence** does not extend to a casual presence in a country, on a shopping expedition, for example or there as a traveller. There is no minimum period requirement – it can be established immediately on arrival in a country in which one intends to settle. Intention to reside is not a material requirement however, otherwise mentally disabled people would be excluded from its scope and the

same applies to children incapable of forming the intention on this matter. Illegal residence is not a reason for denying a person the fact that they are resident in a country. However, questions as to general intention are very important. The words permanently or indefinitely are used interchangeably and thus most cases are decided on their own facts. In relation to acquiring *domicile by compulsion*, it is clear that when people go abroad for what is intended to be a short visit to receive medical attention or simply for the benefit of their health, there is no reason to hold that they acquire a foreign domicile. However, where people emigrate from Ireland to a foreign jurisdiction because they think the climate will be conducive to their health, there is every reason to hold that they acquire a foreign domicile. In relation to prisoners, a prisoner will normally be considered to retain during the period of his imprisonment the domicile he had at its commencement. Courts formerly held that members of the armed forces could not acquire a domicile of choice during the period of his service. Over the years, the courts have set aside that view and have come to accept that a soldier may indeed wish to stay on in a foreign country when his or her days of service have been completed. It is now a question of fact in every case, although the great majority of those serving abroad will not acquire a domicile of choice there. A diplomat is regarded as merely a particular category of public servant and his or her domicile is governed by the same principles as apply to public servants in general.

Intention- this may be expressly made, there may be evidence of earlier declarations and the context in which the declaration was made will also be taken into account. The courts have also in several cases laid stress on the requirement that declarations as to intention must be backed up by conduct. Declarations made on legal advise are given little weight but declarations made in relation to "home" have allot of significance attached. In addition, declarations made consistent with the belief that a person will die in a certain country may have strong probative force attached. The failure to make any declaration may be regarded as a basis for holding that a person did not have any particular intention. A domicile of choice may be abandoned by a person ceasing to reside in the country in which he or she has been domiciled, with the intention of no longer residing there. The onus of proving this is on the person alleging it.

A **domicile of origin** is acquired by a person upon birth. This form of domicile is very hard to abandon. It cannot be lost by the abandonment of residence alone. It continues until a domicile of choice or of dependency is acquired.

Dependency Domicile is applied in the case of minors and the mentally ill. Their domicile will depend on that of their mother or father. The Domicile and Recognition of Foreign Divorces Act 1986, section 1 abolishes the domicile of dependency of married women upon their husbands, "that last barbarious relic of a wife's servitude". It depends on two distinct elements:a) intention and b) residence. Illegal residence will not be treated as a reason for denying that he or she was in fact resident in the country.

Nationality refers to a "persons political status, by virtue of which he/she owes allegiance to some particular country''. This depends on such matters as place of birth, parentage, marriage, adoption and naturalisation. Irish rules for the acquisition are liberal in comparison with other countries.

Habitual residence is meant to be different from domicile in that the element of *mens rea* is meant to be weaker. It is the regular physical presence in a country that constitutes the concept, thus making it easier to apply than the principle of domicile with its subjective element of intention.

Ordinary residence refers to a residence in a place with some degree of continuity and apart from accidental or temporary absences. Each case must be dealt with on its own particular facts. It implies that residence is not casual or uncertain, but that the person held to reside does so in the ordinary course of his life. A person may be ordinarily resident in more than one country and he may be ordinarily resident in one country while being resident in another. The concept of ordinary residence has been recognised recently in Ireland when it received the judicial affirmation of Justice McGuinness in the case of **G. McG. V. D.W** [2000] 1 I.R. 96. The central idea behind it was that since Irish courts allow a divorce based on a spouse being ordinarily resident in Ireland, then the Irish courts should also recognise those divorces granted by foreign courts on the same basis. McGuinness J essentially extended the rules of recognition to one of mutuality. Thus, McGuinness J created a new formula for the recognition of foreign divorces where the more onerous requirement of domicile is replaced by 'ordinary residence'.

2.1.4.2. Problems encountered

All systems have placed one or other of these connecting factors in relation to certain areas of law. Domicile has had a pre-eminent position in the Irish legal system. However, that is not to say that problems don't present themselves. **Domicile** is used to identify a country possessing a distinct legal system. Thus, one is domiciled in a country. What constitutes a country is not always easy to determine, especially where federal structures of government exist.

Where land originally within the territorial boundaries of one country becomes part of another country, difficulties may arise after a change in the boundaries in the boundaries. A question arises as to what he persons domicile was before the change. The problem increases in complexity where a single legal unit becomes divided into two or more legal units. It seems clear that the law which the court dealing with the question is to apply in determining the matter of a person's domicile is Irish law. The conventional position in England and **Ireland** in relation to conflicts of law is that the test which determines the place of a person's domicile must remain constant no matter what the nature of the issue may be before the court. Where a person does an act which will be legally binding according to the law of one country but not so under the law of another, the courts will give this factor considerable weight in determining domicile. This is especially so where the act is one of particular moral and social significance, such as marriage or legitimation but less significant acts such as the adoption of the distinctive testimony formalities of one country may also suffice. More recently, habitual residence has gained support internationally. Due to the lack of uniformity in the various jurisdictions in relation to these connecting factors, uncertainty becomes evident in relation to the application of the same law in different countries.

The connecting factor of **nationality** can also cause some practical problems. Nationality as a sole connecting factor can deprive individuals of the entitlement to escape from the laws of a country, which they find oppressive or unjust. It prevents easy evasion from a state's policy which habitual residence can involve. Statelessness also presents particular difficulties for legal systems which favour nationality as a connecting factor. The approach here has generally been to refer to the law of a stateless persons domicile or habitual residence. Difficulties also arise where a person is of a dual nationality, thus resulting in clashing rules with formidable complexities for private international law. In relation to habitual residence, the difficulty lies in determining how long a residence must be to be habitual. In addition, if a person is constantly on the move, having little or

no connection with any of the countries through which he passes, it may prove difficult to determine where a person has his or her habitual residence.

2.2 INTERNATIONAL JURISDICTION OVER MATRIMONIAL PROPERTY ISSUES (JURISDICTION OF THE COURTS AND OF OTHER AUTHORITIES)

2.2.1. The general rules on international jurisdiction as applied to matrimonial property regimes

2.2.1.1. Convention on the Law Applicable to Matrimonial Property Regimes, 1978.

2.2.1.2. Application of these rules in the field of matrimonial property law
None

2.2.2. Rules on international Jurisdiction particular to matrimonial property law issues

2.2.2.1.
None

2.2.2.2.
None

2.2.2.3.
None

2.2.2.4.
None

2.2.2.5.
None

2.3. Law Applicable to the Matrimonial Property Regime

2.3.1. Determination of the law applicable to the matrimonial property regime

2.3.1.1. In case spouses have entered into a marriage contract

2.3.1.1.1. Main choice-of-law rules
None

2.3.1.1.2.General problems of choice-of-law

None

2.3.1.1.3 Particular problems of the marriage contract

None

2.3.1.2. The spouses have not entered into a marriage contract

2.3.1.2.1.Main choice- of- law rules

None

2.3.1.2.2.Problems in applying the choice-of-law rules

None

2.3.2 Scope of the law applicable to the matrimonial property regime

2.3.2.1 During marriage

Where the spouses have made an ante-nuptial contract regulating their future proprietary relations, it will govern their proprietary relations not only in the original matrimonial domicile but also in any other domicile that they may later acquire. The contract may of course be made expressly between the parties. In the absence of an indication of a contrary intention, a marriage settlement is to be construed according to the law of the matrimonial domicile, otherwise known as the proper law. The essential validity of a marriage settlement is governed by its proper law. The proper law includes subsequent changes in the law. The formal validity of a marriage contract depends on whether it complies with the lex loci contractus or its proper law. In addition, rules of interpretation of a marriage settlement are determined according to its proper law.

2.3.2.1.1.Matters governed by the law which is applicable to the matrimonial property regime

In relation to the Administration of Estates in Ireland, where a deceased person leaves property, it devolves to his personal representatives, that is the executors or administrators. However, before these representatives carry out the functions of their office, they must first obtain a grant of probate or letters of administration. Thus, Irish Law prohibits property being dealt with by anyone without letters of administration. However, in civil law jurisdictions, the entire property of a deceased person passes directly to their heirs, unless they renounce it. Therefore, this will not give good title to these persons if the property is situated in Ireland, unless they obtain an Irish grant of probate. In relation to persons domiciled or resident abroad Rule 23 of Order 79 of the Rules of the Superior Courts 1986 provides that, in the case of such a person, administration of the will or administration with the will annexed, may be granted to his attorney, acting under the power of attorney. The administration of a deceased person's estate is governed by the law of the country in which the personal representative obtained his grant. The lex fori determines the admissibility and priority of debts. In this respect, foreign credidors rank equally with Irish creditors. The distribution of the assets remaining in the hands of the representative is determined according to the law of succession rather than the rules of administration, usually the rules according to the lex domiclii are applied.

In relation to the Marriage Contract, the essential is governed by the proper law, that is, the law which has the closest connection with the issues under consideration, usually on the basis of preponderant groupings. A marriage settlement will be formally valid if it complies with either its proper law or the *lex loci contractus,* the latter being the law where the contract was made.

2.3.2.1.2Matters governed by another law

In the past, in order to have the capacity to enter the marriage contract, one had to comply with the lex loci celebrationis. However, this has since changed and the weight of Irish authority suggests that the capacity to enter into the marriage contract is determined by a person's ante-nuptial domicile. KED (otherwise KC) v. MC[26th September 1984, Carroll J, High Court] Public Policy considerations prohibit the recognition of Polygamous Marriages as well as same-sex Marriages, despite the fact that they comply with the lex loci celebrationis.

2.3.2.1.3Matters of which it is disputed by which law they are governed

A marriage settlement will be formally valid if it complies with either its proper law or the lex loci contractus, the latter being the law where the contract was made. Statutory sources include section 22(b) of the Maintenance Act 1994 which provides that an order made by a foreign court may be recognised in this jurisdiction as long as the maintenance claimant was resident in the foreign jurisdiction at the date of the commencement of the proceedings. The Maintenance Act 1994 allowed Ireland to ratify the 1990 Rome Convention between the Member States of the EU on the Simplification of Procedures for the Recovery of Maintenance Payments and the 1956 New York Convention between Member States of the United Nations on the Recovery of Maintenance Abroad. Both Conventions provide for the establishment of a central authority in each signatory state. Under the 1990 Convention, a person who has already obtained a maintenance order may apply for its enforcement through the central authority of his or her resident State. Under the New York Convention, the Central Authority may initiate original maintenance proceedings where required on behalf of a maintenance claimant. The maintenance claimant's Central Authority transfers the necessary documentation to the Central Authority of the State where the Maintenance Debtor is living. That Central Authority then becomes responsible for the recovery of the maintenance that is sought.

2.3.2.2. At the time of the dissolution of marriage

2.3.2.2.1.Dissolution during the life of spouses

In Ireland, divorce decrees are granted on the basis of a 'no fault' ground of living apart for four years. Assets are divided not on the basis of sanctioning the 'guilty' spouse but on the basis of 'proper provision' and the needs of the spouses. Divorce in Ireland is also based on the model of a no-clean break jurisdiction. Consequently, children and spouses must be maintained according to their needs and requirements. No termination of maintenance obligations may occur unless the creditor spouse remarries and/or there is a change in circumstances. No compensation is granted due to fault.

2.3.2.2.2.Dissolution upon the death of one the spouses

None

2.3.3. Law applicable in case of changes in the matrimonial property regime

2.3.3.1. Modifications of the connecting factor

2.3.3.1.1 Assumption as to the ’conflict mobile’

None

2.3.3.1.2 Laws applicable in case of ’conflict mobile’

None

2.3.3.2. Modifications of the Applicable Law

2.3.3.2.1Assumptions as to ’transitory conflictsof the internal law’

None

2.3.3.2.2Law applicable as to these transitory countries

None

2.3.3.4 Other possible changes in the matrimonial property regime

None

2.3.3.4.1 Automatic changes in the regime?

None

2.3.3.4.2 Changes in the regime as a consequence of a court decision or public authority

None

2.3.4. Law applicable to the publication of the matrimonial property regime

2.3.4.1. Law applicable to the publication of the initial regime

None

2.3.4.1.1.Can the regime be relied upon against third parties without restrictions?

None

2.3.4.1.2.Which law is applicabnle to the system for publication

None

2.3.4.1.3.Which law governs the obligation to register in a public registry?

None

2.4 RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS AND 'PUBLIC' ACTS IN RESPECT OF MATRIMONIAL PROPERTY REGIMES

2.4.1. The general rules on the effectiveness of foreign public acts and court decisions applied in the area of matrimonial property regimes

A plaintiff may obtain a judgment in a particular country against a defendant but be unable to enforce his judgment against him in that country because the defendant is not resident there and has no assets there against which execution can be levied. Thus, the question arises as to whether the foreign judgment will be capable of recognition and enforcement in Ireland. Enforcement of a foreign judgment is premised on its recognition. On the other hand, a foreign judgment can be recognised without being enforced.

2.4.1.1. Overview of sources and content of these rules

An order of a foreign court will not be recognised and enforced automatically. Certain conditions have to be fulfilled before a foreign judgment will be regarded by our courts as having created a duty or obligation with which the defendant is bound to comply. These include:

a) **The foreign court must have had "jurisdiction" under Irish conflicts rules.** The judgment must have resulted from an adjudication of a court of competent jurisdiction. This means that the foreign court must have been a court of competent jurisdiction in relation to the particular defendant according to *Irish conflicts* of law, not simply according to the foreign court's own domestic or conflicts rules.

b) **Judgments in personam.** Irish Courts exercise jurisdiction in personam based on the **presence** of the defendant within the jurisdiction, his submission to the jurisdiction or the specific grounds set out in Order 11 of the rules of the Superior Courts 1986. Traditionally the view was that there is jurisdiction where at the date of commencement of the action, the defendant was resident or present in the foreign country, so as to have the benefit and be under the protection of its laws. However, the question in relation to **temporary presence** has posed some problems. Irish courts themselves exercise jurisdiction on the basis of mere temporary presence and it might be expected that they would recognise jurisdiction exercised by a foreign court on the same basis. The court of a foreign country has jurisdiction where a party has, by its own conduct, submitted to that jurisdiction. Submission may occur;

    a) By appearing as plaintiff in the foreign action
    b) By voluntarily appearing to contest the foreign court on the merits
    c) By having contracted to submit to the jurisdiction of the foreign court.

The court may also have insufficient bases of jurisdiction;

a) Nationality or allegiance of the defendant
b) Domicile of the defendant
c) Reciprocity
d) The cause of action arose in the foreign country
e) Possession by the defendant of property in the foreign country.

d) Judgment in rem Judgment *in rem* is not confined to judgments in actions *in rem* but embraces all judgments determining the status of a thing as against the whole world and not merely as between the parties the action. So, a judgment that vests possession of or property in a thing in a person as against the whole world or that decrees the sale of a thing in satisfaction of a claim against the thing itself is a judgment *in rem*. So also is a judgment that orders property to be sold by way of administration of an estate in bankruptcy or on death. If a judgment consists of an adjudication as to the status of a person, then it is also a judgment *in rem*. In relation to characterisation, whether a foreign judgment is one of *in rem* or *in personam* is determined as a question of fact by the court in which it is sought to have the judgment recognised, despite any contrary views of the foreign court. This is due to the application of the *lex fori,* with the question of fact being arrived at according to the laws of the foreign law district. In essence the *lex fori* determines the issue in light of the effect of the foreign proceedings, regardless of how the foreign law characterises this effect. In the field of matrimonial property and property in general, it may be difficult to decide whether the foreign judgment was *in rem* or *in personam* against the defendant which is capable of being enforced against his property. Where the subject matter of the proceedings is moveable or immoveable, a judgment *in rem* will be recognised or enforced here only if the property was at the time of the proceedings present in the foreign country involved. However, if the judgment in question related to title to foreign immoveables, no question of its enforcement could arise, the property is situated in the foreign jurisdiction and therefore Irish courts would have no effective jurisdiction over it. In relation to recognition, the courts of the *situs* of immoveable property will be recognised as having sole jurisdiction in an action relating to property. Thus, a court from a foreign jurisdiction delivering judgment as to title to immoveable property situated in Ireland will not be recognised even though the Irish courts will have the capacity to determine the validity of wills relating to immoveables abroad. Where the foreign judgment in rem relates to moveable property, the question of recognition or enforcement become intertwined with the assignment of that property. If foreign title is vested in the plaintiff as a result of the foreign judgment and the plaintiff subsequently comes into the Irish courts to assert his title against another person within the jurisdiction, he is seeking recognition of the judgment as an assignment of property to him. Sometimes the special rules in relation to assignment will apply and in others, the judgment will only be recognised if the res was at the time of the action situated within that court's jurisdiction.

In order of to maintain an action on a foreign judgment, the judgment must not only be made by a court of competent jurisdiction, but it must also be final and conclusive. Essentially, an Irish court will not enforce a judgment, which is liable to be abrogated by the same court from which the judgment was issued. The foreign decree need not be final in the sense that it be made the subject matter of an appeal. In the latter case, the Irish courts may grant a stay on the execution of the foreign judgment pending the appeal. It would seem that in a case where a foreign judgment is given in default but the defendant has the right to have it set aside and to have a full hearing on the merits, it would not be regarded as final and conclusive as long as that period remains unexpired. An in personam judgment must be for a definite sum, including a final order for costs and a sum

which can be ascertained by a mere arithmetical calculation. It also includes a judgment for definite sums to be paid periodically as ordered. Thus orders for an injunction or specific performance remain unenforceable. Of importance is the fact that if a foreign court has jurisdiction in the international sense, the merits of the case could not be re-opened. Estoppel *per rem judicatam* applies to judgments *in personam* as well as judgments *in rem*, the former being conclusive between the parties and the latter being conclusive as against the whole world. In addition if a person successfully defended foreign proceedings where the judgment was final and conclusive and given on the merits, he cannot be later sued in Ireland by the same plaintiff under the same cause of action. Thus the plaintiff is estopped from denying the conclusiveness of the judgment. In addition, if a plaintiff has already been compensated in accordance with a judgment issued abroad, he cannot try and claim further compensation in Ireland.

There are a number of defences that a defendant to an action for enforcement of a foreign judgment can raise. These include the fact that the judgment may have to be set aside due to fraud or collusion. This is not dependant on the rules of the court but it is part of the inherent jurisdiction of the court. Fraud must be clearly alleged and proved. The plaintiff must at the very least provide evidence of new facts discovered after the former judgment was issued that imply that the action has a reasonable chance of succeeding. If a judgment is impeached for fraud, enforcement of it will be refused in Ireland. This may be fraud that was perpetrated by the members of the court itself but would more commonly involve fraud having been perpetrated on the court by one or more of the parties. In addition, foreign decrees contrary to 'natural justice' or 'substantial justice' may not be recognised by an Irish court.

At **Common law** a foreign judgment can only be recognised and enforced if an action was brought in an Irish Court in relation to the obligation which it creates. However, there are other mechanisms in place which may provide for a more simple and direct form of enforcement in the case of certain foreign judgments. The **Maintenance Orders Act 1974** provides for the reciprocal enforcement of maintenance orders made in the state, Northern Ireland, England, Scotland and Wales. This act is largely modelled on the **European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters**. This has been recently overtaken by Council Regulation (EU) No.1347/2000 of May 29,2000 on jurisdiction and enforcement of judgements in matrimonial matters in matters of parental responsibility for the children of both spouses, otherwise known as the **Brussels II** Convention. **Chapter III** of this Convention deals with recognition and enforcement of foreign judgments. The procedure for enforcement is similar to that outlined in the original Brussels Convention. However, the Brussels II Convention clearly states that the term 'judgments' cover those in the areas of nullity, Separation and Divorce only. Thus any issues in relation to ancillary relief and maintenance obligations will not be covered by the Brussels II Convention and these areas will be determined according to the original Brussels Convention that is in place. The basic rule in relation to recognition of foreign judgments in the areas mentioned is that they be given by competent courts and they are then entitled to be automatically recognised by other member states without any special procedure being required. In addition, Article 17 of the Convention prevents any decisions being reviewed as to substance by the courts of member states.

2.4.1.2 Their application in the area of matrimonial property regimes

None

2.4.2. Rules on the effectiveness of foreign public and private acts and court decisions specific to the area of matrimonial property regime

2.4.2.1. Recognition of marriage contracts concluded abroad

In relation to marriage contracts, there has always been a distinction made between the formalities of a marriage and the essentials of a marriage. Formalities relate to factors such as the time and place at which a marriage may be celebrated and the essentials refer to the mental capacity of the parties involved and whether there was any duress involved. For the purposes of conflicts analysis, it has long been held that the question whether a particular requirement refers to formalities or essential validity is one that must be determined according to the lex fori. In relation to the formal validity of a marriage, the lex loci celebrationis is regarded as the appropriate law. Thus, as a general principle, if a marriage is valid according to the lex loci celebrationis, then it is good the whole world over, despite the fact that it may not be a valid marriage in the country of domicile of either of the spouses. The question as to where the lex loci actually is, is one that meets with difficulty. Three particular types have been identified. The first has been labelled as Marriages by Correspondence. Is it sufficient that the marriage complies with the law of the place where the contract was concluded or should it be necessary to comply with the laws of both places. This is still unclear. Proxy Marriages are permitted by several countries, their characteristic feature being that one of the spouses is not generally present at the marriage ceremony. Marriages by Habit and Repute are marriages that are created instantaneously and require the passage of an undefined amount of time before they are established. The latter are sometimes also referred to as Common Law Marriages. The Lourdes Marriages are of particular interest here. During the 1950's, Irish couples getting married under a Catholic ceremony in Lourdes became quite a common phenomenon. This was in breach of French law as it only recognised civil ceremonies as valid. When this practice was halted in the 1960's, 33 of these marriages had been undertaken. Since the lex loci was said to govern the formal validity of marriages, the validity of these particular marriages was called into question. Section 2 of the Marriages Act 1972 was enacted to remedy this position through retrospectively validating these marriages.

2.4.2.2 Recognition of modifications agreed between spouses which took place abroad

None

2.4.2.3. Enforcement of foreign court decision on winding up and distribution of the matrimonial property regime

None

2.4.2.4 Cooperation between the courts and public authorities in this respect

None

2.4.3. Practical Significance of the rules set out under 2.4.1 – 2.4.2

2.4.3.1. Frequency of court decisions

None

2.4.3.2. Frequency of application of the rules on effectiveness

None

2.5 OTHER REMARKS

CHAPTER 3
UNMARRIED COUPLES. INTERNAL LAW

3.1 SOURCES OF THE LAW ON UNMARRIED COUPLES

Marriage enjoys a unique and privileged position. The growing ranks of family groupings existing outside the boundaries of marriage by contrast attract virtually no legal recognition for their existence. Children born outside marriage are now treated as having the same rights and privileges as children born of married parents. However, their unmarried parents for legal purposes are largely treated as legal strangers in relation to each other. In this jurisdiction, a cohabiting couple is not recognised as a 'family' even in circumstances where the parties have lived together for a number of years, or where they have had children and effectively live as a family as recognised under the Constitution. In circumstances where the relationship breaks down, the dispute does not fall within the realms of family law legislation. Under current Irish Law, the rights of unmarried couples in the sphere of matrimonial law are determined according to legal principles which are equally applicable to legal strangers. In particular, in the case of a property dispute between an unmarried couple, the parties must, on failing to reach a compromise between themselves, bring a claim in the civil courts by way of equitable proceedings under the **Partition Acts 1868-1876**. In addition, neither party has the right to seek maintenance from the other party even in circumstances where they have resided together for a long period of time. Neither party has a legal right to claim a share in the estate of the other party and the equitable presumption of advancement is not applicable to non-marital cohabitees. The House of Lords in **Tinsley v. Milligan** [1993] 3 WLR 126 held that this presumption does not arise in the context of cohabitees. At present, in the event of a breakdown of the relationship between the parties, the practice is that in a number of cases the equity proceedings under the Partition Acts 1868-76 are adjoined to the family proceedings, where there are children involved. Such cases are being heard in the Family Law Courts. Unmarried couples are not regarded as a **de facto** family nor are they regarded as a **de jure** family. The law does not ascribe rights on a heterosexual unmarried couple living together as a family. Thus, the **Irish Constitution 1937**, being the basic law of Ireland, gives protection to private property ownership, which can be curtailed only by the exigencies of the common good. Despite the fact that 'The Family' based on marriage is the only family granted recognition and protection under the Constitution, marriage itself does not expressly impose a matrimonial property regime. The property rights of spouses remain exactly the same after marriage as they were before it. Thus, the doctrine of separate property is strictly applied.

3.1.1. General legislative sources

Article 40.3 of the Irish Constitution, Fundamental Rights
Article 41 of the Irish Constitution, The Family
Children Act 1997
Domestic Violence Act 1996 – this extends the protection of the barring order and the protection orders to cohabitees.
Family Law (Maintenance of Children and Spouses) Act 1976
Guardianship of Infants Act 1964
Partition Acts 1868-76
Succession Act 1965
Status of Children Act 1987

3.1.2. Principal decisions in court decisions

Ennis v. Butterly – Cohabitation Contracts are repugnant to the Constitution and are unenforceable on ground of public policy.

W v. W [1981] ILRM 202 – In this case Finlay P set out a number of principles applicable to assessing the beneficial interests of parties as determined in a traditional yet modified application of trust law. This case has since been approved by the Supreme Court in N v. N [1992] ILRM 127 where Finlay C.J relied on his earlier precedent and held that the paying off of any mortgage gives one a share in the property as the bank owns it and the claimant by paying paying the mortgage instalments is buying it back piecemeal. In W v.W, Finlay P was dealing with a married couple, yet the principles enunciated are of wider application. Adapting them to the unmarried couple, and excluding in particular references to the presumption of advancement, they may be summarised as follows:

> where one party contributes to the purchase of property owned by the other in that other's sole name, in the absence of evidence of some inconsistent agreement or arrangement, the court will decide that the contributing party is entitled to an equitable interest in that property approximately proportionate to the extent of the contribution as against the total value of the property at the time the contribution is made.
>
> **C v. C** [1976] IR 254 clearly establishes that where the property is purchased in one partner's name but the other party has made **direct contributions** to the purchase price or to instalment payments on a mortgage, the property will be held on purchase money resulting trust to the extent of these contributions.
>
> This decision was subsequently approved by the Supreme Court which further stretched the notion in **McC v. McC** [1986] ILRM 1 to encapsulate **indirect contributions** made to the mortgage repayments.
>
> **GNR v. KAR** [unrep, High Court, Carroll J., March, 1981] asserted that in calculating the amount contributed to the family fund, the court should only take cognisance of what the parties actually contributed to the family fund so that a husband's earnings were reduced by one quarter to indicate the amount he spent on himself. In cases where he spent a substantial amount in himself, he will be entitled to a smaller share in the Family Home.
>
> **NAD v. TD** [1985] ILRM 153, advocated that where a claimant expends monies or carries out work in the improvement of a property, the legal ownership of which is solely vested in the other partner, the claimant will be unsuccessful in claiming entitlement to a an equitable share in the property unless it can be proved that there was a specific contractual agreement or other unambiguous agreement to this effect or that the claimant in question was led to believe that she would be recompensed to some extent.
>
> **Norris v. Attorney General** [1984] IR 36(HC) (SC) concerned a male homosexual who unsuccessfully challenged the validity of subsection 61 and 62 of the Offences Against the Person Act 1861 and section 11 of the Criminal Law (Amendment) Act 1885. The provisions of the 1861 Act that were challenged rendered it a criminal offence to commit buggery with mankind. The provisions of the 1885 Act made it an offence for a male to commit 'in private or in public' any 'act of gross indecency with another male person'. O'Higgins CJ in the Supreme Court rejected the plaintiff's claim and accepted that the effect of the three sections was to prohibit and criminalise such conduct between male persons. He stated that homosexual acts were

regarded as particularly harmful to the family based on marriage under the Irish Constitution and therefore these provisions were consistent with the Constitution.

3.1.3 Descirption of any reforms of the law carried out in your country

There are reforms proposed by the Irish Law Reform Commission in the area of Cohabitees. They expect to examine the area within the years 2000-2007. (The **Second Programme** for examination of certain branches of law with a view to their reform: 2000 – 2007, The Law Reform Commission, 2000) The **Irish Constitution Review Group** in 1996 recommended that 'in addition to protection for the family based on marriage', the Constitution should be amended to include 'a provision which commits the State to supporting the caring activities of family life howsoever the latter is defined', thus encapsulating cohabitees. (Report of the Constitutional Review Group, Dublin: Stationary Office, 1996, p334.) No such amendment has yet been made by the Irish Government. The **Irish Law Reform Commission** has issued a paper which notes that given the amendment to the Constitution allowing divorce under Article 41.3.2, it would prove to be 'inequitable to allow diversification from the traditional norm in partner relationships without ensuring that the law protects the rights of people in such non-traditional partnerships from injustice'. The Commission has also drawn attention to the fact that Ireland has found itself obligated not only to recognise and protect the rights of non-marital families and married families in which the marriage has broken down, but also to recognise the rights of gays and lesbian couples to engage in sexual relationships.

In **Norris v. Attorney General** [1984] IR 36(HC) (SC), the plaintiff, a male homosexual, unsuccessfully challenged the validity of subsection 61 and 62 of the Offences Against the Person Act 1861 and section 11 of the Criminal Law (Amendment) Act 1885. The provisions of the 1861 Act that were challenged rendered it a criminal offence to commit buggery with mankind. The provisions of the 1885 Act made it an offence for a male to commit 'in private or in public' any 'act of gross indecency with another male person'. O'Higgins CJ in the Supreme Court rejected the plaintiff's claim and accepted that the effect of the three sections was to prohibit and criminalise such conduct between male persons. He stated that homosexual acts were regarded as particularly harmful to the family based on marriage under the Irish Constitution and therefore these provisions were consistent with the Constitution.

3.2 HISTORIC DEVELOPMENT

3.2.1. Stages of historic development

The 1937 Constitution (Bunreacht na hÈireann) has always placed the Family based on Marriage on a lofty Constitutional pedestal. The rights and duties that exist and are acknowledged by the State as vesting in the 'marital family' do not extend to the non-marital family. The Constitutional ban on any legislation which may permanently impair the legal integrity of the marital family, has presented an effective block on legislative and judicial initiative to any privileged recognition of possible separate legal interests owned by the individual parties within the non-marital family. The concept of a de facto family is unknown, so far, to the Irish Constitution. In Ireland, a cohabiting couple is not recognized as a Family even in circumstances where the parties have lived together for a number of years, or where they have had children and effectively live as a family as recognized

under the Constitution. There is no express or implied common law, statutory or constitutional legal protection given to unmarried couples.

3.2.2 Actual Situation

Where the non-marital relationship breaks down, any subsequent legal dispute does not fall within the ambit of the Family Law Courts. In relation to the resolution of property disputes, the provisions of the Family Law Act 1995 and the Family Law (Divorce) Act 1996 do not apply to cohabiting couples. In the case of a property dispute between unmarried couples, the parties must refer the dispute to the civil courts by way of equitable proceedings under the **Partition Acts 1868-76**. Thus, property disputes between cohabitees must be heard in public as opposed to 'in camera' proceedings, which are heard in private since they are exclusively family matters. In relation to property disputes between cohabitees, the Irish Courts have preferred a contribution based approach. The High Court decision **C v. C** [1976] IR 254 clearly establishes that where the property is purchased in one partner's name but the other party has made **direct contributions** to the purchase price or to instalment payments on a mortgage, the property will be held on purchase money resulting trust to the extent of these contributions. This decision was subsequently approved by the Supreme Court which further stretched the notion in **McC v. McC** [1986] ILRM 1 to encapsulate **indirect contributions** made to the mortgage repayments. However, a *de minimus* requirement was added to the effect that a trust will only be inferred when the wife's contribution is of the size and kind as will justify the conclusion that the acquisition of the house was achieved by the joint efforts of the partners. Indirect contributions include contributions made by the wife by way of earnings which essentially relieved the husband of the financial burden he incurred in purchasing the house. It is important to note that these circumstances merely give rise to a presumption of a resulting trust which may be rebutted by evidence of a contrary intention.

In the case of **GNR v. KAR** [unrep, High Court, Carroll J., March, 1981] it was asserted that in calculating the amount contributed to the family fund, the court should only take cognisance of what the parties actually contributed to the family fund so that a husband's earnings were reduced by one quarter to indicate the amount he spent on himself. In cases where he spent a substantial amount in himself, he will be entitled to a smaller share in the Family Home.

As a result of the case of **NAD v. TD**[1985] ILRM 153, where a claimant expends monies or carries out work in the improvement of a property, the legal ownership of which is solely vested in the other partner, the claimant will be unsuccessful in claiming entitlement to a an equitable share in the property unless it can be proved that there was a specific contractual agreement or other unambiguous agreement to this effect or that the claimant in question was led to believe that she would be recompensed to some extent. It would also seem that work in the family home by a non-earning partner does not merit a share in the property.

Cohabitees have been conceded some rights by the legislature where they live together as a married couple and they have purchased a family home, they may be entitled to some redress in relation to the following areas:

a) In disputes as to Guardianship and / or Custody and Access of the child or children of such a union, the parties can make an application under the **Guardianship of Infants Act 1964**,

b) In relation to maintenance for the children, recourse can be made to the **Family Law (Maintenance of Children and Spouses) Act 1976**. This provides that where it appears to the court that the parent of a dependant child has failed to provide such maintenance for the child as 'is proper in the circumstances', the court may order that parent to make either periodic maintenance payments or the payment of a lump sum or sums for child support.

c) The **Domestic Violence Act 1996** allows for such cohabitees to have a right to seek a barring order or a protection order in certain circumstances. Cohabitees who wish to apply for a safety or barring order must satisfy a number of temporal and proprietary requirements, which do not apply to married couples. Under section 2 of the Domestic Violence Act 1996 the cohabitee must have lived with the respondent as husband and wife for at least 6 months in aggregate during the period of 12 months immediately prior to the application for a safety order. When seeking a barring order, the applicant must show that he/she lived with the respondent for at least 6 months out of the 9 months immediately prior to the application. In addition, in the case of a barring order, the applicant must prove that they have at least a 50% interest in the property in question.

d) **The Status of Children Act 1987**, amending the 1964 Act, permits a father to become guardian of his child by agreement with the natural mother or by court order.

There is at present, however, no statutory framework within which a parental support order or maintenance support order in favour of a cohabitee or former cohabitee can be made. In addition, the concept of palimony is not recognised or provided for under Irish law.

There are a number of reasons why cohabitation relationships are likely to increase in the future. These include the fact that there is fall-off in religious observance and practice and a less religious view of matrimony. The rates of Divorces and Separations have increased and changes have occurred in social attitudes as to the permanence of marriage and the marriage commitment. There is also a perceived lack of any great financial or fiscal advantage in marriage as opposed to cohabitation. Finally there is an increase in the number of economically active women and there are changes in the pattern of child-bearing and in the age of child-bearing. However, cohabitation relationships do not all conform to one identical pattern. At one end of the spectrum is the case of the couple who live together effectively as husband and wife in a jointly owned home with children. At the other end of the spectrum, there may be a couple conducting a very casual relationship but leading very separate lives, possibly with spouses and children of their own.

3.3 The legal character of relations other than traditional marriage

3.3.1. The concept of 'legal' marriage

In Ireland, the classic definition of marriage is ``the voluntary and permanent union of one man and one woman to the exclusion of all others for life``(as defined by Mr. Justice Costello in **B v. R** [1995] 1 ILRM 491 (HC) reiterating Lord Penzance in **Hyde v. Hyde** [1866] LR 1 P&D 130).

The latter definition involves four conditions: a marriage must be voluntary; it must be potentially for life; it must be monogamous and it must be between parties of a different sex. Marriage is perceived as being both a contract and a relationship based on partnership. In order for persons to become husband and wife under Irish law, they must possess the capacity to marry and they must observe the basic legal formalities as laid down by Irish law. Capacity to marry is governed by the law of each parties pre-nuptial domicile, while the formalities are governed by the *lex loci celebrationis, i.e*. the law of the place where the marriage is celebrated. Thus, the celebration of polygamous marriages, same sex marriages and any other forms of marriage in Ireland are not permitted or recognised under Irish Law, as they do not conform to the *lex loci celebrationis*. In addition, the fact that these marriages were celebrated abroad would still not make them legally enforceable as they would be regarded as contrary to public policy. Section 31 of the Family Law Act 1995 stipulates that parties to a marriage must be at least 18 years of age. Exemption from this minimum age requirement is possible on application to the Family Court: such exceptions are rarely given. The formalities required for solemnisation of marriage under Irish Law are a mixture of ecclesiastical and civil rules. The law is complex and set out in legislation dating from the Marriages (Ireland) Act 1844 right up to the Family Law (Miscellaneous Provisions) Act 1997, while religious or church marriages are permitted to regulate marriages for their own purposes, such church marriages **must** comply with the civil law. The marriage laws regulate marriage for the following religious denominations:

a) Roman Catholic
b) Church of Ireland
c) Presbyterian
d) Other Christian
e) Society of Friends
f) Jews.

Marriage by civil contract may be solemnised on the parties obtaining a Registrar's certificate or licence. To get a certificate or licence notice must be given to the District Registrar.

Finally it is mandatory for the parties to a marriage to notify the District Registrar, in writing, of their intention to marry, not less than three months prior to the date on which the marriage is to take place. Section 32 of the Family Law Act 1995 regulates the notification requirement. It is possible to get an exemption in relation to the three month notification requirement (Section 33 of the Family Law Act 1995). In 2000, 1,181 such applications were made to the court and 1,150 were granted. (See the Courts Service Annual Report 2000, at p.54, www.courtsinfo.ie) Not all failures to comply with formalities of marriage will render a marriage void. If there is any doubt as to marriage status, section 29 of the Family Law Act 1995 enables the Family Court to make one of the following declarations:

(a) a declaration that a marriage was valid at its inception
(b) a declaration that a marriage subsisted on a specified date
(c) a declaration that a marriage did not subsist on a specified date
(d) a declaration that the validity of a foreign divorce, annulment or legal separation is entitled to recognition in the State
(e) a declaration that the validity of a foreign divorce, annulment or legal separation is not entitled to recognition in the State.

3.3.2. The marriage of fact

The constitutional enshrinement of the family based on marriage has led to a clear judicial bias against the unmarried cohabiting couple which is reflected both in case law and in the application of equitable doctrines. The Judiciary has advocated that 'the public policy of this State ordains that non-marital cohabitation does not and cannot have the same constitutional status as marriage'.[Ennis v. Butterly [1997] 1 ILRM 28 at p.38 per Kelly J.) In the case of **W.O'R v. E.H** [1996] 2 IR 248 the court was asked, in a consultative case referred to it by the Circuit Court, whether the concept of **de facto** family ties, which formed the decision of the European Court of Human Rights in **Keegan v. Ireland** [1994] 18 EHRR 342, was recognised by the Irish Constitution. Chief Justice Hamilton, answering the question for the majority of the court, asserted that the decision of the European Court is not part of domestic law in Ireland. The Family referred to in Articles 41 and 42 of the Constitution is the family based on marriage. The concept of a **de facto** family is unknown to the Irish Constitution.

3.3.3 Partnership registration

None

3.3.4. Contract to cohabitate

Cohabitation contracts are regarded as legally unenforceable under Irish law as they are contrary to public policy. The rationale for such an approach is that a cohabitation agreement would be injurious to morality and marriage. In Ennis v. Butterly, a claim for the breach of a cohabitation contract was dismissed by Kelly J. for two reasons. The first was that to enforce such a contract would afford a similar status in law to that enjoyed by a marriage contract. Mee disagrees and asserts that 'a cohabitation contract...is no different from any other private contract enforceable between any two individuals in the State, neither gaining for the parties any constitutional rights nor bringing them within the scope of Irish legislation regulating the rights of married people'. (Mee J., 'Contract Law- Public Policy for the New Millenium'[1997] 19 DULJ 149 at 156-157.) The second reason Kelly J. enunciated for dismissing the action was that it would be contrary to public policy. Mee, while acknowledging the fact that in the past there was social disapproval which would have justified the public policy argument, he asserts that in recent times social attitudes to cohabitation have changed radically. This is due to the special status accorded to the family based on marriage under the Irish Constitution.

3.3.5. Any other type of relation accepted by the internal legal system which is other than 'legal' marriage, but shares some of the chararcterisitics of marriage and is not envisaged in paragraphs 3.3.2.-3.3.4.

None

3.4. PROPERTY IN RELATIONS OTHER THAN TRADITIONAL LEGAL MARRIAGE

In Ireland, there is scant legislation applicable to unmarried cohabitees in relation to their property rights. A Family Home is described as a dwelling house in which a married couple resides. Thus, if the couple are not married to each other, the property in which they reside is not regarded as a Family Home and will not avail of any of the legislative and constitutional protections that are

attached to it. Many cohabitees reside together in property which is owned by one partner but where the other partner has also made financial contributions to it. In the latter case, the use of a resulting trust or constructive trust is the only possible way of establishing an interest in the property.

Some cohabitees purchase property together and make equal or unequal contributions to its acquisition. If the property is registered in both names, it may be held under a **joint tenancy** or a **tenancy in common.** In the case of a **joint tenancy**, the right of survivorship applies which essentially means that that if one joint tenant dies, his/her undivided share passes to the surviving joint tenant or tenants. There is also the possibility of severing the joint tenancy and converting it into a tenancy in common by agreement between all the joint tenants.

In order to acquire a joint tenancy, there must be unity of interest, time, title and possession. If one joint tenant alienates his/her interest in the property to another, then this would sever the unities.

A cohabitee who claims to have a proprietary or beneficial interest in property, the legal title of which is vested in the sole name of the other cohabitee may, of course, in ejectment proceedings or in separate proceedings, seek a court order to declare the extent of any such interest in the property. The doctrine of separate property is relied on here. In relation to the separation of a cohabitee couple, they may seek orders under the **Partition acts 1868-76** in separate civil proceedings. They may also seek relief under the equitable resulting trust in relation to the family home, where the property is held in the name of one of the parties and the other party has made direct or indirect contributions to the property in question.

3.5. PROPERTY ISSUES IN CASE OF SEPARATION OF UNMARRIED COUPLES

3.5.1. The separation of the couple

None

3.5.2. The effects of the separation upon the property of the members

A significant number of couples who reside together outside marriage find that their relationship breaks down. The procedures available to them for dismantling the property issues arising from that breakdown are antiquated and outmoded. The solutions are found in the Partition Acts 1868-72 and the general law of equity under trusts and the tenancy in common and the joint tenancy. All such cases, if brought to court are held in public.

The property is divided according to the doctrine of separate property under the Partition Acts 1868-76. However, in the case of a 'Family Home' where both spouses have made contributions to it, equitable rules apply. Where direct contributions have been made by one of the spouses to the purchase price, these create a beneficial interest in the property for that party by way of resulting trust. The courts decide the amount of the property that will be held by way of resulting trust according to the extent of the contributions made and whether these were direct or indirect and whether any agreement was made between the parties. The parties to the relationship itself have no right to maintenance in the event of a breakdown of the relationship. However the children to the

relationship are entitled to be provided for under statutory law, Family Law (Maintenance of Spouses and Children) Act 1976 and the Status of Children Act 1987.

3.5.3. Effects of separation with regard to third parties

The unmarried couple is not treated as a unit for the purposes of **debts** incurred to third parties, etc, these would be dealt with on a contractual basis as between the parties involved. The same provision in relation to the division of property cannot be applied in relation to cohabitees as is applied in the case of marital breakdown.

3.6. PROPERTY ISSUES IN CASE A MEMBER OF THE UNMARRIED COUPLE DIES

3.6.1. In relation to the surviving member

The provisions of the **Succession Act 1965** in terms of 'a legal right share' does not apply to unmarried cohabitees. If property is acquired by way of a **joint tenancy**, the deceased persons share in the ownership terminates on death. The other party takes through the law of survivorship and not through the law of succession. However, where only one of the partners paid for the property acquired in joint tenancy and no substantial direct or indirect contribution to the property was made by the other cohabitee to the acquisition, the latter's interest in the property may be regarded in law as held for the former on resulting trust or constructive trust. In such circumstances, the surviving partner holds the property in trust for the deceased's estate (and so is subject to the rules of the Succession Act). This result can be avoided by proof of a clear intention that the beneficial interest was intended to vest in the survivor.

3.6.2. In relation to third parties

None

3.7. OTHER REMARKS

It has been argued that statutory reform is the preferred solution to the issue of cohabitees in Ireland. In relation to the enforceability of cohabitation contracts it is asserted that to an agreement between two independently advised de facto couples could act as a bar to any subsequent litigation that may arise upon the breakdown of a relationship between the cohabitees. It is imperative that both parties be fully aware of the consequences of such an agreement and freely consent to be bound by its provisions. Thus, there must be no evidence of duress or undue influence which would render the contract void. In addition, it is suggested that any legislation purporting to regulate property disputes between cohabitees should be based upon the applicable legislation as it applies to married couples. However, there should be certain requirements put in place which would regulate the type of relationships that could avail of this legislation. Irish law lacks certainty and consistency in the area of the rights of cohabitees. Thus, there is a need for some sort of statutory regulation in this area, conveying some element of predictability on this area of family law.

CHAPTER 4.
UNMARRIED COUPLES. PRIVATE INTERNATIONAL LAW

4.1. GENERAL PRINCIPLES OF P.I.L.

4.1.1. Public Policy. Characterisation

The Irish Constitution 1937, Bunreacht na hÈireann, fails to provide any protection for unmarried couples akin to that available to those based on the marital family. Thus, Cohabitation contracts made between these couples are regarded as legally unenforceable as being contrary to public policy which is clearly reflected under the provisions of the constitution. The scarcity of legislative provisions for unmarried cohabitees reflects the **negative** approach adopted in relation to such relationships under Irish law.

The Irish approach would appear to provide problems for Private International Law in this area. It is acknowledged that many countries legally recognise such unions but it has been asserted that **not** a single one was modeled on the cohabitation legislation of another country. (Folder C., 'Civil Aspects of Emerging Forms of Registered Partnership', Report presented at the fifth European Conference on Family law, The Hague 1999, p.23.

Under Council Regulation (EC) No. 1347 /2000 on Jurisdiction and the recognition and enforcement of judgments in Matrimonial matters (Brussels II) signed May 29th, [2000] O.J. L160/19 all member states are required to recognise and enforce family law judgments handed down in other EU member states. There is an important exception, however, where a judgment is found to be irreconcilable with the public policy of the State in which recognition is sought, the court is not obliged to give recognition to it. According to the European Court of Justice in **Hoffman v. Lrieg** - case 145 / 86 [1988] E.C.R. 645 the judgment in question must be manifestly contrary to public policy.

In relation to unions between persons of the same sex, these are not recognised as marriage in Ireland. Dutch marriages are **not** recognised in Ireland. The French PACs arrangements are also **not** recognised.

4.1.2 Recognition of the relation between an unmarried couple

Under the rules of Private International Law a marriage contacted abroad will be recognised only if a number of conditions are satisfied. 1) The parties must have complied with the formalities applicable in the jurisdiction in which the marriage ceremony takes place (*lex loci celebrationis*) 2) the parties must have the legal capacity to marry according to the rules of jurisdiction in which they were domiciled. (*i.e.* the jurisdiction in which a party has decided to make his permanent home. A marriage celebrated abroad will only be recognised in Ireland if it is analogous to what is generally understood to be a marriage in Ireland. If a marriage is potentially polygamous, for example, it will not be recognised. The **Brussels II Convention** will govern the matter of court judgments in relation to marital status and the present rules on recognition will be superseded by those in the regulation which then could be directly invoked in any court in the land. However the public policy exception remains here and by virtue of this principle it is submitted that a union between members of the same sex will not be recognised as a marriage in this jurisdiction. Since there are no equivalent rules in place to govern unmarried couples, it seems that cohabitee

couples who have acquired a legal status in a foreign jurisdiction, they would also fail to be recognised for the purposes of Irish matrimonial law.

The Domicile and Recognition of Foreign Divorces Act 1986, provides for the recognition of a foreign divorce *a vinculo* if either spouse was domiciled within the jurisdiction of the foreign court which granted it, at the date of the institution of the divorce proceedings. There is no similar legislation in place for the recognition of same sex couples.

4.1.3. Admissibility of the 'celebration' of a same sex 'marriage'

None

4.2. INTERNATIONAL JURISDICTION

4.2.1. Separation of unmarried couples. International jurisdiction

The provisions which are applied to married couples who wish to separate may not be applied to unmarried couples as unmarried couples have no legal status under Irish Law. Separated couples are still recognised as members of the Marital Family under the Irish Constitution 1937 whereas unmarried couples have no such status. Since there is no International jurisdiction recognised in Ireland in relation to unmarried couples, the general rules of International Jurisdiction could not be applied as it would be unenforceable and contrary to public policy. There are no courts or public officers vested with international jurisdiction.

4.2.2. Property aspects of the separation. International jurisdiction

There are no special rules on International jurisdiction for unmarried couples. In the absence of these, the rules that are normally applied to married couples could not be applied in relation to unmarried couples as it is regarded as contrary to public policy and thus these property aspects of the separation of unmarried couples would be regarded as legally unenforceable. There are no courts or public officers vested with international jurisdiction.

4.2.3. Relation between 4.2.1. and 4.2.2

None

4.3. APPLICABLE LAW

4.3.1. Determination of the law applicable to the property regime

Such contracts are not recognised as enforceable.

4.3.1.1. In case the couple has entered into a 'contract'

None

4.3.1.2. In case there is no contract between the members of the couple

None

4.3.2. Scope of the applicable law

4.3.2.1. During the 'existence' of the couple
None

4.3.2.2. At the time of separation
None

4.3.2.2.1. While the members are alive
None

4.3.2.2.2. Upon the death of one of the members
None

4.3.3 Applicable law and changes of the property regime

4.3.3.1. Modification of the connectin factor
None

4.3.3.2. Modifications of the applicable law
None

4.3.3.3 Changes in the property regime by consent of the couple
None

4.3.3.4. Other possible chnages to the property regime
None

4.3.3. Law Applicable to publication of the property regime of an unmarried couple

4.3.4.1. Publication of the initial regime
None

4.3.4.2. Publication of the modified regime
None

4.4. RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS AND 'PUBLIC' ACTS IN RESPECT OF PROPERTY OF UNMARRIED COUPLES

4.4.1. The general rules on the effectiveness of foreign 'public' and court decisions as applied in the area of property of unmarried couples

4.4.1.1. Overview and sources of content of these rules

None

4.4.1.2. Their application in the area of unmarried couples

None

4.4.2. Rules on the effectiveness of foreign 'public' and private acts and court decisions specific to the area of property of unmarried couples

4.4.2.1. Recognition of contracts concluded between unmarried couples abroad

None

4.4.2.2. Recognition of modifications agreed by the couple which took place abroad

None

4.4.2.3 Enforcement of foreign court decision on winding up and distribution of the property of the couple

None

4.4.2.4 Cooperation between the courts and public authorities in this respect. Are there special provisions on publication?

None

4.4.2.5. Problems concerning the international effectiveness ('enforceability') of contracts which have been concluded during the 'existence' of the couple

None

4.4.3. Practical significance of the rules set out under 4.4.1 – 4.4.2

4.4.3.1. Frequency of court decision (judgements) concerning the effectiveness of foreign court decisions and foreign ’public’ acts

None

4.4.3.2. Frequency of application of the rules on effectiveness of foreign court decisions and foreign ’public’ acts by other ’public’ authorites, outside court.

None

4.5 VARIOUS MATTERS

ANNEXES TO THE REPORT

1. Tables

2. Texts of Legislation

Sources of the Documents and the Official sources of the documents referred to in the National Report:

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http://www.gov.ie/ag/
Office of the Irish Attorney General

http://www.gov.ie/ag/csso/index.html Chief State Solicitor

www.info@ag.irlgov.ie

3. List of abbreviations

AG	Attorney General
CRG	Constitution Review Group
IJFL	*Irish Journal of Family Law*
ILRM	Irish Law Reports Monthly
IR	Irish Reports
LRC	Law Reform Commission
HC	High Court
SC	Supreme Court
UNREP	Unreported Judgment

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See (Shannon, ed, Looseleaf, 2001) at B-016, H-005, H-116, H-117, H-118, H-120, H-123.

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For commentary –
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